

**Symposium on the Protection of Persons Fleeing Armed Conflict and Other Situations of Violence**

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***Using the 1951 Convention Relating to the Status of Refugees to protect people fleeing armed conflict and other situations of violence: key legal challenges***

I am very pleased to be here and honoured to be on this distinguished panel. This is a very timely event, as we are in the process of developing guidelines on international protection to update the 1979 UNHCR Handbook<sup>1</sup> on this exact topic. I look forward to the opportunity to hear your views.

Four key events have contributed to shaping the draft guidelines to date:

- 2011: Study by UNHCR's Europe Bureau, "Safe at Last".<sup>2</sup>
- 2011: Summary Conclusions from an expert meeting jointly organized by UNHCR and the International Criminal Tribunal for Rwanda, with the participation of the International Criminal Tribunal for the former Yugoslavia, International Criminal Court and the International Committee of the Red Cross, on the relevance of international criminal law jurisprudence to the interpretation of the 1951 Convention (Arusha Summary Conclusions).<sup>3</sup>
- 2012: Summary Conclusions from an expert meeting held in Cape Town,<sup>4</sup> which looked at are today's topic (Cape Town Summary Conclusions). In preparation for this meeting, UNHCR commissioned five background studies and will publish an edited collection on the same in 2015.

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<sup>1</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, reissued 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>2</sup> UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, available at: <http://www.refworld.org/docid/4e2ee0022.html>.

<sup>3</sup> UNHCR and ICTR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, available at: <http://www.refworld.org/docid/4e1729d52.html>.

<sup>4</sup> UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, available at: <http://www.refworld.org/docid/50d32e5e2.html>.

- 2013: Summary Conclusions from an expert meeting on the Cartagena declaration on Refugees held in Montevideo, Uruguay (Montevideo Summary Conclusions).<sup>5</sup>

So what is so special or complex about this topic that it has deserved such attention by UNHCR and others over the last few years? Why has it become, or is it perceived to be, difficult to apply the 1951 Convention to persons fleeing conflict and other situations of violence?

There seem to be **three main challenges**:

The first challenge relates to wrong perceptions about the 1951 Convention, that it is an instrument applying to very particular individuals singled out for persecutory treatment. Some attribute this perception to the drafting of the refugee definition in Article 1A(2) in the singular person. Proponents of this view also point out that the more ‘individualised’ definition in the 1951 Convention can be distinguished from the group-based approach to refugee status of earlier instruments.<sup>6</sup>

Second, the regional refugee instruments<sup>7</sup> and the subsidiary protection regime under the EU Qualification Directive<sup>8</sup> have raised questions about the relationship between the global and the regional definitions and between refugee status and subsidiary protection. In this regard it hasn’t helped that there is limited guidance on the application of the regional refugee definitions (from which the subsidiary protection regime in Europe also drew some inspiration). UNHCR’s guidelines will also deal with the regional instruments and their relationship with the 1951 Convention.

The third challenge is linked to the changing character of armed conflict and other situations of violence, most notably an increase in non-international armed conflicts. These situations are characterised, for example, by new actors and different modes of violence and methods of warfare, which can blur the lines between combatant/fighters and civilians. At the same time, these “new” conflicts observe a decrease in lethality, yet an increase in targeting or terrorising of civilians, with deliberate military strategies to instill fear in the civilian population. The causes and consequences of armed conflict and other situations of violence have indeed become more complex, multiple and overlapping. We can see this when comparing the Second World War to the ongoing conflicts in Somalia, Afghanistan, Syrian Arab Republic or Iraq.

*But* none of these explain the difficulties of applying the 1951 refugee definition, nor suggest that the 1951 Convention does not apply. I will now return to each of these three challenges in turn.

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<sup>5</sup> UNHCR, *Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration; roundtable 15 and 16 October 2013, Montevideo, Uruguay*, 7 July 2014, available at: <http://www.refworld.org/docid/53c52e7d4.html>.

<sup>6</sup> See, League of Nations, *Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, 12 May 1926, League of Nations Treaty Series, Vol. LXXXIX, No. 2004; League of Nations, *Arrangement Relating to the Legal Status of Russian and Armenian Refugees*, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005; League of Nations, *Convention relating to the International Status of Refugees*, 28 October 1933, League of Nations Treaty Series, Vol. CLIX No. 3663; League of Nations, *Convention concerning the Status of Refugees Coming From Germany*, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461, page 59, available at: <http://www.refworld.org/docid/3dd8d12a4.html>.

<sup>7</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, Article I(2), available at: <http://www.refworld.org/docid/3ae6b36018.html>; Declaración de Cartagena sobre Refugiados, adopted during the Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios, held in Cartagena, 19-22 November 1984 (Cartagena Declaration).

<sup>8</sup> European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, pp 9-26, available at: <http://www.refworld.org/docid/4f197df02.html>.

First, the shift from “group” to “individual” is a false one. The 1951 refugee definition, in identifying the proscribed grounds of persons – race, religion, nationality, membership of a particular social group or political opinion – recognizes that discrimination based on membership in such “groups” is at the heart of the refugee definition.

What the 1951 Convention aimed to do in elaborating a refugee definition in the terms that were finally agreed was not to suggest that members of groups of persecuted persons would not be recognized, but rather the drafters sought to:

- create a universal rather than a situation-specific definition. The “statutory refugees” were also recognized in any event in Article 1A(1).
- grant refugee status and a series of rights to refugees to be enjoyed individually.

There was always the understanding that the hundreds of thousands of persons fleeing World War II were refugees. Mass influx is not a bar to the application of the Convention. Quite the contrary, the mass movements arising from the Second World War called for a collective international response. Mass influx was dealt with instead via reservations to relevant provisions, rather than to the status question per se.<sup>9</sup>

Regarding the second challenge, the regional refugee definitions were not developed because the 1951 Convention did not apply, but because of the humanitarian responses required to such situations.

While indeed some of the circumstances justifying, for example, OAU Convention<sup>10</sup> protection – e.g. events seriously disturbing public order – may not meet the threshold of persecution in the 1951 Convention sense, it is now well understood from the records that African governments were really looking for the geographical and temporal limits of the 1951 Convention to be removed, so that the 1951 Convention would extend to those persons fleeing colonial wars and subsequent wars of independence in Africa. When the Protocol removing those limits was adopted in 1967, these states were compelled to change their position and sought a broader, humanitarian definition.<sup>11</sup>

Finally, the third challenge relating to the changing character of conflict does not make the 1951 Convention inapplicable; it requires instead a better understanding of contemporary conflicts. Gaps in understanding contemporary conflicts has become a challenge for decision makers, as it is for lawyers, but it is not a legal challenge, rather, it is a factual one. The problem is heightened when information is not readily available because of the fluidity of given situations or where the causes are uncertain, or when there is a lack of information that is up-to-date. For many applicants too, they may not be able to articulate or even understand why they were forced to flee, especially in situations of life-threatening chaos and changing frontlines. Decision-makers thus need to be willing to understand the situation fully, and see how the Convention can apply in such situations.

Today I wanted to deal with **two further legal challenges**:

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<sup>9</sup> For further argumentation, see Public lecture by Dr Alice Edwards, Chief of Law and Policy, UNHCR University of Tasmania School of Law, “A Numbers Game: Counting Refugees and International Burden-Sharing”, 19 December 2012, available at: <http://www.refworld.org/docid/512c75de2.html>.

<sup>10</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“OAU Convention”), 10 September 1969, 1001 U.N.T.S. 45, available at: <http://www.refworld.org/docid/3ae6b36018.html>.

<sup>11</sup> For overview of history of the instruments, and the distinct understandings, see UN High Commissioner for Refugees (UNHCR), *The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination*, January 2013, PPLA/2013/01 available at: <http://www.refworld.org/docid/50fd3edb2.html>.

1. Differentiated risk
2. For reasons of Convention grounds

Drawing on the research by Vanessa Holzer,<sup>12</sup> it is evident that:

- In a few jurisdictions, courts have held that claimants fleeing conflict situations need to show a fear of persecution “over and above the risk to life and liberty inherent in the civil war.”<sup>13</sup> [differentiated risk]
- Other courts have held, for example, that “The harm suffered must be particularized to the individual. Harm arising from general conditions such as anarchy, civil war, or mob violence will not ordinarily support a claim of persecution.”<sup>14</sup>

These restrictive views find no explanation in the 1951 Convention. Article 1A(2) requires that the applicant establish only that they have a well-founded fear of being persecuted for a Convention reason, nothing more, nothing less. There is no justification for asserting a higher risk threshold during wartime – when persons are generally in fear – than in peacetime, when persons are less likely to come in harm’s way. In fact to do so is rather perverse. The better and proper approach is that of the Justice McHugh in the Australian High Court of *Haji Ibrahim*, in which he stated:

I see no basis in the text of the Convention or otherwise for holding that, in conditions of civil war or unrest, a person can prove persecution only when he or she can establish a risk of harm over and above that of others caught up in those conditions. (...) It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification.<sup>15</sup>

A 2008 Canadian Federal Court Case likewise noted that, while accepting the need for a personalised risk, it was acknowledged that an individuals’ personalised risk may be “shared by many other individuals.”<sup>16</sup> This view is also supported by the New Zealand Refugee Status Appeals Authority.<sup>17</sup>

The Cape Town Summary Conclusions, reflecting the general threads of a discussion with an esteemed group of experts, held that the fact that many or all members of a particular community may be equally at risk does not undermine the validity of any particular claim. The test is whether an individual’s fear of being persecuted is well-founded. In fact, at times, the impact of a conflict on an entire community strengthens, rather than weakens, the risk to any particular individual.<sup>18</sup> Further, there is nothing in the text of the 1951 Convention to suggest that a refugee has to be singled out for persecution, either generally or over and above other persons at risk of being persecuted.<sup>19</sup>

In respect of the nexus with one or more of the Convention grounds, what distinguishes refugee status from other forms of protection from harm may be the underlying discriminatory basis for the persecutory treatment that is feared.

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<sup>12</sup> UN High Commissioner for Refugees (UNHCR), *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, September 2012, PPLA/2012/05, available at: <http://www.refworld.org/docid/50474f062.html>.

<sup>13</sup> *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Slynn of Hadley, [case concerned Somalia].

<sup>14</sup> *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005) [case concerned Somalia].

<sup>15</sup> *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para 70 [case concerned Somalia].

<sup>16</sup> *Prophète v. Canada (Minister of Citizenship and Immigration)* 2008 FC 331, para 18 [case concerned Haiti].

<sup>17</sup> Refugee Appeal No 76551 [2010] NZRSAA 103 (21 September 2010), para 66 [case concerned Somalia].

<sup>18</sup> Cape Town Conclusions, para 8.

<sup>19</sup> *Ibid.*, para 9.

In some conflict situations, the fighting and its effects may look at first glance as generalized and/or random in the sense of having no obvious targets, or at least not having targets such as civilian populations of particular ethnic or religious groups. Many conflicts today are, however, deeply rooted in ethnic or religious divisions, such that civilians are at risk because of their membership in particular groups. They may be direct targets or they may not receive refugee protection because of their membership in particular groups. War strategies including genocide, ethnic cleansing, sexual and gender-based violence, or forced displacement, each are closely associated with Convention grounds. The consequence of bombing in particular areas may also lead to impoverishment or lack of water/means of survival for particular communities, deliberate or not.

This can mean that civilians on both sides (or multiple sides) of a conflict are refugees and entitled to refugee protection under the 1951 Convention.

In other conflict situations, the issue will be one of imputed political opinion, or imputed religion, ethnicity or social group, such as persons living in a particular area considered to sympathize with opposition forces (e.g. Syria, Côte d'Ivoire).

In conclusion, the “war refugee” is the image of a refugee in the popular media and such refugees are also reflected in the 1951 Convention. While we need to remain authentic to the 1951 Convention's legal terms, the refugee definition is, properly interpreted, applicable to persons fleeing the causes or consequences of armed conflict.