



Introduction

VOLKER TÜRK, ALICE EDWARDS AND CORNELIS WOUTERS^{*}

The dangers inherent in armed conflict and violence are the major causes of refugee movements in the twenty-first century. New conflicts have broken out or been reignited, while few of the old ones have found a proper solution. These conflicts have spread in unpredictable ways, and their conduct has become increasingly complex.

At the time of finalizing the entries in this edited collection, there were over four and a half million Syrian refugees in the immediate region and over 810,000 asylum applications submitted in European countries since 2011.¹ Syria is now the greatest refugee producing country in the world, the conflict straining the hospitality of neighbouring countries and prompting more and more Syrians to move out of the immediate region. The situation in Iraq continues to force people to flee, with more than 100,000 Iraqi refugees in the region and over 3 million displaced internally. Many more countries can be added to the list of places experiencing conflict where violence is prevalent and producing refugees, including Afghanistan, Burundi, the Central African Republic, Colombia, the Democratic Republic of Congo, Libya, Mali, Nigeria, Somalia, South Sudan, Sudan, Myanmar, the Northern Triangle countries of Central America, Ukraine and Yemen.²

Armed conflict and violence invariably cause human suffering, most directly threatening the lives and physical and mental integrity of affected civilian populations. The indirect consequences can destroy state and social infrastructure, disrupt economies and cause crises in health care and food security. Forms of sexual and gender-based violence are

^{*} The authors thank Charlotte Luelf for her assistance in the preparation of this Introduction.

¹ UNHCR, 'Syria Regional Refugee Response', available at: <http://data.unhcr.org/syrianrefugees/regional.php>.

² UNHCR, 'Note on International Protection', 8 June 2015, EC/66/SC/CRP.10, available at: www.refworld.org/docid/55c1dac4.html.

prevalent, and children are also targets, for example, for forced recruitment. Internal and external displacements can be key indicators of the extent of the violence and human suffering. In 2014, the number of refugees had risen to 19.5 million and 1.8 million asylum applicants.³ Nearly 11 million other persons were newly displaced within their own countries by conflict and persecution in the same year.⁴

In response, over the past sixty-five years, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (hereafter the 1951 Convention) have afforded refugee protection to people fleeing a wide array of threats in their countries of origin. In fact, these global refugee instruments are more than just legal texts. They have served to crystallize and catalyse a grand humanitarian and ethical tradition that has helped millions of vulnerable people at risk.

The 1951 Convention and 1967 Protocol equally reflect the recognition that refugee issues are of international concern, involve international responsibilities and make international cooperation a necessity. The framework of the 1951 Convention sets out a broad yet minimalist set of state responsibilities. Its fundamentals are unchallengeable and as essential today as they were in 1951. No one can contest that people should not be returned to danger, that they should not be discriminated against and that they should enjoy a minimum standard of treatment, such as freedom of movement, basic health, social and economic rights and recognition of identity and legal status, the latter being particularly important in a world that is so reliant on legal identity.

Yet, when it comes to people fleeing armed conflict and violence, different practices are discernible, including in relation to the 1951 Convention. The discrepancies between refugees recognized under the 1951 Convention, on the one hand, and the broader group of persons in need of international protection, on the other, arise in part from the way in which the definition of ‘refugee’ in the 1951 Convention has been interpreted and applied by some states and in part from limitations inherent in the instrument itself. Over time, these discrepancies have been reduced through, *inter alia*, the subsequent adoption of the 1967 Protocol to the 1951 Convention and regional refugee instruments and the evolution in the elaboration and application of certain non-return obligations under international human rights law, as well as state practice and jurisprudence.

³ UNHCR, ‘World at War: Global Trends. Forced Displacement in 2014’, June 2015, 2.

⁴ *Ibid.*

Specifically, observing the various recognition rates of national status-determination procedures for claimants fleeing situations of armed conflict and violence,⁵ in some sense rendering national asylum systems into asylum lotteries,⁶ this book attempts to address some of the main misconceptions and ambiguities in the interpretation and application of the 1951 Convention to such claims. These inconsistencies fragment the overall objective of the global refugee protection system to provide a single, universal standard of access to and quality of international protection that is applied to all refugees.

This book also looks at the regional refugee definitions, in particular, those developed in Africa and Latin America, and their relationship with the 1951 Convention definition. The existence of these ‘extended’ regional definitions, grounded in responses to humanitarian situations, has raised questions about their inter-operability and relationship. This book also examines the European Union’s subsidiary protection system under the EU Asylum Acquis.

This edited collection represents a response by UNHCR, in collaboration with leading experts in the field, to how international refugee law applies in times of conflict and violence. It has been produced as part of a consultation process towards the elaboration of guidelines on international protection.⁷ This consultation process has included several expert roundtables, namely:

2011: *Summary Conclusions on the Relevance of International Criminal Law and International Human Rights Law Jurisprudence to the Interpretation of the 1951 Convention*, 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, the International Criminal Court and the International Committee of the Red Cross (‘Arusha Summary Conclusions’).⁸

⁵ See e.g. 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: www.refworld.org/docid/4e2ee0022.html.

⁶ The term ‘refugee roulette’ was coined by J. Ramji-Nogales, A. I. Schoenholtz and P. G. Schrag in *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2011).

⁷ The *Guidelines on International Protection* complement UNHCR, *Handbook on Criteria and Procedures for Determining Refugee Status* (Geneva, 1979), re-issued together in 2011, available at: www.unhcr.org/refworld/docid/4f33c8d92.html.

⁸ 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: www.refworld.org/docid/4e1729d52.html.

2012: *Summary Conclusions on International Protection for Persons Fleeing Conflict and Other Situations of Violence*, from an expert meeting held in Cape Town ('Cape Town Summary Conclusions').⁹ In preparation for the meeting in Cape Town, UNHCR commissioned five background studies, which have been refined and updated for this publication.¹⁰

2013: *Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration*, from an expert meeting on the Cartagena Declaration on Refugees held in Montevideo, Uruguay ('Montevideo Summary Conclusions').¹¹

It is hoped that this edited collection will contribute to a more consistent application of the existing instruments in all national jurisdictions and provide legal certainty for claimants for refugee status.

For the purposes of this book, the phrase 'situations of armed conflict and violence' is used to refer to situations marked by a certain level or spread of violence or other forms of serious public disorder that affect civilian populations.

The Changing Character of Conflict and Its Effects on Refugee Status Determination

The character of conflict has changed over time. Most significantly, civilians are playing an increasingly important role both as participants in armed conflicts and as victims of their impact. The transformation in the nature of violence is also linked to a number of factors, not least the relationship between state fragility and violence. Shifts in power in fragile states are evident – for example, from state to de facto authorities who exercise control over territory and people and who have at least some sense of responsibility towards them to a myriad of private actors with no such sense of responsibility. The demobilization of paramilitary or guerilla forces in different countries in Latin America, Asia and Africa, for

⁹ 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: www.refworld.org/docid/50d32e5e2.html.

¹⁰ All documents from the Roundtable on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence, Cape Town, South Africa, 13–14 September 2012, hosted by the Refugee Rights Project of the University of Cape Town, are available at: www.unhcr.org/3e5f78bc4.html.

¹¹ UNHCR, 'Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration, Expert Roundtable, 15 and 16 October 2013', Montevideo, Uruguay, 7 July 2014, available at: www.refworld.org/docid/53c52e7d4.html.

example, has often led to the emergence of an array of violent criminal organizations that are not only involved in trafficking drugs, arms and people but also in the control of land for economic exploitation. They may in some instances be linked to parts of the elite and are likely to act in collusion with local authorities. Their activities are often more concentrated in border zones or areas where civilian state presence is weak or where the state's ability to provide protection is limited. However, there is also a spill-over effect into the urban environment with intra-urban violence on the rise, resulting in further displacement.

Chapter 1 by Theo Farrell and Oliver Schmitt, using both quantitative and qualitative data from six country studies, explains these changes and sets the scene for the remainder of this book. As they note, we have seen not only an increase in the number of armed conflicts, but they have become more complex in regards to actors, objectives and military tactics and weapons deployed. Today's conflicts are also more likely to be internal or internationalized, marked by the involvement of one or more non-state armed groups and their fight against a state counterpart or one another – and often with the involvement of and support from other states.¹²

Farrell and Schmitt note a decline in the overall lethality of conflicts since the Second World War. In 2014, however, there were forty-two active conflicts, less than in the preceding ten years, but with much higher fatalities.¹³ The targeting of civilians through other means, including displacement, is also increasing, alongside the long-term indirect effects of prolonged violence. Hostilities are often taking place in crowded urban spaces.

The drivers of armed conflict and violence remain primarily those of race/ethnicity, religion, political opinion and social group. Not much has changed in this regard since the Second World War. These drivers are often intertwined with other motivations such as economics, the pursuit of profit and organized crime. The complexity of motivations has complicated the choice of the appropriate 1951 Convention grounds in refugee status-determination procedures yet also reinforces the fact that those grounds remain applicable to today's situations. On the causes of contemporary armed conflict and other situations of violence, there is

¹² For a chart on the development of intra- and inter-state conflicts, see Chapter 1 of this book, and for charts since 1945, see Institute for International Conflict Research Heidelberg, *Conflict Barometer 2014*, 17.

¹³ International Institute for Strategic Studies, Armed Conflict Database Monitoring Conflicts Worldwide, available at: <https://acd.iiss.org/en/acdindex>.

usually no singular explanation for a particular conflict. In fact, there are often multiple and overlapping causes, which may change over time. Different or similar causes may lead to the perpetuation of conflict or may reignite it.¹⁴

The rise in non-state actors has become part of the landscape of contemporary conflicts. The issue of non-state agents of persecution and the 1951 Convention refugee definition has now thankfully been resolved. In situations of armed conflict and violence, states have proven unable and, at times, unwilling to implement their international obligations vis-à-vis civilian victims. In UNHCR's understanding, persecution can emanate from non-state groups or sections of the population or even private individuals if their persecutory actions are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer protection. UNHCR's view is now reflected in the EU Qualification Directive¹⁵ and in most national jurisdictions. In particular, this interpretation has allowed the claims of women to be more easily included in the 1951 Convention refugee definition.¹⁶

An additional change in contemporary conflicts is the blurred distinction between civilians as victims of hostilities and as active participants in the conflict. This blurring can cause challenges for adjudicators, for instance, in regard to exclusion from refugee status.¹⁷

The adverse effects on the civilian population and the increased general level of violence in many countries often prevent internal flight alternatives. A seemingly perpetual cycle of violence in many countries has been part of the daily reality of people and communities over extended periods. Many conflicts are not only protracted but also intractable in the absence of broad-based, determined political resolve to end

¹⁴ UNHCR, 'Cape Town Summary Conclusions', para. 4.

¹⁵ 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, OJL 337/9–337/26; 20.12.2011, 2011/95/EU.

¹⁶ See, UNHCR, 'Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/01, available at: www.refworld.org/docid/3d36f1c64.html.

¹⁷ See UNCHR, 'Guidelines on International Protection No. 5: Application of the Exclusion Clause: Article 1F of the 1951 Convention Relating to the Status of Refugees', 4 September 2003, HCR/GIP/03/05, available at: www.refworld.org/docid/3f5857684.html.

them. The reality is sadly not always reflected in the protection provided to those fleeing such situations.

The interpretation and application of international protection instruments in today's world requires, firstly, the need to understand fully the particular situation of violence and conflict and its effects on civilians. Secondly, many of today's situations are similar and yet at times also distinct from those in the minds of the drafters of the 1951 Convention or the regional instruments. This does not mean, however, that these instruments are not applicable to current realities. Considered a living instrument, the 1951 Convention and the whole field of international refugee law need to be read and interpreted in light of changing realities and the tenets of international treaty law.¹⁸

The Applicability of the 1951 Convention Definition in Times of Armed Conflict and Violence

The scale and character of contemporary situations of violence and conflict have led to some major misconceptions regarding the applicability of the 1951 Convention refugee definition, which this book seeks to address. Yet, as agreed by the participants in UNHCR's Cape Town expert roundtable on this subject, reflecting the general threads of a discussion with an esteemed group of experts,

Nothing in the text, context or object and purpose of the 1951 Convention hinders its application to armed conflict or other situations of violence. In fact, the 1951 Convention makes no distinction between refugees fleeing peacetime or wartime situations. Drafted in the aftermath of World War II, the drafters understood that individuals fleeing from armed conflict and other situations of violence may have a well-founded fear of being persecuted for one or more Convention grounds.¹⁹

So, why is its application challenged today? Situations of widespread violence have sometimes been misinterpreted to mean that such violence is indiscriminate rather than persecutory for one or more 1951 Convention grounds. While violence may often seem on the surface to be general in nature – general in the sense of being widespread, large-scale and indiscriminate – a deeper excavation of the socio-economic-political context

¹⁸ 'It would be an error to construe the definition so as to ignore the changing circumstances of the world in which the Convention now operates.' *A and Another v. Minister for Immigration and Ethnic Affairs and Another*. (1997) Australia: High Court, 190 CLR 225, per Kirby J, para. 227.

¹⁹ UNHCR, 'Cape Town Summary Conclusions', para. 6.

may show that the situation in fact involves many incidences of specific targeting of individuals, groups or whole communities. Persons are often targeted on racial, ethnic, religious, political or social lines, or because they are perceived as opposing the groups in control, or simply for being an obstacle or hindrance to their goals by mere presence. Violence is not undertaken for its own sake but has a deeper underlying motivation or purpose.²⁰ The characterization of such violence as ‘generalized’ is frequently misleading. UNHCR has on numerous occasions underlined that it is based on a wrongful understanding of contemporary conflicts, in particular, with regard to the character of contemporary warfare and its discriminate character.²¹

In a few jurisdictions, courts have even 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’.²² This has been referred to as a ‘differentiated’ risk criterion. Other courts have held, for example, that ‘[t]he 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’.²³

In response, Chapter 2 by Vanessa Holzer on the application of the 1951 Convention to such situations provides an overview of a number of problematic trends in the case law and questions their basis in the 1951 Convention. She rightly argues that these restrictive views find no explanation in the 1951 Convention. Article 1A(2) requires that applicants establish only that they have a well-founded fear of being persecuted for a 1951 Convention reason, ‘nothing more, nothing less’.²⁴ There is no

²⁰ See Presentation by V. Türk, ‘Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalized Violence’, Brussels, 18 January 2011, pp. 4–5, available at: www.refworld.org/docid/4d37d8402.html.

²¹ See e.g. UNHCR, ‘Note on Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’, April 2001, para. 20, available at: www.unhcr.org/refworld/pd/fid/3b20a3914.pdf. See also B. Tax, ‘Refuge by Association’, *Forced Migration Review* 47 (2014), available at: www.fmreview.org/syria/tax.

²² See e.g. *Adan v. Secretary of State for the Home Department*, [1998] 2 WLR 702, per Lord Slynn of Hadley (case concerned Somalia).

²³ *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005), para. II.A (case concerned Somalia).

²⁴ See presentations by A. Edwards, ‘Using the 1951 Convention Relating to the Status of Refugees to Protect People Fleeing Armed Conflict and Other Situations of Violence: Key Legal Challenges’, Luxembourg, 20 October 2014, available at: www.refworld.org/pd/fid/545b43884.pdf; and A. Edwards, ‘Coping with Contemporary Conflicts: “Conflict Refugees” and the 1951 Convention Protection Regime’, 70th Course on International Refugee Law International Institute of Humanitarian Law San Remo, Italy, 23 April 2013, available at: www.refworld.org/docid/5178d7c44.html.

justification for asserting a higher risk threshold during wartime – when persons are generally in fear – than in peacetime. In fact, to do so would be absurd. The better and proper approach is well expressed by Justice McHugh in the Australian High Court case 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.²⁵

A 2008 Canadian Federal Court Case likewise noted that ‘while accepting the need for a personalised risk, it was acknowledged that an individual’s personalised risk may be shared by many other individuals.’²⁶ This view is also supported by the New Zealand Refugee Status Appeals Authority.²⁷

The Cape Town Summary Conclusions restated these views, by noting the fact that many or all members of a particular community may be equally at risk and that this does not undermine the validity of any particular claim. The test is rather whether an individual’s fear of being persecuted is well founded. In fact, at times, the impact of a conflict on an entire community increases, rather than weakens, the risk to any particular individual.²⁸ 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.²⁹

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, however,

²⁵ *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, para. 70 (case concerned Somalia).

²⁶ *Prophète v. Canada (Minister of Citizenship and Immigration)* 2008 FC 331, para. 18 (case concerned Haiti).

²⁷ *Refugee Appeal No 76551*, [2010] NZRSAA 103 (21 September 2010), para. 66 (case concerned Somalia), available at: www.refworld.org/pdfid/4cbf0ea62.pdf.

²⁸ UNHCR, ‘Cape Town Summary Conclusions’, para 8. ²⁹ *Ibid.*, para 9.

are deeply rooted in political, ethnic, religious or social divisions such that civilians are at risk because of their real or perceived political opinion, race/nationality, religion or membership in particular groups. They may be direct targets or they may be deprived of protection because of their link to a 1951 Convention ground. Ethnic cleansing, sexual and gender-based violence and forced displacement are often part of political or military strategies and are each closely associated with one or more of the 1951 Convention grounds. The consequence of bombing particular areas may also lead to impoverishment or lack of means of survival for particular communities. Furthermore, many ordinary civilians may be at risk of harm from shelling, suicide attacks or improvised explosive devices. These methods of violence may be used in areas where civilians of specific ethnic or political profiles reside or gather. All of this would mean that civilians on both sides (or multiple sides) of a conflict could be entitled to refugee protection under the 1951 Convention.

What each of these misperceptions reinforces is the importance of gathering up-to-date and comprehensive information and documentation on such situations. Obtaining such information in a timely manner is not, however, always feasible owing to the very context of the violence and conflict, nor is the reliability of such information ensured when situations are fluid and rapidly changing. The ‘information gap’ is one of the real challenges facing decision-makers.

Age and Gender Dimensions in Situations of Armed Conflict and Violence

Building on the work of UNHCR since the Global Consultations on International Protection in 2001–2 and the elaboration of UNHCR’s first Guidelines on International Protection on Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention in 2002, the experiences of violence and conflict on the basis of age and gender form an important contribution to this book. In a detailed and broad jurisprudential analysis, Valerie Oosterveld examines in Chapter 6 how decision-makers have dealt with gender-specific experiences of women and girls in contexts of armed conflict and violence. Case law from Australia, Canada, New Zealand, the United Kingdom and the United States from 2004 to 2012 illustrates that a gender-sensitive interpretation of the 1951 Convention definition is often missing.

There are two particularly interesting findings from Valerie Oosterveld’s research: the first is that during conflict, gender norms often take on