UNHCR Guidelines on International Protection – *Call for comments on:*

Claims to refugee status related to situations of armed violence and conflict under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions

UNHCR issues its Guidelines on International Protection pursuant to its mandate, as contained in the Office's Statute, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. UNHCR Guidelines provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out mandate refugee status determination or advising governments on their own procedures.

UNHCR is committed to a broad consultation process in the issuance of its Guidelines on International Protection. Comments will be carefully reviewed to inform our own deliberations, alongside other consultation processes and other relevant instructive sources.

All stakeholders, including States, other UN and regional human rights mechanisms, UN organisations or specialised agencies, National Human Rights Institutions, Non-Governmental Organisations (NGOs), research institutions, and academics are invited to provide their comments in writing to **HQPPLA@unhcr.org**; *Subject*: **Guidelines on International Protection: claims to refugee status related to situations of armed violence and conflict**.

Submissions should:

- be submitted in English [regrettably we are not able to receive submissions in French at this time];
- be submitted in WORD format;

Deadline:

Comments must be submitted by **21 March 2016**. To facilitate the work of UNHCR, this deadline will be strictly applied.

UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

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GUIDELINES ON INTERNATIONAL PROTECTION NO. XXX:

Claims to refugee status related to situations of armed violence and conflict under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions

UNHCR issues these Guidelines on International Protection pursuant to its mandate, as contained in, inter alia, the *Statute of the Office of the United Nations High Commissioner for Refugees*, paragraph 8(a), in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees*, Article II of its *1967 Protocol*, Article VIII(1) of the *1969 OAU Convention governing specific aspects of refugee problems in Africa*, and Commitment II(e) of the *1984 Cartagena Declaration on Refugees*.

These Guidelines clarify paragraph 164 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* and otherwise complement the Handbook. They are to be read in conjunction with UNHCR's other Guidelines on International Protection, in particular Guidelines No. 1 (gender-related persecution), 8 (child asylum claims) and 10 (claims related to military service).

These Guidelines, having benefited from broad consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* and the *Guidelines on International Protection* are available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html.

Calls for public consultation on future guidelines will be posted at: http://www.unhcr.org/544f59896.html.

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I. INTRODUCTION

1. Situations of armed violence and conflict are today the major causes of refugee movements. The majority of the world's conflicts are fought along ethnic or religious lines, or involve political, religious, ethnic, social or gender persecution, making the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (1951 Convention) directly applicable to affected civilians.

2. The purpose of these Guidelines is to provide substantive and procedural guidance for assessing claims to refugee status involving a situation of armed violence and conflict and to promote consistency in the application of the 1951 Convention and the regional refugee definitions.

3. These Guidelines provide guidance in relation to the inclusion aspects of the refugee definitions in:

- Article 1A(2) of the 1951 Convention and its 1967 Protocol (Part II of these Guidelines),
- Article I(2) of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa[1] (OAU Convention) (Part III of these Guidelines), and
- Conclusion III(3) of the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) (Part IV of these Guidelines).[2]

4. These Guidelines do not address exclusion[3] or cessation,[4] issues related to the civilian and humanitarian character of asylum,[5] or claims related to military service,[6] for which other

[1] Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 ("OAU Convention").
[2] *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 ("Cartagena Declaration"), http://www.unhcr.org/refworld/docid/3ae6b36ec.html. The 1984 Cartagena Declaration is not a treaty within the meaning of the 1969 Vienna Convention on the Law of Treaties (Article 1(a)) and need to be incorporated by the national laws of States in order to have binding legal effect.
[3] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, http://www.refworld.org/docid/3f5857684.html. See also, UNHCR, *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*, 7 February 2006, http://www.refworld.org/docid/43f48c0b4.html.
[4] UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, http://www.refworld.org/docid/3e50de6b4.html.
[5] EXCOM Conclusion No. 94 (LIII), 2002, para. (c)(viii); UNHCR, *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, September 2006, http://www.refworld.org/docid/452b9bca2.html.

guidance is available. These Guidelines do also not deal with prima facie recognition of refugee status, for which Guidelines on International Protection No. 11 should be consulted; however, they do deal with the relationship between the 1951 Convention definition of a refugee and the regional definitions, including what approaches can be used in applying the various definitions (paragraphs 95 to 97 of these Guidelines).[7] The Guidelines focus on refugee status and do not address subsidiary or complementary forms of international protection, although paragraph 9 of these Guidelines below contains a brief reference to the relationship between the 1951 Convention and the European Union (EU) subsidiary protection status.

A. Terminology

5. For the purpose of these Guidelines, the phrase "situations of armed violence and conflict" is being used generally to refer to situations that are marked by a certain level or spread of violence or other forms of serious public disorder that affect the civilian population. Such situations may involve armed violence between different groups in society or between the State and armed groups. While in some circumstances situations of armed violence and conflict may be categorized as an international (IAC) or a non-international armed conflict (NIAC) within the meaning of international humanitarian law (IHL), for the purpose of refugee status determination such categorization is not required.[8] Many 'armed conflicts' are not classed as such for IHL purposes, such designations also often relying on political decision-making, yet the means employed and their consequences may be just as violent or persecutory.[9] Other labels – such as a situation of generalized violence – have also been used by decision-makers to describe a particular context. Regardless of such characterizations, the method of assessing the claim to refugee status is unchanged – a full and inclusive application of the refugee definition to the situation at hand is required, as explained in these Guidelines.

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[6] UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 December 2013, HCR/GIP/13/10/Corr. 1, http://www.refworld.org/docid/529ee33b4.html.

[7] UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 5 June 2015, HCR/GIP/15/11, http://www.refworld.org/docid/555c335a4.html.

[8] By analogy, this is the position taken by the CJEU in *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, European Union: Court of Justice of the European Union, 30 January 2014, para. 23, http://www.refworld.org/docid/52ea51f54.html, in which the CJEU considered that "while [IHL] is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of wars on persons and property, it does not … provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties".

[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, para. 12, http://www.refworld.org/docid/50d32e5e2.html.

B. The relationship between the 1951 Convention/1967 Protocol refugee definition and the regional definitions as well as EU subsidiary protection

6. The regional refugee instruments, i.e. the OAU Convention and the Cartagena Declaration, complement the 1951 Convention, which remains the universal and primary legal protection instrument for refugees.[10] Each instrument incorporates the 1951 Convention definition of a refugee and also contains a broader definition of a refugee (referred to as "regional definitions"). The principle purpose of both the OAU Convention and the Cartagena Declaration was to provide refugee protection in specific humanitarian situations, responding, in part, to large-scale arrivals of people fleeing objective circumstances in their country of origin.[11]

7. Certain factual scenarios may suggest the relevance and applicability of both the 1951 Convention definition and one of the regional definitions to an individual case and raise questions concerning which definition to apply.[12] In other situations, an individual may qualify only for refugee status under one of the regional definitions and not under the 1951 Convention definition, such as where no causal link can be established between his or her fear of being persecuted and a Convention ground. Also, despite the existence of an objective situation covered by a regional definition, there may be situations where the harm in question may not amount to persecution as understood in the 1951 Convention. In such circumstances, the regional definitions expand the range of individuals eligible to benefit from refugee status.

8. While the wording of the two regional definitions is slightly different, the types of situations they refer to and intend to cover can largely be assimilated. Further, although the regional definitions are broad, neither instrument was intended to be an all-encompassing definition for every situation in which persons are compelled to leave their countries of origin and cross an international border. As far as the persons' status and rights are concerned, the 1951 Convention and the regional instruments each recognise refugee status and provide for 1951 Convention rights to be applied.[13] Given that there is no difference in the status or rights

[10] EXCOM Conclusion No. 87 (L) 1999, para. (f); EXCOM Conclusion No. 89 (LI) 2000.
[11] UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, para. 5, http://www.refworld.org/docid/555c335a4.html.
[12] The regional definitions were not developed because the 1951 Convention did not apply, but because of the humanitarian responses required to the situations mentioned in the regional definitions.
[13] The OAU Convention accepts the rights in the 1951 Convention as applicable to refugees recognized under the OAU Convention (see tenth preambular paragraph) and also contains a number of additional rights for refugees, including securing the settlement of refugees (Article II(1)), the granting of temporary residence pending resettlement (Article II(5)), and voluntary repatriation (Article V). The Cartagena Declaration also accepts the rights in the 1951 Convention as applicable to refugees recognized in accordance with Conclusion III(3) (see Conclusion III(1) and III(8)) and also expressly calls upon countries in the region to apply the 1969 American

afforded to persons recognized as refugees under either the regional definitions or the 1951 Convention definition at the national level, dual recognition should not be of material consequence in most cases. For the purposes of legal certainty, however, a proper interpretation of each definition is to be encouraged, with a sequential approach to adjudication being recommended (see further Part V.A of these Guidelines). Adjudicators need also bear in mind that the regional protection systems should be implemented in a manner that strengthens and complements, rather than undermines, the 1951 Convention regime.

EU subsidiary protection

9. The EU Qualification Directive (recast) provides for subsidiary protection that is complementary and additional to refugee protection enshrined in the 1951 Convention/1967 Protocol[14] to those who do not qualify as refugees but would face a real risk of suffering serious harm inter alia when there is a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.[15] Certain factual situations may give rise to an overlap between the criteria for refugee protection in accordance with the 1951 Convention and subsidiary protection. Because of the primacy of refugee protection and the limitation that subsidiary protection only applies to persons who do not qualify as refugees, claims related to situations of armed violence and conflict are first to be assessed in accordance with the criteria for refugee protection and only when the applicant does not qualify for refugee status should the claim be assessed in accordance with the criteria for subsidiary protection.[16]

Convention on Human Rights for the treatment of refugees and for countries to acknowledge that reunification of families constitutes a fundamental principle (Conclusion III(13)).

[14] 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, preamble, recital 33, http://www.refworld.org/docid/4f197df02.html ("EU Qualification Directive (recast)"). The Court of Justice of the European Union acknowledged the two distinct systems of protection in: *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: Court of Justice of the European Union, 2 March 2010, para. 78, http://www.refworld.org/docid/4b8e6ea22.html.

[15] According to Article 2(f) of the EU Qualification Directive a "'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom provisions on exclusion from subsidiary protection in Article 17(1) and (2) EU Qualification Directive do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country." Serious harm as defined in Article 15 consists of: "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

[16] *H. N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, European Union: Court of Justice of the European Union, 8 May 2014, para. 35, http://www.refworld.org/docid/5375e84f4.html. It would be at variance with the Common European Asylum System, the Treaty of the European Union and the 1951

II. SUBSTANTIVE ANALYSIS OF ARTICLE 1A(2) OF THE 1951 CONVENTION

10. The text, context and object and purpose of the 1951 Convention make clear that the Convention applies to persons fleeing situations of armed violence and conflict. In fact, Article 1A(2) of the 1951 Convention makes no distinction between refugees fleeing peacetime or "wartime" persecution. The analysis necessary under Article 1A(2) requires that they establish a well-founded fear of being persecuted for one or more of the Convention grounds. The phrase "*persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol*" contained in paragraph 164 of the UNHCR Handbook have always been understood as limited to situations where (i) there is no causal link between a person's well-founded fear of being persecuted and a 1951 Convention ground; or (ii) the risk or threshold of persecution has not been established.

A. A well-founded fear of being persecuted

11. Threats to life or freedom, serious human rights violations and other serious harm constitute persecution for the purposes of the 1951 Convention refugee definition.[17] In addition, lesser forms of harm may constitute persecution by accumulation.[18] Discrimination will amount to persecution where the effect leads to a situation that is intolerable or substantially prejudicial to the person concerned.[19] Likewise, serious violations of IHL can constitute persecution (see paragraphs 14 and 15 of these Guidelines).[20] What amounts to persecution will also depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.[21] There is no difference in applying these standards to understand persecution of persons fleeing situations of armed violence and conflict.

Convention when subsidiary protection criteria would be applied first, because, for example, of the comparatively or perceived easier task of establishing the existence of violence and conflict through generally-available country of origin information than a well-founded fear of being persecuted for one or more Convention grounds.

[17] UNHCR Handbook, para. 51

[18] UNHCR Handbook, para. 53.

[19] UNHCR Handbook, para. 54.

[20] UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 13-21, http://www.refworld.org/docid/4e1729d52.html.

[21] UNHCR Handbook, paras. 52 and 55.

12. No higher level of severity or seriousness of the harm is required for the harm to amount to persecution in situations of armed violence and conflict compared to other situations, nor is it relevant or appropriate to assess whether applicants would be treated worse than what may ordinarily be "expected" in situations of armed violence and conflict. The overall context of a situation of armed violence and conflict can compound the effect of certain lesser harms on an individual and/or his or her family, giving rise in certain circumstances to a fear of harm that amounts to persecution. Protracted situations of armed violence and conflict, for example, can have serious deleterious effects on the physical and psychological health of applicants, which would need to be evaluated, taking into account the applicant's character, background, position in society, age, gender, and other factors.[22]

13. Situations of armed violence and conflict frequently involve exposure to serious human rights violations or other serious harm amounting to persecution. Such persecution would include, genocide[23] and 'ethnic cleansing'[24]; torture and other forms of inhuman treatment; rape and other forms of sexual violence; forced recruitment, including of children;[25] arbitrary arrest and detention; and hostage taking and enforced or arbitrary disappearances.

Relevance of international humanitarian and criminal law

14. Many of the aforementioned human rights violations or other harm also constitute war crimes when committed in the context of an armed conflict, and/or, when part of a widespread or systematic attack against a civilian population, crimes against humanity, prohibited by international humanitarian law and/or criminalised by international criminal law.[26] Deportations and forcible transfer or displacement, sometimes in the form of 'ethnic cleansing' or genocide, are also war crimes, when committed in the context of an armed

[22] UNHCR Handbook, para. 43. UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 10, http://www.refworld.org/docid/4b2f4f6d2.html.

[23] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Article 6, http://www.refworld.org/docid/3ae6b3a84.html.

[24] Ethnic cleansing is defined as 'a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas', Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), para.130, http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

[25] UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 December 2013, HCR/GIP/13/10/Corr. 1, para. 35 and 37 to 41 ("unlawful child recruitment"), http://www.refworld.org/docid/529ee33b4.html.

[26] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Articles 7 and 8, http://www.refworld.org/docid/3ae6b3a84.html.

conflict, and, when part of a widespread or systematic attack against a civilian population, crimes against humanity constituting forms of persecution covered by the 1951 Convention.[27]

15. For the purposes of determining refugee status, violations of IHL can be informative but not determinative. An applicant cannot be required to establish either an IHL violation or an international crime for a finding that a particular kind of harm amounts to persecution.[28] Nor are the criteria of the crime against humanity of persecution as defined in international criminal law[29] relevant to refugee status determination: international criminal courts and tribunals are concerned with the prosecution of harm committed in the past and for the purposes of criminal prosecution; they are not concerned with the broader humanitarian purpose of providing international protection to civilians. Relying on international humanitarian or criminal law in its strictest sense would undermine the international protection objectives of the 1951 Convention, and leave outside its protection persons who face serious threats to their life or freedoms.[30] Moreover, the fact that certain conduct is not prohibited under IHL does not change the fact that for international refugee law purposes such conduct may amount to a form of harm of a persecutory character.[31]

Relevance of derogations under international human rights law

16. Notwithstanding the power of States parties to relevant human rights treaties to derogate from a limited number of human rights in times of public emergency threatening the

[27] UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 9 and 10, http://www.refworld.org/docid/4e1729d52.html

[28] For example, the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population in international criminal law are not required by international refugee law, see: UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, para. 15, http://www.refworld.org/docid/4e1729d52.html.

[29] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Article 7(1)(h), http://www.refworld.org/docid/3ae6b3a84.html.

[30] UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, para. 15, http://www.refworld.org/docid/4e1729d52.html.

[31] Such conduct may, for example, amount to a serious human rights violation or other serious harm. International human rights law does not cease to apply during situations of armed conflict, save in part through the effect of provisions for derogation of the kind to be found, for example, in Article 4 of the International Covenant on Civil and Political Rights, see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para. 15, http://www.refworld.org/docid/4b2913d62.html; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, para. 106, http://www.refworld.org/docid/414ad9a719.html; UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 11, http://www.refworld.org/docid/478b26ae2.html. *AF (Syria)*, [2012] NZIPT 800388, New Zealand: Immigration and Protection Tribunal, 20 December 2012, paras. 45 to 49, http://www.refworld.org/docid/54c127434.html.

life of the nation,[32] the overall circumstances of the case need to be assessed. A lawful derogation may, for example, not diminish the threat of serious harm facing an applicant when the harm amounts to torture or to other forms of cruel, inhuman or degrading treatment or punishment.

Individual and group-based risks

17. In situations of armed violence and conflict an applicant may be at risk of being singled out or targeted for persecution. Equally in such situations, entire groups or populations may also be at risk of serious harm. The fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim. The test is whether an individual's fear of being persecuted is well-founded. At times, the impact of a conflict on an entire community strengthens, rather than weakens, the well-founded fear of being persecuted of any particular individual.

18. For example, in situations of armed violence and conflict, whole communities may be affected by or be at risk from aerial bombardments, the use of cluster munitions, barrel bombs or chemical weapons, artillery or sniper fire, improvised explosive devices, landmines, car bombs or suicide bombers, or siege tactics. The systematic and deliberate denial of food and medical supplies, the cutting of water supplies and electricity, the destruction of property or the militarization or closure of hospitals and schools are also serious human rights violations that affect whole communities. Exposure to such actions can amount to persecution within the meaning of Article 1A(2) of the 1951 Convention, either independently or by accumulation.[33] The direct or indirect consequences of these actions may also constitute persecution, including long-term consequences of situations of armed violence and conflict such as demolition of vital infrastructure, insecurity and abject poverty.

19. More specifically, situations of armed violence and conflict may seriously affect State and societal structures and support systems. People may face a full or partial collapse of government institutions and services, political institutions and the police and justice system.

[32] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S., 171, Article 4. Also, UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, http://www.refworld.org/docid/453883fd1f.html, States may only derogate against specifically identified rights, and can only do so to the extent strictly required by the exigencies of the situation, must be consistent with other obligations under international law and may not be based on or result in discrimination. The measures adopted must be proportionate and of temporary duration, and the relevant human rights body needs to be notified of the derogation.

[33] 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, para. 11, http://www.refworld.org/docid/50d32e5e2.html.

Vital services such as water, electricity and sanitation may be disrupted. People may experience increased crime levels, looting and corruption; food insecurity, malnourishment or even famine; constraints on access to education and health care; serious economic decline, destruction of livelihoods and poverty. Depending on the individual circumstances of the case, these consequences of situations of armed violence and conflict may be sufficiently serious, either individually or cumulatively, to constitute persecution and create a well-founded fear of being persecuted. This is also relevant where the risk of persecution emanates from non-State actors (see paragraphs 28 to 30 of these Guidelines).

20. Other factors to take into account include propaganda that may create or contribute to an oppressive atmosphere of intolerance vis-à-vis one or more groups and promote or lead to a risk of persecutory harm.[34]

Likelihood of risk

21. A person's fear (of persecution) is well-founded if s/he can establish, to a reasonable degree, that her or his continued stay in the country of origin has become, or would become, intolerable.[35] This does not require a probability calculus,[36] based, for example, on the number of people killed, injured and displaced, but requires an analysis of both quantitative and qualitative information assessed against the circumstances of the applicant (see paragraphs 98 to 100 of these Guidelines on establishing the facts).

No differential risk

22. The 1951 Convention does not to require an applicant fleeing a situation of armed violence and conflict to establish a risk of harm over and above that of others similarly situated (sometimes called a "differentiated risk").[37] No higher level of risk is required to

[34] For example, in Rwanda in 1994, Tutsi women were portrayed in Hutu controlled media outlets as "seductive agents of the enemy", thereby "articulat[ing] a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them", see *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence)*, ICTR-99-52-T, International Criminal Tribunal for Rwanda (ICTR), 3 December 2003, para. 1079, http://www.refworld.org/docid/404468bc2.html.

[35] UNHCR Handbook, para. 42.

[36] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, http://www.refworld.org/docid/3ae6b68d10.html, in dismissing a calculus Stevens J. considered: "The High Commissioner's analysis of the United Nations' standard is consistent with our own examination of the origins of the Protocol's definition, as well as the conclusions of many scholars who have studied the matter. There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening".

[37] *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, Australia: High Court, 26 October 2000, http://www.refworld.org/docid/3deb737f7.html, paras. 66 and 70. The "differentiated risk" test was considered by Lord Lloyd of Berwick in *R v. Secretary of State for the Home Department, Ex parte*

establish a well-founded fear of persecution in situations of armed violence and conflict compared to other situations. As mentioned in paragraph 17 of these Guidelines, a person may have a well-founded fear of persecution that is shared by many others, and be of the same degree.[38]

23. Further, some courts have referred to a "differential risk" in order to emphasize the requirement for a causal link to exist between the risk (i.e. well-founded fear of persecution) and the reasons for persecution (i.e. one or more Convention grounds). However, such phrasing can lead to conflation of the risk element with the causal link requirement – addressed in paragraphs 32 and 33 of these Guidelines – and not be in keeping with a proper application of the 1951 Convention definition of a refugee.[39]

Forward-looking assessment of risk

24. A decision on whether a person has a well-founded fear of being persecuted requires a forward-looking assessment of risk. The 1951 Convention protects those who at present are at risk, regardless of whether they have actually suffered past persecution. However, persons having suffered persecution in the past may be assumed to have a well-founded fear of being persecuted in the present.[40]

25. When assessing the risk, it is important to take into account the fluid character of many contemporary situations of armed violence and conflict to which changing levels of intensity of violence or control during an armed conflict are common. For example, even if the level of violence at the time of taking a decision is relatively low, a longitudinal view of the conflict may show that the risk of persecution may nonetheless be well-founded. There may be reasons for the lower level of violence at a particular moment in time, such as when the parties are regrouping or re-strategizing, or a temporary ceasefire has been agreed. Similarly, even if violence has not yet broken out in a particular part of the country, it may be foreseeable that the violence will spread there, taking into account the overall context and history of the conflict, the trajectory and mapping of the violence, the power dynamics at play and other conditions in the applicant's country of origin.[41] The effects of past violence may

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Adan, CO/872/98, United Kingdom: House of Lords (Judicial Committee), 2 April 1998, http://www.refworld.org/docid/3ae6b6c914.html.

[38] *Ralph Prophète v. The Minister of Citizenship and Immigration*, 2008 FC 331, Canada: Federal Court, 12 March 2008, para. 18, http://www.refworld.org/docid/54c109a24.html.

[39] *Refugee Appeal No. 71462/99, Tamil and a Citizen of the Democratic Socialist Republic of Sri Lanka v. Refugee Status Branch of the New Zealand Immigration Service*, 71462/99, New Zealand: Refugee Status Appeals Authority, 27 September 1999, http://www.refworld.org/docid/3ae6b73cc.html.

[40] UNHCR Handbook, para. 45.

[41] UNHCR Handbook, para. 42.

also still rise to the level of persecution, despite any temporary suspension of hostilities, and would need to be assessed carefully.

Sexual and gender-related persecution

26. Sexual and gender-based violence are common forms of persecution in many situations of armed violence and conflict.[42] Rape, for example, may be used as a weapon of war,[43] victimizing women and girls or men and boys, as part of deliberate military or political strategies to debase, humiliate, terrorize or destroy "the enemy" in pursuit of the broader goals or objectives of the conflict. Rape, by definition, is a serious human rights violation amounting to persecution, irrespective of the purpose behind the rape or the motivation of the individual perpetrator.[44] Further, rape has its roots in gender and other forms of discrimination and is thus directly linked to one or more of the Convention grounds.[45] Other forms of gender-related harm, including human trafficking, sexual slavery and conjugal slavery/forced marriage, are also forms of persecution.[46]

27. For many victims of sexual and gender-based violence, the harm may continue long after the initial violent act was committed and long after the conflict and violence has ended. They may be at risk of harmful conduct again or the psychological consequences of their experiences may itself amount to persecution,[47] in particular when they have suffered from

[42] 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, paras. 9 to18, http://www.refworld.org/docid/3d36f1c64.html.

[43] See, for example, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, para. 1347, http://www.refworld.org/docid/49b102762.html. *In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC)*, [2005] UKHL 19, United Kingdom: House of Lords (Judicial Committee), 10 March 2005, para. 30, http://www.refworld.org/docid/423ec7784.html.

[44] 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, para. 21, http://www.refworld.org/docid/50d32e5e2.html.

[45] 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, paras. 25 and 26, http://www.refworld.org/docid/50d32e5e2.html.

[46] 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, para. 21, http://www.refworld.org/docid/50d32e5e2.html.

[47] *In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC)*, [2005] UKHL 19, United Kingdom: House of Lords (Judicial Committee), 10 March 2005, para. 36, http://www.refworld.org/docid/423ec7784.html, in which Baroness Hale of Richmond considered: "[t]o suffer the insult and indignity of being regarded by one's own community as 'dirty like contaminated' because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape … is the sort of cumulative denial of human dignity which … is quite capable of amounting to persecution".

particular egregious harm making return to the country of origin intolerable even if there is no future risk of harm.[48]

Agents of persecution

28. In a given situation of armed violence and conflict, persecution may emanate from State as well as non-State actors, or from one or more sides of a conflict.[49] Nothing precludes refugee status being applied to persons at risk of harm from actors on both or all sides of a conflict. Agents of persecution may include the State's armed forces, its law enforcement agents or security forces or other State organs or groups and individuals for whom the State is responsible or whose conduct can be attributed to the State.[50] The State may empower, direct, control, support, or tolerate the activities of so-called non-State actors, such that their actions can in some instances be attributable to the State.[51]Agents of persecution also include non-State actors such as paramilitary groups, militias, insurgents, bandits, pirates, criminal gangs or organizations, terrorist organizations, private military or security companies, or other individuals or groups taking up arms or engaging in armed violence. Non-State actors may also include neighbours, family members and other individuals.

29. In many situations of armed conflict and violence, there is not always a clear divide between State and non-State actors, especially as power shifts, conflicts overlap and alliances change, or where non-State actors have penetrated or corrupted State institutions and/or law enforcement agencies or armed forces.[52] The uncertainty during an attempted, ongoing or successful coup d'état, for example, can also make such distinctions complex. Nonetheless, it is not crucial to determine precisely from whom the feared harm may emanate, as long as a threat is established, this would be sufficient for determining a well-founded fear of persecution (notwithstanding the need to establish a causal connection between the well-founded fear of persecution and one or more Convention grounds).

[48] UNHCR, *UNHCR intervention before the House of Lords in the case of Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, 14 June 2006, para. 24(2), http://www.refworld.org/docid/45631a0f4.html.
[49] UNHCR Handbook, para. 65.
[50] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Articles 4,5, 6, 8 and 11, http://www.refworld.org/docid/3ddb8f804.html.
[51] UNHCR *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 December 2013, HCR/GIP/13/10/Corr. 1, para. 42, http://www.refworld.org/docid/529ee33b4.html.
[52] UNHCR, *Country of Origin Series: Guatemala: Background Paper*, October 2013, RBA/COI/GUA/13/01, p. 11, http://www.refworld.org/docid/53832fe84.html.

30. In cases involving non-State actors or unidentified actors, it is necessary to review the extent to which the State is able and/or willing to provide protection against persecutory harm.[53] The particularities of the situation of armed conflict and violence will be relevant, as the State may be prevented from extending protection to affected populations in, for example, cases where it has lost control over its territory and population. Further, particularly in situations where numerous non-State actors are active with diverse backgrounds and objectives, there may be shifting alliances and overlapping conflicts. Moreover, control over many parts of a country may be unclear or fluid, preventing the State from being able to provide protection. The key assessment in non-State actor cases is the ability or willingness of the State to protect individuals against the harm.

Refugees "sur place"

31. A well-founded fear of persecution may arise after an applicant has left his or her country of origin, owing to circumstances arising in the country of origin during the applicant's absence, or as a result of his or her own actions after s/he has left the country of origin, making the applicant a refugee *sur place*.[54] In the context of claims for refugee status related to situations of armed violence and conflict, a person may well become a refugee *sur place* owing, for example, to the outbreak of armed violence or intensification of a pre-existing but latent conflict in her or his country of origin.[55]

B. For reasons of one or more Convention grounds

For reasons of (causal link)

32. The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a Convention ground, but it is not necessary or decisive, not least because it is often difficult to establish,[56] in particular in situations of armed violence and conflict. The causal link can also be established by the strategies, tactics or

[53] UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 December 2013, HCR/GIP/13/10/Corr. 1, para. 43, http://www.refworld.org/docid/529ee33b4.html.
[54] UNHCR Handbook, para. 94-96.
[55] For example, Mozambicans finding themselves in South Africa between 1980 and 1985 could be considered as refugees *sur place*, see *South Africa: Passport Control Instruction No. 20 of 1994 - Guidelines for Refugees Status Determination of Mozambicans in South Africa*, 1994, para. 5 [of the Guidelines] http://www.refworld.org/docid/3ae6b5082c.html.
[56] UNHCR Handbook, para. 66. UNHCR *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 December 2013, HCR/GIP/13/10/Corr. 1, para. 48, http://www.refworld.org/docid/529ee33b4.html.

means and methods of warfare of the persecutor; by the unwillingness of the State to provide protection; or by the effect(s) of the situation of armed conflict and violence. The question to guide decision-makers is: what are the reasons for the person's feared predicament within the overall context of the case.

33. Armed violence and conflict may be rooted in, be motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics or social group divides; or may impact people based on these factors. In fact, what may appear to be indiscriminate violence (i.e. violence whereby the persecutor is not seeking to target particular individuals) may be in reality aimed at targeting whole communities or areas whose inhabitants are actual or perceived supporters of one of the sides in the conflict. Rarely are modern day conflicts characterised by violence that is not in one way or another aimed at particular populations or which does not have a disproportionate effect on a particular population, establishing a causal link with one or more of the Convention grounds. Who belongs to or is considered to be affiliated with a particular side of a conflict is often interpreted broadly by political or armed actors during times of armed violence or conflict and may include a range of people, including family members of fighters as well as all those who belong to the same religious or ethnic groups or reside in particular neighbourhoods, villages and towns. A Convention ground is regularly imputed to groups of people based on their family, community, geographic or other links.[57]

Convention grounds

34. The reasons for fearing persecution may be multiple, whereby one or more Convention grounds may be relevant. They are not mutually exclusive and frequently overlap.[58] A Convention ground need only be a contributing factor; it need not be the dominant or the sole cause of the fear of persecution.

35. Situations of armed violence and conflict are regularly rooted in or driven by a variety of motives or have consequences that affect various groups. Situations of armed violence and conflict regularly involve a mix of ethnic, religious, societal and political dimensions with the parties involved operating along ethnic, religious or social lines and pursuing – or perceived to be pursuing – political and/or religious goals.

[57] UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II*, 22 October 2013, para. 14, http://www.refworld.org/docid/5265184f4.html. UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*, 27 October 2014, para. 12, http://www.refworld.org/docid/544e446d4.html. *Arrêt n° 122 129*, Belgium: Conseil du Contentieux des Etrangers, 4 April 2014, para. 2.6, available [in Dutch only] via: http://www.rvv-cce.be/rvv/index.php/nl/home.
[58] UNHCR Handbook, para. 67.

36. Even where the motivations and drivers behind violent or otherwise harmful conduct resulting from, or prevalent in, situations of armed violence and conflict may – at first sight – appear to be criminal or profit driven and thus relate to factors outside the scope of the 1951 Convention, these too are regularly interconnected with Convention grounds.[59] For instance, armed groups may set up criminal enterprises to finance a racial, ethnic, religious or political conflict; or the armed violence of gangs or other armed groups, including for example drug cartels, that is primarily profit driven may also have the aim of consolidating or expanding the group's powerbase in society, potentially making the violence politically motivated.[60] The targeting of individuals but also of whole areas and populations often has ethnic, religious and/or political purposes or links.

37. Expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties to the conflict or refusing to join, support, financially contributing to, take sides or otherwise conform to the norms and customs of the parties to the conflict may be considered critical of the political goals of the persecutor or as deviating from the persecutor's religious or societal norms or practices.[61] Such objections, stance or behaviour may indicate or create the perception of holding a political opinion or religious (non-)belief, having an affiliation with or belonging to an ethnic, racial or social group.

38. Persons pursuing certain trades, professions or occupations may be at risk for reasons of, for example, their real or perceived political opinion or religious (non-)belief.[62] Their activities, role or status within society that follows from or is associated with their trade,

[59] *Refugee Appeal No. 76289*, No. 76289, New Zealand: Refugee Status Appeals Authority, 8 May 2009, para. 43, http://www.refworld.org/docid/4a2e2a5e2.html. *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 24 November 2000, paras. 43, 44, 50, 51 and 73(XI), http://www.refworld.org/docid/40487df64.html. *Osorio v. Immigration and Naturalization Service*, 18 F.3d 1017: 1994 U.S. App. LEXIS 4170, United States Court of Appeals for the Second Circuit, 7 March 1994, http://www.refworld.org/docid/3ae6b70e7.html.

[60] See, for example, *NS (Social Group - Women - Forced Marriage) Afghanistan v. Secretary of State for the Home Department*, CG [2004] UKIAT 00328, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 30 December 2004, para. 69, http://www.refworld.org/docid/42c928984.html; and *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 24 November 2000, para. 40, http://www.refworld.org/docid/40487df64.html.

[61] *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, para. 42, http://www.refworld.org/docid/500fdacb2.html. UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, para. 10, http://www.refworld.org/docid/4fc369022.html. *Souad Noune v Secretary of State for the Home Department*, C 2000/2669, United Kingdom: Court of Appeal (England and Wales), 6 December 2000, Schiemann LJ, paras. 8(5) and 28(5), http://www.refworld.org/docid/558bcbad4.html.

[62] M Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012, PPLA/2012/02, chapter 5.7.3, http://www.refworld.org/docid/4f7d94722.html. *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 24 November 2000, para. 46, http://www.refworld.org/docid/40487df64.html.

profession or occupation may be regarded as a real or perceived opinion on a matter in which the machinery of State, government, society or policy may be engaged, in particular in a country involved in conflict. For instance, journalists and other media professionals as well as human rights and rule of law defenders may report factually or critically on the conduct of certain actors; medical professionals may be seen as supporting the opposition by continuing to treat opposition fighters; humanitarian workers continuing with their humanitarian work may be perceived as assisting the "enemy";[63] and religious leaders may be siding, or seen to be siding, with one of the parties.

39. Civilians per se, may constitute a particular social group in situations that have been designated an armed conflict for the purposes of IHL, as they have a protected status under IHL.[64] Their protected status is a characteristic that is fundamental to their human dignity and makes civilians in such circumstances cognizable.[65] It is likely, however, that in many contemporary situations of armed violence and conflict, their case may be analysed under another of the Convention grounds.

40. Claims involving gender-related persecution may be analysed under any of the Convention grounds, i.e. in relation to real or perceived political opinion, ethnicity[66] and/or religion or social group (gender).[67]

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[63] UNHCR, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers*, August 2007, page 111, http://www.refworld.org/docid/46deb05557.html. UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, HCR/EG/IRQ/12/03, page 20 and 31, http://www.refworld.org/docid/4fc77d522.html.

[64] Under international humanitarian law (IHL) the term "civilians" refers to persons who are not members of the armed forces and are not prisoners of war (within the meaning of Article 4 of the Third Geneva Convention), Article 50 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, http://www.refworld.org/docid/3ae6b36b4.html. Also, *Prosecutor v. Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, para. 180, http://www.refworld.org/docid/4146f1b24.html and Rule 5 under customary IHL, see J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, 2005), p. 17.

[65] 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, para. 18, http://www.refworld.org/docid/50d32e5e2.html. In general on "membership of a particular social group", see: UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" 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/02/02, para. 6, http://www.refworld.org/docid/3d36f23f4.html.

[66] Real or perceived ethnicity is covered by the Convention grounds race and/or nationality, see, for example, UNHCR Handbook, paras., 68 and 74 and 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, paras. 24 (race) and 27 (nationality), http://www.refworld.org/docid/3d36f1c64.html.

[67] 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, paras. 25 (religion), 28 to 31 (membership of a particular social group), and 32 to 34 (political opinion), http://www.refworld.org/docid/3d36f1c64.html.

C. Internal flight or relocation alternative

41. The relevance of an internal flight or relocation alternative (IFA) in situations of armed violence and conflict needs to be carefully assessed. Situations of armed violence and conflict are often characterized by widespread fighting, are frequently fluid, with changing frontlines and/or escalation in violence, and often involve a variety of State and non-State actors, sometimes not easily identifiable, operating in diverse geographical areas. Further, such situations often seriously affect State and societal structures and support systems (see paragraph 19 of these Guidelines) creating hardship for the civilian population. The humanitarian situation of civilian populations living in conflict areas or areas affected by armed violence is often dire, including by the blockage of supply routes and restrictions on humanitarian aid. In many situations of armed violence and conflict, it may neither be relevant nor reasonable to apply an internal flight or relocation alternative.

42. Only when the violence and its impact is geographically limited and confined to a specific part of the county would it be relevant to assess whether an internal flight or relocation alternative exists.[68] In such exceptional cases, a careful examination needs to be made of the practical, legal and safe accessibility of the identified alternative area, in particular for the person concerned, and the ability of the organized and stable controlling entity, i.e. an organized and stable authority, to exercise full, effective and durable control over the territory and its population.[69] It would be inappropriate to equate national protection provided by States with the activities of certain administrative authority which may exercise some de facto – but not de jure – control over territory.[70] Such control is often temporary and without the range of functions required of a State, including the ability to readmit nationals to the territory or to exercise other basic functions of government. Specifically, such non-State entities and bodies do not have the attributes of a State, are not parties to international human rights treaties, and therefore cannot be held accountable for their actions as can a State. Their ability to enforce the rule of law is limited. Further, for the internal flight or relocation alternative to be reasonable a careful assessment needs to be made of the ability for the person to live in safety and security without undue hardship and with respect for human rights; and in

[68] UNHCR Handbook, para. 91. UNHCR guidance on a proper assessment of an internal flight or relocation alternative is found in: UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, http://www.refworld.org/docid/3f2791a44.html.

[69] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 17, http://www.refworld.org/docid/3f2791a44.html.

[70] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 16, http://www.refworld.org/docid/3f2791a44.html.

particular the likely spread of the conflict into new areas need to be taken into account (see paragraph 25 of these Guidelines).[71] It is never reasonable to return someone to a zone of conflict.

43. The presence of internally displaced persons, including those who are receiving international assistance, in one part of the country should not be used as evidence of the reasonableness of the internal flight or relocation alternative.[72] Quite the contrary, the fact that internally displaced persons often do not enjoy basic rights[73] and are faced with economic destitution or existence below an adequate level of subsistence, may itself be evidence of the unreasonableness of the proposed IFA.[74] Consideration would be needed of the capacity of local authorities and communities to provide protection against harm as well as whether there is a rights-respecting environment.[75] Further, in some situations internal displacement may be the result of "ethnic cleansing" policies, or otherwise in violation of the prohibitions on forcible transfer or arbitrary displacement under IHL, such that return to an area of internal relocation would not be justified.[76]

44. Equally, "protected zones"[77] or "safe zones"[78] and other similar areas never form a relevant or reasonable internal flight or relocation alternative regardless whether the area is being protected by a United Nations or other international force. Such zones and areas are

[71] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, paras. 17 and 27 to 30, http://www.refworld.org/docid/3f2791a44.html.
[72] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 31, http://www.refworld.org/docid/3f2791a44.html.
[73] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 32, http://www.refworld.org/docid/3f2791a44.html.
[74] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 29, http://www.refworld.org/docid/3f2791a44.html.
[75] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, paras. 27 and 28, http://www.refworld.org/docid/3f2791a44.html.
[76] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 31, http://www.refworld.org/docid/3f2791a44.html.
[77] The term "protected zones" is the overarching term used by the International Committee for the Red Cross and Red Crescent (ICRC) for all relevant zones stipulated in the Geneva Conventions. The legal basis for establishing protected zones in the context of armed conflict can be found in Article 23 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, http://www.refworld.org/docid/3ae6b3694.html; Article 14 (hospital and safety zones and localities) and 15 (neutralized zones) of the the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: http://www.refworld.org/docid/3ae6b36d2.html; and Articles 59 (non-defended localities) and 60 (demilitarized zones) of the 1977 Additional Protocol I to the Geneva Conventions and the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, http://www.refworld.org/docid/3ae6b36b4.html.
[78] In a number of instances, the United Nations Security Council has called upon the creation of "safe zones", for a variety of reasons, and in different ways, usually based on Chapter VII of the UN Charter.

invariably set up as emergency measures to protect the civilian population against imminent threats to their life or safety. People living in such zones and areas are, at a minimum, denied freedom of movement. At worse, the safety of the people living in such zones and areas may be compromised, as a result of sieges, or attacks against the zone or area and the population therein.

III. SUBSTANTIVE ANALYSIS OF ARTICLE I(2) OF THE 1969 OAU CONVENTION

45. Article I(1) of the OAU Convention replicates the 1951 Convention refugee definition contained in Article 1A(2) of the 1951 Convention as amended by the 1967 Protocol,[79] whereas Article I(2) offers refugee protection to

> *every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*

A. Preliminary considerations to guide interpretation

46. In applying the OAU Convention definition, the primacy of the 1951 Convention needs to be borne in mind.[80] Following the adoption of the 1967 Protocol, which made the 1951 Convention the global instrument for the protection of refugees, the OAU Convention sought in large part to extend international refugee law to new refugee situations in Africa and to address the *specific* challenges facing African countries in responding to refugee crises on the continent.

47. The OAU Convention is protection- and humanitarian-oriented[81] and reflects trans-African solidarity.[82] It specifically reaffirms the right to asylum[83] and the principle of *non-*

[79] Contrary to Article 1A(2) of the 1951 Convention, Article I(1) of the 1969 OAU Convention does not include the temporal limitation of having a well-founded fear as a result of "events occurring before 1 January 1951"; a limitation later removed with the adoption of the 1967 Protocol, Article I(2).
[80] OAU Convention, ninth preambular paragraph.
[81] OAU Convention, second preambular paragraph.
[82] OAU Convention, eighth preambular paragraph.
[83] OAU Convention, Article II. The right to asylum is also recognized in Article 12(3) of the African Charter on Human and Peoples' Rights, Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html.

refoulement[84], the duties of refugees[85], the principle of non-discrimination[86] and the search for durable solutions, including the essentially voluntary character of repatriation.[87] Cooperation with the African Union and UNHCR are also emphasised[88], and it calls on all OAU (now African Union) Member States to accede to the 1951 Convention.[89]

Scope of the OAU Convention definition

48. The OAU Convention definition applies to all persons within the jurisdiction of a State party and is not limited to persons whose country of origin or nationality is in Africa.

49. Article I(2) of the OAU Convention is the first refugee definition of its kind to steer away from discriminatory persecutory conduct towards more generalized or so-called "objectively" identifiable situations. The OAU definition acknowledges that the compulsion for persons to leave their country may occur not only as a result of the calculated acts of the government of the refugee's country of origin, but also as a result of that government's loss of authority due to external aggression, occupation, foreign domination or events seriously disturbing public order. The OAU Convention focuses on situations that compel people to leave their countries in search of safety and sanctuary.

B. Elements of the OAU Convention definition

50. Article I(2) of the OAU Convention protects as refugees persons who (i) are outside their country of origin, (ii) having been compelled to leave their place of habitual residence, (iii) because of one or more of the situations exhaustively listed exists in either part or the whole of their country of origin or nationality. These elements of the OAU Convention definition are explained below and need to be considered as part of a holistic assessment.

[84] OAU Convention, Article II(3).
[85] OAU Convention, Article III.
[86] OAU Convention, Article IV.
[87] OAU Convention, Article II(5), referring to a right to reside, to be granted temporary residence, and resettlement. The right to voluntary repatriation is regulated by Article V of the OAU Convention.
[88] OAU Convention, eleventh preambular paragraph and Articles VII and VIII.
[89] OAU Convention, tenth preambular paragraph. At the time of writing, from the 54 Member States of the African Union (AU), 46 are a State party to the OAU Convention, of whom 44 are also a State party to either the 1951 Convention or the 1967 Protocol (with the Republic of Cabo Verde only a State party to the 1967 Protocol and neither the Union of the Comoros nor Libya being a State party to either the 1951 Convention or the 1967 Protocol). Of the 8 AU Member States that are not a State party to the OAU Convention, 4 States are a State party to both the 1951 Convention and the 1967 Protocol (i.e. the Republic of Djibouti, the Republic of Namibia, the Somali Republic and the Democratic Republic of Sao Tome and Principe; all of whom have signed the OAU Convention but not ratified the treaty), one State is only a State party to the 1951 Convention (i.e. the Republic of Madagascar), and three States are neither a State party to the 1951 Convention nor the 1967 Protocol (i.e. the State of Eritrea, the Republic of Mauritius and the Republic of South Sudan).

Outside one's country of origin or nationality

51. The phrase "country of origin or nationality" refers to the person's country of nationality, or in the case of stateless persons, the reference to "country of origin" can be assimilated with "country of former habitual residence" in Article 1A(2) of the 1951 Convention. To benefit from the OAU Convention, an applicant needs to be outside her or his country of origin or nationality.

Compelled to leave one's place of habitual residence

52. By including the language of "compulsion" in the definition, Article I(2) of the OAU Convention emphasizes the seriousness of the situation. Compulsion is generally understood to mean "to urge irresistibly, to constrain, oblige, force".[90] This is taken to mean that when the situation in question is sufficiently serious such that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country they need to be protected.[91]

53. Reference to one's "place of habitual residence" must be understood as part of the compulsion to leave and seek refuge outside one's country of origin or nationality. The "place of habitual residence" element has no other or separate legal effect.

54. Article I(2) of the OAU Convention does not require a personalized or discriminatory threat or risk of harm.[92] Whole groups of persons or an entire population may be affected by the situation and be compelled to leave their places of habitual residence owing to the situation in question.

55. As the Article I(2) emphasises the seriousness of the situation in question over motives for flight or the risk of harm, individuals are largely able to determine for themselves when they are compelled to leave. Adjudicators should generally defer to such an individual

[90] Oxford English Dictionary, online, 2015, 'compel'.
[91] *Radjabu v. The Chairperson of the Standing Committee for Refugee Affairs*, 8830/2010, South Africa: High Court, 4 September 2014, para. 6, http://www.refworld.org/docid/540874f94.html. The criterion of 'objectively reasonable to leave' speaks to the ordinary meaning of the word 'compulsion'. According to the Court, compulsion rather than volition is the predominant factor, whereby determining whether a person qualifies for refugee status under the regional definition requires an assessment of the existence of objectively ascertainable circumstances in the person's country of origin corresponding with any of those stipulated in the definition and whether their effect on the person concerned has been such as to force him or her to leave the place where s/he ordinarily resided.
[92] Article I(2) of the OAU Convention is not ignorant of a risk of harm as is evident from the phrase 'is compelled to leave' in the definition read in conjunction with the principle of *non-refoulement* laid down in Article II(3) of the OAU Convention, protecting people from being returned to a territory where their life, physical integrity or liberty would be threatened. However, a threat or risk of harm is not a necessary requirement to be granted protection under the regional definition.

decision, unless it is patently unreasonable, and assess whether flight from their country of origin or nationality is objectively reasonable.

Refugees "sur place"

56. Sur place claims are accepted under the OAU Convention, in line with accepted State practice and consistency in the interpretation of the 1951 Convention and the Cartagena Declaration definitions.

Situations

57. Guided by the protection-purpose of the OAU Convention, the situations mentioned in Article I(2) are to be given their ordinary meaning, wherever possible, and interpreted in an evolutionary way so they remain relevant and applicable to new situations and situations that were not foreseeable when the OAU Convention was drafted.

58. The situation may be the result of "*external aggression*", i.e. aggression through the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations,[93] including international armed conflicts within the meaning of IHL,[94] as well as conflicts not categorized as such under IHL and fuelled by outside involvement or those that have spilled over from neighbouring States, including because of the presence of (members of) the armed forces of another State or incursions by foreign armed groups.

59. Situations of armed violence and conflict may also accompany or be the result of "*occupation*", i.e. a situation whereby the territory is actually placed under the authority or effective control of a hostile army[95] or armed group(s) from either within or outside the

[93] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 2(4) and Chapter VII, http://www.refworld.org/docid/3ae6b3930.html. Article 1 of the UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314, http://www.refworld.org/docid/3b00f1c57c.html. Article 3 includes a non-exhaustive list of acts that qualify as an act of aggression. See also, Article *8bis* of the UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, http://www.refworld.org/docid/3ae6b3a84.html.

[94] See: Common Article 2(1) of the 1949 Geneva Conventions, including the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, http://www.refworld.org/docid/3ae6b36d2.html, applicable to international armed conflicts, refers to "*cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting States*"; and Article 1(4) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, http://www.refworld.org/docid/3ae6b36b4.html, makes further reference to "*armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination*".

[95] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Article 42, http://www.refworld.org/docid/4374cae64.html. See also, *Chiragov and Others v. Armenia*, Application no.

country;[96] or "*foreign domination*", i.e. the political, economic or cultural control of a State by (agents of) one or more other States, association of States, or States governed international organizations.[97]

60. The phrase "*events seriously disturbing public order*" should be broadly construed, in line with the OAU Convention's humanitarian object and purpose, to include events that impact on the maintenance of public order (*ordre public*) based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are put in danger.[98] The threshold of "serious" public disorder events is likely to disrupt the normal functioning of the institutions of the State and effect internal and external security and stability of the State and society. Such events may be categorized as an international or non-international armed conflict within the meaning of IHL, but may also include events not categorized as an armed conflict within the meaning of IHL, involving armed violence between different groups in society or between the State and non-State actors, including gangs and criminal organizations.[99] The ground of "events seriously disturbing public order" is the most commonly chosen situation when granting refugee status under the OAU Convention.

61. While one-off acts or incidents may prompt a serious disturbance of public order, it is more common that a series of acts of a systematic or cumulative nature whereby the State is either unwilling or unable to provide protection would qualify. Situations that have prompted the Government to declare a state of emergency may be an important albeit not necessary indicator of the ground, although each situation should be assessed on its individual circumstances.[100]

62. Events seriously disturbing public order also involve situations of generalized violence, i.e. violence that is widespread, affecting large groups of persons or entire populations; serious and/or massive human rights violations; or events characterized by the

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13216/05, Council of Europe: European Court of Human Rights, 16 June 2015, para. 96, http://www.refworld.org/docid/5582d29d4.html.

[96] African Commission on Human and Peoples' Rights, *Statement by the African Commission on the Present Human Rights Situation in Mali*, 18 January 2013, http://www.refworld.org/docid/5108d96a2.html.

[97] *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), http://www.refworld.org/docid/3ae6b3630.html, Article 20(3): "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

[98] UNHCR, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)*, 6 April 1992, EC/1992/SCP/CRP.6, http://www.refworld.org/docid/3ae68cd214.html.

[99] See paragraph 92 of these Guidelines.

[100] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S., 171, Article 4. Also, UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, http://www.refworld.org/docid/453883fd1f.html.

loss of Government control and its inability or unwillingness to protect its population, including situations characterized by repressive and coercive social controls by non-State actors, often pursued through intimidation, harassment and violence.

63. Factual indicators of events seriously disturbing public order include: a declared state of emergency; violations of IHL, including war crimes;[101] acts of terrorism; the number of people killed, injured or displaced; the closure of schools; a lack of food, medical services and supplies and other vital services such as water, electricity and sanitation; the change in or collapse of government institutions and services, political systems and the police and justice system; the imposition of parallel justice and administrative systems; and/or non-State actors controlling State territory. Responses to any of these situations may also give rise to escalating violence and cause additional insecurity.

C. Internal flight or relocation alternative

64. The consideration of possible internal relocation is not generally relevant to the determination of refugee status under Article I(2) of the OAU Convention.[102]

65. Article I(2) covers both situations that affect either "part" or "the whole" of the claimant's territory.[103] As the focus of Article I(2) is on situations that seriously disrupt state and societal structures, it cannot be required for people to relocate to other parts of the country, including when the situation in those alternative parts may be less disruptive. The only exception would be where the situation is isolated to a particular part of the country or city/region, and where the State is able and willing to protect its citizens in those other areas. Consideration of the likely spread of the situation and the accompanying violence and disorder into other areas would need to be carefully assessed, with a forward-looking perspective.

[101] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Article 8, http://www.refworld.org/docid/3ae6b3a84.html

[102] UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 23 July 2003, para. 5, http://www.unhcr.org/3f28d5cd4.html, States may only derogate against specifically identified rights, and can only do so to the extent strictly required by the exigencies of the situation, must be consistent with other obligations under international law and may not be based on or result in discrimination. The measures adopted must be proportionate and of temporary duration, and the relevant human rights body needs to be notified of the derogation.

[103] *Recueil des décisions (No 2 - 2008)*, Benin: Comité d'éligibilité au statut de réfugié, 2008, p. 97, http://www.refworld.org/docid/563cede14.html.

IV. SUBSTANTIVE ANALYSIS OF CONCLUSION III(3) OF THE 1984 CARTAGENA DECLARATION

66. According to Conclusion III(3) of the Cartagena Declaration it is recommended to include among refugees

> *persons who have fled their country because their lives, security*[104] *or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*

A. Preliminary considerations to guide interpretation

67. The Cartagena Declaration on Refugees is a regional protection instrument, adopted in 1984 by a group of experts from several Latin-American countries,[105] as the result of a colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico and Panama held in Cartagena de Indias, Colombia. Its adoption represented a humanitarian and pragmatic response to the movements of groups of people from conflict and other situations characterised by indiscriminate threats to life, security and freedom. The Cartagena Declaration reaffirms the centrality of the right to asylum and the principle of *non-refoulement*, the importance of searching actively for durable solutions, and the necessity of co-ordination and harmonization of universal and regional systems and national efforts.[106]

68. Although included in a non-binding regional instrument,[107] the Cartagena refugee definition has attained a particular standing in the region, not least through its incorporation into 14 national laws.[108] The authority of the Cartagena refugee definition has been reaffirmed

[104] The original Spanish text of Conclusion III(3) of the Cartagena Declaration refers to '*seguridad*', which is properly translated into English as 'security'.
[105] Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela.
[106] See respectively, Conclusion III(4) on the right to asylum; Conclusion III(5) on the principle of *non-refoulement*; Conclusion III(11) on integration and Conclusion III(12) on voluntary repatriation; and Conclusions III(14) to (17) on co-operation, co-oordination and harmonization.
[107] The 1984 Cartagena Declaration is not a treaty within the meaning of the 1969 Vienna Convention on the Law of Treaties (Article 1(a)) and therefore, its refugee definition included in Conclusion III(3) needs to be incorporated by the national laws of States in order to have binding legal effect.
[108] In addition to the incorporation of the Cartagena refugee definition into 14 national laws, the Constitutional Court of Ecuador has ordered the regional definition to be reinstated in the national legal framework in September 2014 [add reference to the Court's order].

by the Inter-American Court of Human Rights (I/A Court H.R.),[109] the Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (2004),[110] the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas (2011)[111] and the Brazil Declaration and Plan of Action (2014).[112]

69. The Cartagena Declaration, as a protection instrument, has at its foundation the commitment to grant the treatment provided by the 1951 Convention to all refugees.[113] It drew inspiration from the OAU Convention, as well as the doctrine of the Inter-American Commission on Human Rights (IACHR).[114] As such, its interpretation is to be informed by international and regional law, especially the norms and standards of the 1948 American Declaration of the Rights and Duties of Man,[115] the 1969 American Convention on Human Rights,[116] and the evolving case law of the Inter-American human rights bodies.

70. Furthermore, the humanitarian- and protection-orientation of the instrument calls for an inclusive, evolving and flexible interpretation, as reflected in State practice and jurisprudence.[117] Where the ordinary meaning is not clear, the text should be given a purposive or teleological interpretation.

Scope of the Cartagena refugee definition

[109] *Advisory Opinion OC-21/14 of August 19, 2014 requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, Inter-American Court of Human Rights (I/A Court H.R.), 19 August 2014, paras. 76, 77, 79 and 249, http://www.refworld.org/docid/54206c744.html.

[110] *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America*, 16 November 2004, http://www.refworld.org/docid/424bf6914.html.

[111] UNHCR, *Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas*, 11 November 2010, http://www.refworld.org/docid/4cdd44582.html.

[112] *Brazil Declaration and Plan of Action*, 3 December 2014, http://www.refworld.org/docid/5487065b4.html.

[113] Cartagena Declaration, Conclusion III(8). See also Recommendation E of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.refworld.org/docid/40a8a7394.html.

[114] See the text of Cartagena Declaration, Conclusion III(3).

[115] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, http://www.refworld.org/docid/3ae6b3710.html.

[116] Cartagena Declaration, Conclusion III(8) and (10) make explicit reference to the 1969 American Convention on Human Rights, see: Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, http://www.refworld.org/docid/3ae6b36510.html ("American Convention on Human Rights").

[117] 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, page 2 (ft 5), http://www.refworld.org/docid/53c52e7d4.html. Among participants at the roundtable there was consensus on the need to move beyond the, overly legalistic, approach presented in "Principles and Criteria for the protection and assistance of Central American refugees, returnees and internally displaced in Latin America" (CIREFCA, 89/9, April 1989, available online at: http://www.refworld.org/docid/4370ca8b4.html) and rather focus on new developments in State practice and the value of the interpretation of the evolving case law of the Inter-American human rights bodies.

71. Like the OAU Convention definition, the Cartagena definition aims to provide protection from situational risks. The five "situations" mentioned in the Cartagena definition are characterized by the indiscriminate, unpredictable or collective nature of the risks they present to a person or group of persons, or even to populations at large.

72. As with any refugee claim, the Cartagena definition requires an assessment of the situation in the country of origin as well as the particular circumstances of the individual or group of persons who seek protection as refugees. The focus of the assessment is, however, on the exposure of the individual or group of persons to the risks inherent in the five situations contained in the definition. For example, civilians at risk to their lives, security or freedom from confrontations between armed groups fighting for control over territory, which – directly or indirectly – endangers the lives and security of anyone living in the area, would fall within the Cartagena definition of a refugee. They are not required to show an individual risk over and above others similarly situated, as the risk can be established from being "in the wrong place at the wrong time". This example underlines the temporal and spatial/geographical dimensions of the risk, essential components of the Cartagena definition.

73. As the Cartagena definition focuses on indiscriminate threats or risks, authorities are advised where possible to adopt a consistent approach to persons fleeing the same country (or area within a country) in similar circumstances. This would contribute towards removing protection gaps in the region, and lead to consistent outcomes between cases.

B. Elements of the Cartagena definition

74. The Cartagena definition protects as refugees persons who (i) are outside their country, (ii) because their life, security or freedom is threatened, (iii) as a result of one or more of the situations the country in question is experiencing. The particular elements of the Cartagena definition are explained below, although they need to be considered as part of a holistic assessment and should not be rigidly compartmentalised.

Outside their country

75. For the purposes of the Cartagena definition, the concept of "outside their country" is to be interpreted in line with the 1951 Convention definition's understanding of this term in Article 1A(2), to encompass not only the country of nationality but also, in the case of stateless persons, the country of former habitual residence.

Refugees "sur place"

76. Sur place claims are accepted under the Cartagena definition, in line with accepted State practice and for consistency in the interpretation between the 1951 Convention and the OAU Convention definitions.[118]

Situations

77. Guided by the protection-purpose of the Cartagena Declaration, the situations mentioned in the Cartagena definition are to be given their ordinary meaning, wherever possible, and interpreted in an evolutionary way so they remain relevant to apply to new or not-yet-predicted situations.

78. "*Generalized violence"* is not a term of art, nor does it have a strict or closed definition. Adopting a case-by-case approach, the term would encompass situations characterised by violence that is indiscriminate and/or sufficiently widespread to the point of affecting large groups of persons or entire populations compelling their flight. Drawing instead on international human rights law, identifying factual indicators on the number, type, level and effects of violence persisting in the country of origin would be an appropriate approach.[119] Situations of generalized violence would clearly include situations involving massive as well as serious violations of human rights. Generalized violence can be established via the intensity, geographic spread or density of the violence or through a combination of more than one of these.

[118] 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, p.9, http://www.refworld.org/docid/53c52e7d4.html.

[119] The I/A Court of H.R. has considered a situation of generalized and indiscriminate violence in El Salvador in the early 1980s to exist, referring to systematic violence indiscriminately affecting a large number of people over a prolonged period of time, see I/A Court H.R., case of Massacres of El Mozoto and nearby places v El Salvador, Merits, Reparations and Costs. Judgment of 25 October 2012, Series C No. 252, paras. 70 and 193. The Inter-American Commission on Human Rights (IACHR) has referred to similar indicators when describing situations of "widespread violence" in some countries in the region. These include, but are not limited to, the following: a) the number of violent incidents as well as the number of victims of those incidents is very high; b) the prevailing violence inflicts heavy suffering among the population; c) violence manifests itself in most egregious forms, such as massacres, torture, mutilation, cruel, inhuman and degrading treatments, summary executions, kidnappings, disappearances of persons and gross breaches to IHL; d) the perpetration of acts of violence is often aimed at causing terror and, eventually, creating a situation such that individuals are left with no option other than flee the area affected; e) violence can emanate from state and non-state agents, and when it emanates from the first, or from others acting at the instigation or with the acquiescence of state's authorities, the authors enjoy impunity; f) where violence emanates from non-state agents, authorities are unable to effectively control them; and g) the level and extent of violence is such that the normal functioning of society is seriously impaired. For a more detailed analysis see for example: IACHR, "Violence and Discrimination against Women in the Armed Conflict in Colombia", Chapter II, OAS/Ser.L/V/II. Doc. 67, 18 October 2006, p.11; IACHR, "Report on the Situation of Human Rights in Jamaica", Chapter II Citizen, Security and Human Rights and Chapter Chapter III Administration of Justice, OAS/Ser.L/V/II.144 Doc. 12 10 August 2012, pp.5 and 27; IACHR, "Report on the Situation of Human Rights in the Republic of Guatemala", *Introduction, Conclusions and Recommendations*, OAS/Ser.L/V/II.53 doc. 21rev.2. 13 October 1981; and IACHR, "Report on the Situation of Human Rights in the Republic of Guatemala", Conclusions and Recommendations, OAS/Ser.L/V/II.61 Doc. 47 rev.1. October 5, 1983.

79. As "generalized violence" is not a term found in IHL, it cannot be circumscribed by situations of armed conflict as understood under IHL. See also paragraphs 5 and 15 of these Guidelines in relation to the limited relevance of categorizing a situation as an armed conflict under IHL in interpreting the 1951 Convention.

80. Situations of generalized violence would encompass violence carried out by State as well as non-State actors, in the latter in situations where the will or ability of the State to provide protection to those under its jurisdiction is inadequate. It is, however, the situation on the ground, and the risks that the violence presents that is at issue – rather than the question of state responsibility. The effects of generalized violence would also be a relevant consideration, including whether the violence is sustained over time and/or space.

81. "*Foreign aggression*" is understood to be the same as the terms "aggression", "war of aggression" and "act of aggression" as defined under international law as well as the term "external aggression" included in the OAU Convention (see paragraph 58 of these Guidelines).[120] Consistent with the object and purpose of the Cartagena Declaration, foreign aggression relates to international armed conflicts, within the meaning of IHL[121] as well as to conflicts not categorized as such under IHL and fuelled by outside involvement or those that have spilled over from neighbouring States, including because of the presence of (members of) the armed forces of another State or incursions by foreign armed groups.

82. "*Internal conflicts*" in the Cartagena definition refers to non-international armed conflicts (NIACs) within the meaning of IHL[122] Accepting that internal conflicts so deemed

[120] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 2(4) and Chapter VII, http://www.refworld.org/docid/3ae6b3930.html. Article 1 of the UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314, http://www.refworld.org/docid/3b00f1c57c.html. Article 3 includes a non-exhaustive list of acts that qualify as an act of aggression. See also, Article *8bis* of the UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, http://www.refworld.org/docid/3ae6b3a84.html. See, also, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, available at: http://www.refworld.org/docid/4023a44d2.html.

[121] See: Common Article 2(1) of the 1949 Geneva Conventions, including the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, http://www.refworld.org/docid/3ae6b36d2.html, applicable to international armed conflicts, refers to "*cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting States*"; and Article 1(4) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, http://www.refworld.org/docid/3ae6b36b4.html, makes further reference to "*armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination*".

[122] See, Common Article 3 of the Geneva Conventions, i.a. International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, http://www.refworld.org/docid/3ae6b3694.html; Article 1 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS

would be covered by the Cartagena definition, the protection purpose of the Cartagena Declaration and, keeping the approach consistent with the authoritative guidance in these Guidelines both with respect to the 1951 Convention and the OAU Convention, IHL is considered to be informative, though not determinative of whether an internal conflict exists, as should the qualifications made by the parties involved or affected by it (see paragraph 15 of these Guidelines).[123] For situations short of a NIAC, for purposes of the Cartagena definition, they may be better captured under the ground of "generalized violence".

83. For situations to qualify for one of "*massive violations of human rights"*, reference to the jurisprudence of the I/A Court H.R. is particularly relevant. The term "*massive*" refers to the scale or magnitude of the violations reported, irrespective of the duration and can as such be the result of an isolated event.[124] Additionally, where the effects of the violations go beyond the actual/direct victims to reach other segments of the population or even the society as a whole, the Cartagena definition would be activated. The elements of planning and organisation on the side of the perpetrator, whether State or non-State, could also be indicia, although not a requirement. In cases of non-State actors, state responsibility is engaged where the authorities are either unable or unwilling to protect its citizens by failing to prevent, investigate, prosecute and sanction these violations.[125] In this context, forced displacement may, in itself, amount to a massive violation of human rights[126] or lead to other serious human violations. The Cartagena Declaration makes no distinction between the types of rights (whether civil, cultural, economic, political or social) that are under threat for protection purposes, although protection would only be provided where such massive violations of human rights give rise to threats to life, security or freedom (see paragraphs 89 to 91 of these Guidelines).

84. The existence of pronouncements, or provisional measures by the I/A Court H.R.[127] or precautionary measures by the IACHR,[128], related to a given situation would be strong

609, http://www.refworld.org/docid/3ae6b37f40.html; and *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 70, http://www.refworld.org/docid/47fdfb520.html.

[123] For example, while an UN Security Council designation of a situation as a non-international armed conflict would be sufficient for the purposes of the Cartagena refugee definition; such a qualification cannot be a requirement. See, also, UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, para. 24, available at: http://www.refworld.org/docid/4e1729d52.html.

[124] I/A Court H.R., case of "Las Dos Erres" Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of 24 November 2009, paras. 73, 79 and 152; I/A Court H.R., case of Rio Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment 4 September 2012, paras. 56, 58-60, 63.

[125] I/A Court H.R., case of Gonzalez et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of 16 November 2009, para. 236

[126]. [Colombia case, Sentence T025 (2004) Constitutional Court]

[127] Provisional measures are an instrument used by the I/A Court H.R. to prevent irreparable harm to the rights and

evidence that such a situation exists. The statements of international human rights bodies or courts might also be used as reference material. However, such pronouncements or measures of the Inter-American Commission or Court of Human Rights are not required to qualify a situation as one of massive violations of human rights. This is a factual assessment, to be undertaken by the relevant asylum adjudication body, relying on relevant information and evidence, including the applicant's own testimony.

85. Importantly, however, should the human rights violations, despite being massive, single out or target particular persons or groups of persons on account of their race, religion, nationality, membership of a particular social group or political opinion, the person or group would be a 1951 Convention refugee.

86. "*Other circumstances which have seriously disturbed public order*" is the less clearly understood phrase and the least applied by national adjudication bodies when determining refugee claims under the Cartagena definition. The notion of "*public order*", while not having a universally accepted definition, can be interpreted in the context of the Cartagena definition as referring to the peace and internal and external security and stability of the State and society and the normal functioning of the institutions of the State based on respect for the rule of law and human dignity. This can take place in times of conflict and/or peace.

87. In the jurisprudence of the Inter-American Court, circumstances seriously disturbing public order have been defined by reference in part to the recourse of States to take measures derogating from its human rights obligations in cases of declaration of a state of emergency.[129] However, a declaration of a state of emergency should not be seen as a prerequisite for existence of a "circumstance seriously disturbing public order," albeit it would ordinarily be indicative of such a situation.

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freedoms ensured under the American Convention on Human Rights of persons who are in a situation of extreme gravity and urgency. The measures are ordered *ex officio* or at the request of a party and result in a protection request to the respondent state of the alleged victim(s). See, Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 63(2), http://www.refworld.org/docid/3ae6b36510.html and Organization of American States (OAS), *Rules of Procedure of the Inter-American Court of Human Rights*, 16-29 November 2009, Article 27, https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm.

[128] Organization of American States (OAS), *Rules of Procedure of the Inter-American Commission on Human Rights*, 1 August 2013, http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp, Article 25, establishes that, in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case, as well as to persons under the jurisdiction of the State concerned, independently of any pending petition or case.

[129] American Convention on Human Rights, Article 27(1), allowing States to take derogating measures in time of war, public danger, or other emergency that threatens the independence or security of a State Party. *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, OC-8/87, Inter-American Court of Human Rights, 30 January 1987, paras. 19 and 20, http://www.refworld.org/docid/402795714.html.

88. The inclusion of the language of "other" could allow States to grant protection in circumstances other than related to the four situations mentioned in the Cartagena definition.

Threat to life, security or freedom

89. The third element of the Cartagena definition is the link between one of the situations and the risk this poses to the "life, security or freedom" of the individual or group of individuals. The "threat" or "risk" element set out in the regional definition connotes the possibility of harm being inflicted on a person or group of persons; it does not imply that the harm has actually materialised. The link to "life, security or freedom" likewise should not be interpreted in a manner as to curtail or restrict the scope of protection granted to persons fleeing these situations of violence unnecessarily, such as to import an individualised assessment as to risk equivalent to the 1951 Convention definition.[130] In fact, proximity of – temporal and/or spatial/geographical – or imminence of the threat would suffice to justify the need for international protection under the Cartagena definition.[131]

90. The "threat" element is distinct from the concept of "well-founded fear" in the 1951 Convention definition in that it should be understood as requiring a lower threshold of proof. The concept of "persecution for reasons of" is also completely absent in the Cartagena definition. Therefore, there is no requirement under the Cartagena definition for an applicant to establish a discriminatory, intentional or individualised aspect in respect of the threat to life, security or freedom. In fact, the Cartagena definition was oriented towards group situations. The focus of this definition is not on the personal circumstances of the individual fleeing a danger to life, security or freedom but on the objective circumstances in the country of origin. The personal circumstances of the individual, while relevant to their risk of harm from one of the situations, cannot play a determining role.

91. Reference to persons' lives, security or freedom should be interpreted broadly, encompassing persons' physical and mental integrity, security, freedoms, human dignity and livelihoods with reference to internationally and regionally recognized human rights.

Gang violence or violence from organized criminal groups

[130] Doing otherwise would make it largely redundant as a tool for extending the scope of international protection provided under the 1951 Convention definition.
[131] In generalized violence situations the threat may be self-evident and only the proximity, in terms of time and/or place, needs to be established for the risk element to be fulfilled.

92. Without prejudice to the 1951 Convention definition, gang violence or violence from organized criminal groups may rise to such a level that it may qualify to provide protection under the Cartagena definition, under one or more of the situations mentioned therein, in particular, generalized violence, internal conflicts, massive human rights violations or other circumstances which have seriously disturbed public order. For example, where the rule of law in the country is weak, State institutions and systems have broken down and where violence affects large segments of society.[132] On the application of the 1951 Convention to such situations, see UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs.[133]

C. Internal flight or relocation alternative

93. State practice in the Americas is largely consistent in holding that an internal flight or relocation alternative is not generally relevant to the determination of refugee status under the Cartagena definition because of the nature of the situations causing flight.

94. The focus of the Cartagena definition is on situations that seriously disrupt State and societal structures. Under such circumstances it cannot be required that people relocate to other parts of the country, including when the situation in those alternative parts may be less disruptive. An exception could be drawn where the situation is isolated to a particular part of the country or city/region, and where the State is able and willing to protect its citizens in those other areas. Consideration of the likely spread of the situation and the accompanying violence and disorder into other areas would need to be carefully assessed, with a forward-looking perspective.

V. PROCEDURAL AND EVIDENTIARY ISSUES

A. Approaches to applying the 1951 Convention/1967 Protocol definition and the regional definitions

95. The various definitions of a refugee are not mutually exclusive. They each recognise refugee status and grant an equivalent set of rights (see paragraph 8 of these Guidelines). As

[132] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, para. 10, http://www.refworld.org/docid/4bb21fa02.html.
[133] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, http://www.refworld.org/docid/4bb21fa02.html.

such, various approaches can be used in applying the refugee definitions. This includes a sequential approach, a 'nature of flight' approach and a pragmatic approach.

96. In principle, a sequential approach is preferred, whereby refugee status is initially assessed under the 1951 Convention definition before proceeding with an assessment under the regional definitions. Such an approach underscores the universal character of the principal definition of a refugee in Article 1A(2) of the 1951 Convention, the primacy of that Convention and the explicit complementary character of the regional definitions.[134] Moreover, a sequential approach is compatible with the practice of most resettlement countries, which generally will not resettle refugees recognized pursuant to a treaty that is not binding upon them.

97. In particular in the context of refugee claims related to situations of armed violence and conflict a 'nature of flight' or a pragmatic approach may also be appropriate, in particular in the context of a single or unified asylum procedure for determining refugee status,[135] either because refugee claims related to such situations are more closely aligned with criteria for refugee status under the regional definitions ('nature of flight'), or because such situations result in a large-scale influx making it more practical and efficient to apply the regional definitions, for example, via *prima facie* recognition of refugee status.[136]

B. Establishing the facts

98. Claims for refugee status related to situations of armed violence and conflict can raise complex factual issues and are highly contextual, turning on the particular circumstances of the applicant viewed against the causes, character and impact of the conflict and violence. In the absence of *prima facie* recognition of refugee status, claims for refugee status should be considered on their individual merits, taking into account up-to-date and relevant country of origin information.

Country of origin information

[134] An additional argument for a sequential approach under the 1969 OAU Convention is the structure of Article I, where in paragraph 1 the 1951 Convention refugee definition is replicated before paragraph 2 provides the regional definition.
[135] EXCOM Conclusion No. 103 (LVI) 2005, para. (q), which encourages States to establish a single or unified asylum procedure for determining refugee status.
[136] UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, para. 5, http://www.refworld.org/docid/555c335a4.html.

99. Up-to-date and relevant country of origin information is important in particular for understanding whether the country of origin is experiencing one of the situations referred to the regional definitions resulting in a compulsion to leave, or a threat to life, security or freedom.[137]

100. Relevant country of origin information includes both qualitative and quantitative information. Qualitative information is particularly relevant to avoid misunderstandings, stereotyping and generalizations and allows for a deeper understanding of the situation of armed violence and conflict, i.e. of the history and development of the situation, the actors involved, the methods of warfare used and the effects the situation has on the country and the people caught up in it. Quantitative information related to situations of armed violence and conflict should be used with great caution. Different sources use different methodologies, often depending on their motivation for collecting statistics, resulting in substantial divergences. Statistical data can provide an indication of the impact of the situation on the population, but can be inconclusive or unreliable regarding the risk, harm and/or relevant 1951 Convention ground or situations mentioned in the regional definitions. Statistical information tends to be biased in favour of deaths, and may not capture other harm – direct and indirect – on persons, state structures or societies.

101. The lack of (accurate) gender and or sexual orientation sensitive,[138] and child-specific[139] country of origin information is an overarching problem affecting all claims based on gender-related persecution, but is particularly prevailing in claims related to situations of armed violence and conflict. Such information is often not available or it may be inaccurate due to a lack of corroborative information on gender issues.[140]

Burden of proof

[137] *Radjabu v. The Chairperson of the Standing Committee for Refugee Affairs*, 8830/2010, South Africa: High Court, 4 September 2014, para. 6, http://www.refworld.org/docid/540874f94.html, according to the Court determining whether a person qualifies for refugee status under the extended definition requires an assessment of the existence of objectively ascertainable circumstances in the person's country of origin corresponding with any of the circumstances stipulated in the definition.

[138] 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, para. 37, http://www.refworld.org/docid/3d36f1c64.html. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, para. 66, http://www.refworld.org/docid/50348afc2.html.

[139] UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 74, http://www.refworld.org/docid/4b2f4f6d2.html.

[140] 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, para. 23, http://www.refworld.org/docid/50d32e5e2.html.

102. While in general the burden of proof lies with the person submitting the claim, the obligation to gather and analyse all relevant facts and supporting evidence is shared between the applicant and the decision-maker.[141] This shared responsibility is particular important when the country of origin is experiencing a situation armed violence and conflict as this makes obtaining information and documentation in general – as well as in relation to the individual – more difficult.[142] Persons fleeing such situations are likely to encounter significant problems in giving a detailed account of events indicating a need for international protection or obtaining evidence to substantiate the claim. It is therefore also important that applicants are given the benefit of the doubt, notably in the absence of supporting evidence.[143]

[141] UNHCR Handbook, para. 196.
[142] *Refugee Appeal No. 71462/99, Tamil and a Citizen of the Democratic Socialist Republic of Sri Lanka v. Refugee Status Branch of the New Zealand Immigration Service*, 71462/99, New Zealand: Refugee Status Appeals Authority, 27 September 1999, para. 51, http://www.refworld.org/docid/3ae6b73cc.html.
[143] UNHCR Handbook, para. 203.