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Extended Definitions of a Refugee and Complementary Forms of Protection: An Obsolete Polarisation between Two Different Approaches to International Protection?

Mathilde Crepin

The 1951 Convention Relating to the Status of Refugees (the 1951 Convention) is the main legal instrument defining who is a refugee at the international level. According to this Convention, refugees are individuals who are outside their country of origin and who cannot return there because of "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[1] When the Convention was drafted after the Second World War, the plenipotentiaries restricted its scope to cover only individuals who had fled events occurring in "Europe or elsewhere before 1951"[2]. In order to protect vulnerable people on a larger scale, the state parties signed a Protocol[3] in 1967, lifting the geographical and temporal limitations and making the 1951 Convention universally applicable. However, in spite of its universal character, the international refugee law regime was imbued with the spirit of the post-War world. The Convention relied on the notion of persecution to determine refugee status and, in that period, persecution was understood as a form of violence perpetrated by state-agents against their population.[4] This approach corresponded to the pattern of repression prevalent at that time and was coherent *with the aspirations and needs of both the receiving countries and the protection seekers in Europe.* Andrew Schacknove observed that the 1951 Convention was designed for an era of people traumatised by the abuses of repressive regimes and civilians fleeing persecutory and discriminatory policies.[5]

However, displacement patterns in the global arena started to change in the post-War period.

[1] The Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
[2] Article 1B (a) and (b) of the 1951 Convention
[3] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (the 1967 Protocol).
[4] Jane McAdam, "Rethinking the Origins of "Persecution" in Refugee Law" [2014] 25 International Journal of Refugee Law 667.
[5] Andrew E. Schacknove, "Who is a refugee?" [1985] 95 Ethics 274, 276.

In South East Asia, Africa and in Latin America, decolonisation conflicts and internal armed struggles prompted a large number of individuals to flee situations of generalised violence and dire life conditions rather than individual persecution[6] and therefore those people fell outside the ambit of the 1951 Convention. In the light of this situation, Eduardo Arboleda argued in the early 1990s, that the international definition of a refugee had been "rendered obsolete by evolving realities in the third world"[7] and was "inadequate to deal with the problems posed by the millions of externally displaced persons" in Africa and Latin America.[8] In order to adapt to the new displacement patterns, new refugee definitions were developed in these regions. A broader refugee definition was first elaborated in Africa through the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) and then, in 1984, in the Cartagena Declaration on Refugees ("Cartagena Declaration"). Both instruments waived the notion of persecution and defined refugees as people escaping generalised forms of violence. According to Eduardo Arboleda, those regional developments were dictated by pragmatism to cover individuals who did not meet the requirements of the 1951 definition, but who were, nonetheless, in need of international assistance.[9]

In the late 1990s, José Fischel De Andrade argued that these regional developments better took into account "specific particularities, mutuality of interest, cultural compatibility and social traditions"[10] of local populations. Indeed, for a long period, displacement patterns were confined within regions and refugees were mostly seeking shelter in the Horn of Africa, Southern Africa, Indochina, South Asia and Central Asia.[11] However, in the past decades, Cedric Audebert and Mohamed Kamel Dorai observed that populations started being displaced on a larger scale due to the "liberalisation of the economies at the global level, increasing interdependence among nations, new infrastructures of transportation, increasing income inequalities and demographic disparities"[12]. The UNHCR also pointed at the existence of larger displacements patterns and considered that globalisation created the "cultural and

[6] UNHCR, "The State of The World's Refugees 1997: A Humanitarian Agenda" (Geneva, 1997), Ch.1.
[7] Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" [1991] 3 International Journal of Refugee Law 185, 188.
[8] Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" [1991] 3 International Journal of Refugee Law 185, 186.
[9] *Ibid*.
[10] *Ibid*.
[11] Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (OUP, 2011) 13-14.
[12] Cedric Audebert and Mohamed Kamel Dorai (eds), *Migration in a globalised world, new research issues and prospects*, (Amsterdam University Press, 2010) 7.

technical conditions" for the mobility of refugees.[13] As a result, asylum applications from individuals fleeing war torn Africa or Latin America considerably increased in industrialised countries.[14] In order to adapt to this evolution and to protect vulnerable people who did not meet the criteria of the 1951 Convention, industrialised countries elaborated new forms of protection. However, in comparison to the extended definition of a refugee contained in the OAU Convention and Cartagena Declaration, these complementary forms of protection tend to be more restrictively defined. The UNHCR recently voiced concern stating that: "the institution of asylum is threatened today by divergent approaches, and signs that two parallel systems may be operating: an asylum regime in the global North, and a refugee regime in the global South."[15] These discrepancies can partly explain the unequal repartition of refugees among states. The ten major refugee-hosting countries[16] all belong to the "global South" and four of them apply the extended refugee definition of the OAU Convention[17].

Additionally, the industrialised countries that have implemented complementary systems of protection have done so in an uncoordinated manner, adopting inconsistent interpretations of who can be a beneficiary of complementary protection. As a result, individuals hailing from the same country, who might be in need of the same protection needs, can be granted different legal statuses depending on the country where they seek asylum. For instance, this is currently the case of Syrian asylum seekers in some of the European countries. Germany, Poland, Denmark, Bulgaria commonly grant them refugee status, whereas Sweden, Spain, the Netherlands, Malta and Cyprus consider that they fall under the ambit of complementary protection.[18] This is particularly problematic because complementary forms of protection tend to afford less rights to their beneficiaries than the refugee status.

Not only are there variations between two different systems of protections, namely between countries applying complementary protections and countries applying the extended definitions of a refugee contained in the OAU Convention or Cartagena Declaration, but there are also major disparities amongst countries applying complementary forms of protection.

[13] UNHCR, "The State of The World's Refugees 2006, Human Displacement in the New Millennium" (Geneva, 2006) 12.
[14] Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (OUP, 2011) 9. UNHCR, "The State of The World's Refugees 2006, Human Displacement in the New Millennium" (Geneva, 2006) 12.
[15] UNHCR, "The State of the World's Refugees, In Search of Solidarity" (Geneva 2012) 9.
[16] UNHCR, Statistical Yearbook, (Geneva 2014), 32.
[17] Chad, Ethiopia, Kenya, Uganda. http://www.achpr.org/instruments/refugee-convention/ratification/
[18] EASO, Annual Report on the Situation of Asylum in the European Union 2014, July 2015, <https://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-2014.pdf> at 44.

This article will consider whether the current fragmentation of the international and regional refugee law regimes is still suitable for the needs of refugees in the 21st Century, and what could be the possible developments to promote a more harmonised and fairer protection for people in need of international assistance. Part I will explore how regional developments in Africa and Latin America led to the expanded definitions of a refugee, whereas part II will analyse how countries applying the traditional definition of the 1951 Convention expanded their asylum regimes through complementary forms of protection. Part III will highlight the discrepancies between the two different systems and part IV will propose the development of a soft law framework in order to encourage a better harmonisation of asylum systems at the international level.

I) Regionalisation of refugee law through the extended definitions of a refugee

Regional developments of refugee law firstly emerged in Africa and later in Latin America as an attempt to provide a suitable response to the needs and priorities of refugees in those regions.

The African approach

After the wave of decolonisation in the 1960s, internal conflicts and local strife in many fledging African States prompted mass exodus of people outside their place of origin. In those contexts, people were generally escaping indiscriminate types of harm whereby they were not personally targeted. Therefore, they were unable to demonstrate being at risk of facing individual persecution as required by the 1951 Convention. For that reason, some states in the region elaborated an extended definition of a refugee, departing from the traditional approach of the 1951 Convention. The OAU Convention[19] stipulated that, in addition to the definition of the 1951 Convention,

> the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality,

[19] 45 African States have signed and ratified the Convention, cf : http://www.achpr.org/instruments/refugee-convention/ratification/

> is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The above definition does not rely on the notion of individual persecution as a pivotal concept for the determination of refugee status, but rather refers to external situations of violence. Andrew Schacknove observed that the 1951 and the OAU Conventions adopted different approaches as they were both the products of "different historical contexts"[20], each instrument being adapted to specific realities of their epoch. He noted that "the normal bond between the citizen and the state can be severed in diverse ways", and that persecution was "just one manifestation of the absence of physical security"[21]. According to him, the 1951 Convention's definition was too restrictive in the African context. Supporting this approach, Eduardo Arboleda also considered that by relying on the "objective conditions in the country of origin"[22], the OAU Convention was more adapted to the local circumstances in the region. Contrary to those views, Alice Edwards argued that the 1951 conception of a refugee was not entirely inappropriate in the African context. She acknowledged that generalised forms of violence, mentioned in the OAU Convention, constitute relevant grounds for a refugee status, but she also argued that the 1951 definition can encompass a wide range of cases of African asylum seekers[23] through a liberal interpretation of its provisions. According to her, the narrow application of the 1951 Convention is simply due to a narrow interpretation of its terms in most cases. Similarly, she contended that the reason why the OAU Convention can encompass a larger number of vulnerable individuals, is because it is broadly interpreted and applied. [24]

The 1951 definition was indeed drafted in broad terms thus conferring large possibilities of interpretation. However, because of the notion of persecution and the five Convention grounds, the 1951 Convention essentially focuses on the individual circumstances of the asylum seekers. In referring to objective situations of violence in the countries of origin, the OAU Convention adopts a different conception of asylum, whereby the risk faced by a refugee in his/her country is assessed based on external factors. In the African context, where

[20] Andrew E. Schacknove, "Who is a refugee?" [1985] 95 Ethics 274, 276
[21] Andrew E. Schacknove, "Who is a refugee?" [1985] 95 Ethics 274, 279.
[22] Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" [1991] 3 International Journal of Refugee Law 185, 189.
[23] Alice Edwards, "Refugee Status Determination in Africa" [2006] 14 African Journal of International and Comparative Law 204, 232.
[24] i*bid.*

state institutions suffered from endemic corruption and local violence in the post-decolonisation period, people were often fleeing the indiscriminate effects of wars or the general insecurity caused by the breakdown of state structures. The individualistic narrative of the 1951 Convention was not always adequate in those situations, even with a broad interpretation of its provisions. The OAU Convention inaugurated a new conception of a refugee that was more suitable to the regional particularities. Not only did the OAU Convention reflect "markedly different historical context(s)", as expressed by Andrew Schacknove, but it also reflected a different geopolitical context, as its aim was to adapt the local asylum systems to specific needs of refugees in the region.

The Latin American approach

Commentators[25] have noted that the nature of refugee flows in Latin America during the Cold War was similar to the one in Africa[26]. Latin American countries adopted in the 80s an analogous approach to the OAU in order to provide for a wider protection of refugees. They elaborated a non-binding instrument called the Cartagena Declaration on Refugees ("Cartagena Declaration")[27] that was later transposed into the national laws of seven countries in the region.[28] José Fischel De Andrade observed that the 1984 Declaration was initially tailored to respond to the specific "problems of the late 1970s and early 1980s in Central America"[29] and later influenced other countries in Latin America. The Declaration acknowledged the peculiarity of displacements in Central America and provided that "in view of the experience gained from the massive flows of refugees" in the region, it was necessary to enlarge the concept of a refugee.[30] The Cartagena Declaration explicitly referred to the OAU Convention as a precedent in this matter [31] and stated that, in addition to the provisions of the 1951 Convention, the definition of a refugee: "includes (…) persons who have fled their country because their lives, safety or freedom have been threatened by generalised

[25] Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" [1991] 3 International Journal of Refugee Law 185 and José H. Fischel De Andrade, "Regional Policy Approaches and Harmonisation: A Latin American Perspective" [1998] 10 International Journal of Refugee Law 389.
[26] José H. Fischel De Andrade, "Regional Policy Approaches and Harmonisation: A Latin American Perspective" 10 International Journal of Refugee Law 389, 390.
[27] Cartagena Declaration on Refugees, (adopted on 22 November 1984) OAS Doc. OEA/Ser.L/V/II.66/doc.10, 190 (Cartagena Declaration).
[28] The seven countries that have directly transposed the Declaration into their national legislation are: Argentina, Bolivia, Chile, El Salvador, Guatemala, Mexico and Nicaragua, UNHCR, The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America, [2013], PPLA/2013/03, 16.
[29] José H. Fischel De Andrade, "Regional Policy Approaches and Harmonisation: A Latin American Perspective" [1998] 10 International Journal of Refugee Law 389, 394.
[30] Cartagena Declaration, conclusion n° 3.
[31] i*bid.*

violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*"*.[32] This definition added new elements to the causes of flight enumerated in the OAU Convention, namely "generalised violence", "internal aggression", and "massive violation of human rights", thus extending even more the scope of protection for refugees. Although the definitions of a refugee set out in the OAU Convention and the Cartagena Declaration are not exactly similar, they clearly adopt the same paradigm. They both refer to the traditional definition of the 1951 Convention and add new provisions, extending the definition of a refugee to diverse circumstances of generalised violence. Commentators have noted that the 1984 Declaration "rules out the concept of individual persecution"[33], thus providing for a broader conception of a refugee more adapted to local displacement patterns. Eduardo Arboleda considered that the 1951 Convention was "too rigid to define adequately the externally displaced type of refugee" in Latin America, and, therefore, was unsuitable for this part of the world. Conversely, José Fischel De Andrade considered that the 1951 Convention had a sufficiently flexible character to adapt to regional particularities and, for that reason, it was still relevant in Latin American. Nonetheless, he argued that argued that local systems of asylum should be further developed in order to provide for a comprehensive response to the needs of refugees. According to him, the objective of regional approaches was to adapt "international refugee law to existing regional refugee problems".[34]

Although the definitions of a refugee set out in the OAU Convention and the Cartagena Declaration are not exactly similar, they clearly adopt the same paradigm. They both refer to the traditional definition of the 1951 Convention and add new provisions, extending the definition of a refugee to diverse circumstances of generalised violence. Although it might be true that the 1951 Convention still retains cogency in local contexts[35], its strict application has proved inadequate to respond to the needs of refugees fleeing indiscriminate forms of harm. As a consequence, countries adopting a strict interpretation of the Convention deny refugee status to individuals who have been displaced because of armed conflicts and other forms of generalised violence. Most recently, this has been the case for Syrian nationals who have been refused refugee status in a number of European countries such as Sweden, Spain, the

[32] i*bid.*
[33] José H. Fischel De Andrade, "Regional Policy Approaches and Harmonisation: a Latin American Perspective" 10 International Journal of Refugee Law 389, 402.
[34] i*bid* 391.
[35] See Alice Edwards, " Refugee Status Determination in Africa" 14 African Journal of International and Comparative Law [2006] 204, 232.

Netherlands, Malta and Cyprus or Switzerland, in spite of the armed conflict ongoing since 2011.[36]

II) Complementary forms of protection in countries applying the "traditional" definition of a refugee

After the emergence of new regional approaches, the United Nations High Commissioner for Refugees (UNHCR) acknowledged the particularity of local situations and, although the agency re-affirmed that the 1951 definition constitutes the foundation of international refugee law, it also considered that other forms of protection might be needed to respond to the needs and priorities of refugees[37]. In order to remedy to the lack of international legislation covering situations of generalised violence, the UNHCR issued a number of recommendations and guidance to encourage States to respect at a minimum the principle of non-refoulement[38] even for individuals who are not eligible to refugee status under the 1951 definition, thus recognising their need of international protection and affirming the necessity to provide some form of assistance to those people, even if not under refugee law.

In the 1990s, industrialised countries progressively started to receive asylum seekers who had escaped generalised violence in the context of post-Cold War conflicts. Indeed, the end of the Cold War triggered the outbreak of a number of internal conflicts that affected civilians in an indiscriminate manner and prompted them to seek asylum in Western countries. Eduardo Arboleda and Ian Hoy observed that, in this period, "there has been an explosive growth in international migration and in the number of people seeking asylum in the developed world" [39] and that that Western jurisdictions were faced with "a greater number and diversity of third

[36] EASO, Annual Report on the Situation of Asylum in the European Union 2014, July 2015, <https://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-2014.pdf> statistics at 44-45.
[37] UNHCR ExCom Conclusion No. 87 (L) – 1999 (f) Reaffirms "that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime; recognises, however, that there may be a need to develop complementary forms of protection, and in this context, encourages UNHCR to engage in consultations with States and relevant actors to examine all aspects of this issue"; Excom Conclusion No. 103 (LVI) – 2005 – Provision on International Protection Including Through Complementary Forms of Protection (…) the Excom recognises: "Recognising that, in different contexts, there may be a need for international protection in cases not addressed by the 1951 Convention and its 1967 Protocol"
[38] UNHCR Excom Conclusions No 87 (L) "General Conclusion on International Protection" (1999); UNHCR Excom Conclusions No 89 (LI) "General Conclusion on International Protection (from 2000 UNHCR Excom meeting) "(2000); UNHCR Excom Conclusions No. 103 (LVI) "Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection" (2005).
[39] Eduardo Arboleda and Ian Hoy, "The Convention Refugee Definition in the West: Disharmony of Interpretation and Application" [1993] 5 International Journal of Refugee Law 66, 67.

world asylum seekers"[40] who did not always fall under the ambit of the 1951 Convention. In spite of this evolution, industrialised countries continued to apply the traditional definition of a refugee and maintained persecution as a pivotal concept in the determination of refugee status, therefore denying refugee status to those people. In order to protect vulnerable individuals not covered by the 1951 definition, Western countries implemented diverse forms of protection, referred to as complementary forms of protection[41]. Eduardo Arboleda and Ian Hoy considered that Western jurisdictions actually implemented ad hoc measures in order "to fill the void"[42] left by the 1951 Convention. Since Arboleda and Hoy made this observation in the 1990s, complementary forms of protection have continued to develop in most industrialised states, but no clear and coherent approach has yet been elaborated at a transnational level in order to coordinate such developments, giving rise to a myriad of different statuses being possibly granted to protection seekers.

In countries such as the United States of America (US), Canada, Australia and New Zealand, the protection of individuals at risk of facing serious harm in their place of origin, ~~and~~ who are not covered by the 1951 definition, is ensured through the application of various types of protection. For instance, the US grants a temporary protected status to people who face a threat to their safety in their country, either because of an armed conflict or ~~because of~~ environmental disasters, or if there "exist extraordinary and temporary conditions in the foreign state" that could justify such protection.[43] In Canada, the authorities provide a permit to stay to "persons in need of protection" only if they are at risk of torture or facing cruel and inhuman treatment upon return.[44] In Australia, a protection visa can be granted to individuals likely to face "significant harm" in their country, "significant harm" being defined as arbitrary deprivation of life, death penalty, torture, cruel, inhuman or degrading treatment or punishment.[45] Finally, in New Zealand a complementary form of protection is given to "protected persons" if there are substantial grounds for believing they would be in danger of being subject to torture[46], ~~or~~ arbitrary deprivation of life or cruel treatment [47] in their place of

[40] i*bid*.
[41] Jane McAdam, *Complementary Protection in International Refugee Law* (1st ed. Oxford University Press, 2007) 1
[42] Eduardo Arboleda and Ian Hoy, "The Convention Refugee Definition in the West: Disharmony of Interpretation and Application" [1993] 5 International Journal of Refugee Law 66, 67.
[43] 8 The U.S. Code of Law para 1254a L.114-19 (1)B.
[44] The Immigration and Refugee Protection Act 2001(c.27) 97.1 (A) (B).
[45] The Migration Act 1958 (No 62) 36 (2A).
[46] The Immigration Act 2009, S 130.
[47] i*bid*, S 131.

origin. It can be seen from the above that Canada, Australia and New Zealand have actually applied the provisions of the Convention against Torture (CAT)[48] as an alternative form of protection for individuals who do not meet the refugee criteria under the 1951 Convention. According to Brian Gorlick, the development of such legislation reflected the growing use of international human rights in national systems as a legal tool to protect asylum seekers who are denied refugee status.[49] Complementary forms of protection are therefore defined through different formulations depending on the domestic jurisdictions. In her extensive study on the notion of complementary protection, Jane McAdam considered that "the concept of complementary protection is plagued by imprecision"[50]. In her book "Complementary Protection in International Refugee Law", Jane McAdams pointed to the fact that no universal system of complementary protection exists to guide countries towards a more coherent implementation of protection mechanisms.[51] Indeed, the lack of international guidance and the absence of expressed political will to harmonise standards on complementary protection resulted in national practices of Western countries being highly inconsistent in granting the status and rights to protection seekers who do not meet the criteria of the 1951 Convention. In light of this situation, McAdam justly warned against "a greater splintering of the concept of international protection as further differentiated statuses and unprotected categories develop."[52]

In order to avoid such splintering of the concept of protection at the European level, the European Union attempted to harmonise the practice of State Members through the Qualification Directive in 2004 (recast in 2011).[53] This directive formally introduced the notion of "subsidiary protection" into European Union law. The Directive acknowledged the importance of setting out minimum standards for the protection of individuals not eligible for

[48] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted 10 Dec 1984, entered into force 26 June 1987, 1465 UNTS 85. Articles 1 and 16.
[49] Brian Gorlick, "The convention and the committee against torture: a complementary protection regime for refugees" 3 [1999] 479.
[50] Jane McAdam, *Complementary Protection in International Refugee Law* (1st ed. Oxford University Press, 2007) 1.
[51] *ibid*, 40.
[52] Jane McAdam, "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime" [2005] 17 International Journal of Refugee Law 461, 493
[53] European Parliament and Council Directive 2011/95/EU 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 [2011] OJ L 337/248 (Revised Qualification Directive).

refugee status in Member States, but who are, nonetheless, at risk of facing "serious harm"[54] upon return to their country. Upon examination of the preparatory materials and draft records of the Directive, McAdam observed that the Directive drew upon existing state practices in the Union and aimed at harmonising the various approaches for more legal certainty.[55] However, she considered that the Directive adopted a narrow interpretation of what was already done in national legislations of Member States and therefore only affords a minimal protection to asylum seekers.[56] According to article 15 of the Directive, protection seekers can be granted subsidiary protection if they are at risk of facing serious harm upon return to their country. The notion of "serious harm" is limited to only three instances of violence, namely (a) death penalty, (b) torture or inhuman or degrading treatment or punishment or (c) serious and individual threat to someone's life due to indiscriminate violence in situations of armed conflict. Helene Lambert noted that article 15c is more restrictive than the practice of states that was enshrined in the Council of Europe's Recommendation (2001) 18 of the Committee of Ministers on Subsidiary Protection. The recommendation listed "armed conflicts as just one example of indiscriminate violence posing a threat to 'life, security or liberty" [57], while the Directive refers to armed conflicts as a necessary condition for subsidiary protection under article 15c. Additionally, in article 15c, the use of contradictory concepts such as individual threats and indiscriminate violence makes the assessment of the risk of harm particularly uncertain. In its first preliminary ruling on the definition of subsidiary protection in 2009, the European Court of Justice (ECJ) was asked to provide advice on how to reconcile this apparent contradiction.[58] However, the court provided a convoluted guidance, stating that the more an asylum seeker is personally affected by a situation of violence in his/her country, the lower the level of indiscriminate violence required in order to qualify for subsidiary protection.[59] The ECJ judges did not specify how to assess the threshold of an individual threat versus the threshold of indiscriminate violence, thus reinforcing the confusion as to the practical application of those two contradictory concepts. As Hélène Lambert has noted the

[54] Definition of serious harm defined in art 15 "Serious harm consists of: (a) 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".

[55] Jane McAdam, "The European Union Qualification Directive : The Creation of a Subsidiary Protection Regime" [2005] 17 International Journal of Refugee Law 461, 465.

[56] *ibid.*

[57] Helene Lambert, "The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence" [2013] 25 International Journal of Refugee Law 207, 214.

[58] Helene Lambert, "The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence" [2013] 25 International Journal of Refugee Law 207, 212.

[59] Case C-465/07 *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* **[**2009**]** ECR I-921, para 39.

court actually failed to clarify the threshold of violence required for an individual to be granted subsidiary protection.[60]

The guidance provided by the court has indeed proved to be of minimal assistance in harmonising the different approaches in Europe, in particular in the context of the recent refugee influx to the continent, and European countries continued to apply complementary forms of protection in a highly inconsistent manner. The European Asylum Support Office reported that in 2014, the interpretation of the notion of subsidiary protection has been uneven amongst Member States, citing the caseload of Afghan applicants. Whereas some countries grant subsidiary protection to Afghan asylum seekers based on a situation of armed conflict and indiscriminate violence in the country, others require an individual form of harm to be first established[61]. The determination of the legal status is important because it has a direct impact on the benefits enjoyed by holders of international protection, as refugees tend to enjoy more rights than beneficiaries of subsidiary protection, depending on the country of asylum. For instance in Europe, under the Qualification Directive, refugees are entitled to longer residence permits and more extended rights in terms of social welfare[62]. As recently expressed by Human Rights Watch, "the reality is that asylum seekers face a protection lottery in the EU due to wide disparities in standards and conditions".[63] In general, different forms of complementary protection have flourished in national jurisdictions without a clear and coordinated understanding of those in need of such assistance. The assessment of the vulnerability of the protection seekers remains therefore uncertain and depends essentially on the host country, leading to divergent practices in the European Union but also at the global level.

III) Unequal protection scope between the extended definitions of a refugee and complementary forms of protection

[60] Helene Lambert, "The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence" [2013] 25 International Journal of Refugee Law 207, 214.
[61] EASO, Annual Report on the Situation of Asylum in the European Union 2014, July 2015, <https://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-2014.pdf> 47.
[62] Revised Qualification Directive, art 24 and art 29(2).
[63] Human Rights Watch, *EU: Leaders Duck Responsibilities on Refugees*, September 2015, <https://www.hrw.org/news/2015/09/24/eu-leaders-duck-responsibilities-refugees>.

Complementary forms of protection are inconsistently defined and implemented at the international level. Additionally, in most of the situations they encompass a restrictive range of cases in comparison to the extended definitions of refugees in Africa and Latin America.

Individuals fleeing armed conflicts

The regional approaches using the extended definitions of a refugee cover situations of armed conflicts giving rise to forced displacements. The OAU Convention mentions situations of "external aggression, occupation, foreign domination or events seriously disturbing public order"[64], while the Cartagena Declaration refers to circumstances of "generalised violence, foreign aggression, internal conflicts, massive violation of human rights".[65] In ethnic or religious conflicts, the 1951 Convention can easily apply when the violence is directed at a specific segment of the population due to the discriminate nature of the harm.[66] However, when individuals are fleeing the indirect consequences of the war, such as the generally unsafe conditions cause by the armed conflict, they are not able to show that they will be "at risk of differential impact"[67] as analysed by Hugo Storey. The 1951 Convention does not cover these kinds of cases. The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status makes it clear that the purpose of the 1951 Convention was not to protect "persons compelled to leave their country of origin as a result of international or national armed conflicts". Whilst victims of the war who suffer from the generally unstable security situation are usually denied refugee status in industrialised countries, they can be granted complementary protection. However, the approaches of states applying such forms of protection are quite inconsistent. In some jurisdictions, this protection can be easily granted when the existence of an armed conflict in the country of origin is identified. This is the case in Europe and in the US, as the European Qualification Directive[68] and the U.S. Code of Law[69] make direct reference to armed conflicts as a ground justifying the benefit of complementary protection. However, Canadian[70], New Zealand[71] and

[64] OAU Convention, art 1(2).
[65] Cartagena Declaration, pt III (3).
[66] UNHCR "Handbook and Guidelines on Procedures and Criteria for Determinin Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees" (reissued Geneva 2011), para 165.
[67] Hugo Storey, "Armed Conflict in Asylum Law: The "War-Flaw"" [2012] 31 Refugee Survey Quarterly 1, 6.
[68] Revised Qualification Directive, **art 15 (c).**
[69] 8 The U.S. Code of Law para 1254a L.114-19 (1)B 1(A).
[70] The Immigration and Refugee Protection Act 2001(c.27) 97.1 (A) (B).
[71] The Immigration Act 2009, s 130 and 131.

Australian[72] legislations do not specifically mention armed conflicts as a basis for protection but instead refer to the dispositions of the CAT, therefore requiring a different test to assess the likelihood of harm. The approach regarding civilians fleeing armed conflicts is therefore variable.

Generalised violence and other human rights violations

The qualification of an "armed conflict", whether internal or international, requires a certain level of violence, usually assessed under international humanitarian law (IHL). As Jonathan Crowe and Kylie Weston-Scheuber explained, the notion of armed conflict plays a "critical role" in IHL. They recall the definition of an armed conflict from the International Criminal Tribunal for the Former Yugoslavia (ICTY) judgment in Prosecutor v Tadić[73], stating that: "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state".[74] The threshold of violence required is therefore quite high, as it has to be protracted and to involve organised armed groups confronting each other. However, in some cases, people escape other types of situations where the intensity of violence does not reach the level of an "armed conflict" but is, nonetheless, the cause of great hardship. Individuals who flee different forms of predicaments resulting from "events seriously disturbing public order" [75], "generalised violence" or "massive violations of human rights"[76] are granted refugee status in countries applying the extended refugee definitions of the OAU Convention and the Cartagena Declaration, but in jurisdictions resorting to the complementary protection systems, the authorities have a more restrictive approach. The expressions "massive violations of human rights" in the Cartagena Declaration or "events seriously disturbing public order" in the OAU Convention are termed quite broadly and therefore open to more flexible interpretation than the formulations used for most of the complementary protection schemes previously mentioned. Although the US temporary protected status is primarily assessed on external factors[77] in the country of origin of asylum

[72] The Migration Act 1958 (No 62) 36 (2A). Jane McAdam, *Complementary Protection in International Refugee Law* (1st ed. Oxford University Press), 2007, 252.
[73]Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law*, (1st ed. Edward Elgar), 2013, 10.
[74] Prosecutor v Tadić, International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Decision on Jurisdiction, 2 October 1995 (70).
[75] OAU convention, art 1(2) 2.
[76] Cartagena Declaration, pt III (3).
[77] 8 The U.S. Code of Law para 1254a L.114-19 (1)B.

seekers, other Western countries used expressions such as "death penalty"[78], "torture"[79], "arbitrary deprivation of life"[80] or "inhuman or degrading treatment"[81] to define the criteria of complementary protection. These formulations are more specific and imply a certain analysis of the personal circumstances of the asylum seekers. Indeed, those terms refer to forms of harm that are directly inflicted upon the victims rather than assessing the risk of objective elements of generalised violence. Consequently, the burden of proof appears higher than what is required under the OAU Convention and Cartagena Declaration, as the protection seekers still have to demonstrate facing an individualised form of risk.

In countries applying the extended definition of a refugee, the objective situation in the place of origin can suffice to warrant refugee status. On the other hand, the industrialised states remain attached to the traditional refugee definition, leaving people fleeing indiscriminate forms of violence in need to demonstrate some level of personalised risk. This restricts the range of cases of successful application, at the same time raising uncertainty regarding the availability of protection, highly dependent on the country where individuals seek asylum from. In a period when international mobility is intensifying, discrepancies in the asylum regimes may have a destabilising effect on refugee movements, which bears the risk of directing refugee flows towards the more protective countries. As Jane McAdam recently observed this situation can create "incentives for asylum seekers to forum-shop"[82].

IV) Towards the elaboration of a soft law framework for the application of complementary forms of protection.

Currently, individuals who hail from the same country and who have the same protection needs are not equally protected at the global level, as they can be granted a different legal

[78] Australia: The Migration Act 1958 (No 62) 36 (2A). European Union : Article 15a of the European Parliament and Council Directive 2011/95/EU of 13 December 2011.
[79] Canada: The Immigration and Refugee Protection Act 2001(c.27) 97.1 (A) (B). Australia: The Migration Act 1958 (No 62) 36 (2A). New Zealand: The Immigration Act 2009, S 130. European Union : Article 15b of the European Parliament and Council Directive 2011/95/EU of 13 December 2011.
[80] Australia: The Migration Act 1958 (No 62) 36 (2A). New Zealand: The Immigration Act 2009, S 130.
[81] Canada: The Immigration and Refugee Protection Act 2001(c.27) 97.1 (A) (B). Australia: The Migration Act 1958 (No 62) 36 (2A). New Zealand: The Immigration Act 2009, S 130. European Union : Article 15b of the European Parliament and Council Directive 2011/95/EU of 13 December 2011.
[82] Jane McAdam, *Complementary Protection in International Refugee Law* (1st ed. Oxford University Press), 2007, 252.

status depending on the country where they seek asylum from.[83] Therefore, a more harmonised system of protection for people in need of international assistance appears to be desirable. Certainly, it would result in greater coherence across the regimes, valuable legal certainty for protection seekers, as well as fairer repartition of asylum at the international level.

However, enlarging the protection scope of the 1951 Convention in order to make it more adapted to the needs and priorities of refugees in the 21st Century appears to be quite optimistic. Indeed, as argued by Laura Barnet, amending the 1951 Convention would be met with serious political obstacles. According to her, "states will shut their doors faster at the threat of massive population influx"[84]. Similarly, Jeff Crisp rejected the idea of expanding the 1951 Convention based on the OAU model considering that public opinion, and therefore states, were not ready for it.[85] Indeed, the procedure for amending exiting treaties is quite burdensome and likely to encounter political opposition. In these conditions, complementary forms of protection appear to be a useful solution to provide protection to individuals not falling into the ambit of the 1951 Convention but, as previously stated, national systems of complementary protection are extremely diverse globally. The conditions to be eligible for these forms of protection can be more or less broad and the rights afforded to the beneficiaries of the complementary protection are unequal depending on the country of reception and can be very dissimilar to the ones enjoyed by refugees.

Drawing upon the work of Alexander Betts, a soft law framework **on complementary protection** could be developed in order to promote a more unified protection regime. Alexander Betts advocated for the elaboration of guiding principles on the protection of vulnerable irregular migrants.[86] According to Betts, there are two categories of vulnerable migrants who travel illegally: those who have " (i) protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution, and (ii) protection needs arising as a result of movement."[87] Betts first analysed the development of a soft law

[83] Jeff Crisp, "Beyond the Nexus: UNHCR's Evolving Perspective on Refugee Protection and International Migration" Research paper No55, UNHCR, 2008, 7.
[84] Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" [2002] 14 International Journal of Refugee Law 238, 258.
[85] Quoted in Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" [2002] 14 International Journal of Refugee Law 238, 258.
[86] Alexander Betts, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants" [2010] 22 International Journal of Refugee Law 209.
[87] *ibid*, 211.

framework for the protection of Internally Displaced People (IDPs) at a transnational level and considered that a comparable process could be initiated for the protection of irregular migrants. Similar to the irregular migrants, beneficiaries of complementary protection do not benefit from an international coherent system of protection. Therefore, it could be argued that a soft law framework could be developed in order to harmonise different approaches. It is indeed necessary to elaborate detailed and comprehensive guidelines on complementary protection in order to avoid inconsistent policies. This could be done through a collaborative process of consultation between relevant actors, such as international and non-governmental organisations as well as other transnational stakeholders and governmental representatives. Given the long operational experience of UNHCR in terms of protection, the UN agency for refugees appears to be in a good position to facilitate such process. While a soft law framework would not be binding on states, it would, nonetheless, constitute a relevant incentive for a more harmonised approach. The aim would be to provide, on the one hand, an encouragement to develop national legislation coherent with such guidelines and, on the other hand, to constitute a framework of interpretation based on common standards. Additionally, the guidelines could set out a common body of rights and obligations that would be afforded to beneficiaries of complementary protection. For a coherent system of protection, international guidelines on complementary protection need to draw upon the criteria set out in the extended definitions of a refugee from the OAU Convention and the Cartagena Declaration in order to align with the extended definitions developed in those regions. Indeed, the criteria used in the extended definitions of a refugee in those regions should be relied upon in countries applying the traditional definition of a refugee for more coherence of international protection. In its conclusion No. 103, the Executive Comity (Excom) of the UNHCR, recognised "the value of regional instruments, as and where applicable, including notably the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as the 1984 Cartagena Declaration on Refugees" and expressed the necessity of "establishing general principles upon which complementary forms of protection for those in need of international protection may be based".[88] The elaboration of a soft law framework for establishing common principles on complementary forms of protection, consistent with the extended definitions of a refugee, could constitute a relevant response to the legal lacuna[89] left by the 1951 Convention. While it would not impose legal obligations on states, it would

[88] UNHCR ExCom Conclusion No 103 (LVI) "The Provision of International Protection including through Complementary Forms of Protection" (2005).

[89] Eduardo Arboleda and Ian Hoy, "The Convention Refugee Definition in the West: Disharmony of Interpretation and Application" [1993] 5 International Journal of Refugee Law 66, 67.

provide a first step towards a more harmonised asylum regime for protection seekers globally through a pragmatic approach. Harmonising the definitions of complementary protection, based on the extended definitions of a refugee under the OAU Convention and the Cartagena Declaration would provide more legal certainty for asylum seekers. Additionally, the differentiation between two systems of protection, namely refugee protection and complementary protection, allows states to adapt the asylum procedures to the different types of caseload. For instance, complementary forms of protection can be processed under group determination procedures, while refugee status could still involve an individual examination of cases.

Conclusion

From the outset, it has been recognised that the 1951 Convention would not cover all situations where individuals would need protection outside their state. The *travaux preparatoires* of the Convention revealed that state parties did not want to sign a "blank check" for the protection of refugees[90]. However, the conference of plenipotentiaries recommended in the Final Act[91] that states should apply the Convention beyond its strict contractual scope to encompass more individuals in need of international assistance. States parties were then free to shape their particular refugee policies according to their own interests, provided that certain minimum standards were guaranteed. Since that period, the international system of protection for refugees has evolved in different directions. On the one hand, some countries strictly apply the definition of a refugee as set out in the 1951 Convention. Those countries are primarily industrialised countries with advanced refugee status determination procedures. In their national jurisdictions, the individualistic approach of asylum remains pivotal for the determination of refugee status. On the other hand, countries from the Southern hemisphere have adopted extended definitions of a refugee, covering a wider range of people fleeing indiscriminate violence and therefore reflecting modern situations. In order to adapt to this evolution, industrialised countries have elaborated complementary forms of protection, but have done so in an uncoordinated and inconsistent manner. In a globalised and more integrated world where migration movements are not only circumscribed to regional groups, but also where asylum seekers increasingly reach far away countries, the divergent approaches to the definition of a refugee seem to be less relevant than

[90] UNHCR, "The Refugee Convention at 50", Editorials (Geneva 2001).
[91] "Final Act and Convention Relating to the Status of Refugees" (25 July 1951) A/CONF.2/108, 9.

before. As early as the 1990s, legal scholarship already observed that the "refugee plight is a phenomenon of our modern world community and must be addressed by all states as a global issue".[92] Working towards the harmonisation of the refugee definition and complementary forms of protections at the international level is a necessary step to address the refugee plight as a global issue. According to the UN agency: "to keep asylum meaningful there is a need to ensure (…) that refugee protection does not depend on where an individual seeks asylum".[93] The development of a soft law framework to provide for specific guiding principles on complementary protection in line with the provisions of the extended definitions of regional instruments could provide an insightful impetus for the better harmonisation of refugee law among states.

[92] Roman Boed, "The State of the rights of asylum in International Law" [1994] 5 Duke Journal of Comparative and International Law 1,31.
[93] UNHCR, "The State of the World's Refugees, In Search of Solidarity" (Geneva 2012)11.