

**LEGAL AND PROTECTION POLICY
RESEARCH SERIES**



**Refugee Law in a Time of
Climate Change, Disaster and Conflict**

**A working legal analysis of the refugee definition in the 1951
Convention and the regional refugee criteria, particularly where
conflict and/or violence interacts with disaster**

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**PPLA/2020/01
January 2020**

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The author is grateful to Madeline Garlick, Cornelis (Kees) Wouters, Isabelle Michal, Erin Bishop, Katinka Ridderbos and Marco Formisano from UNHCR, and Walter Kälin and Atle Solberg from the Platform on Disaster Displacement (PDD), for their review and helpful comments. Marina Sharpe, Tamara Wood, Matthew Scott and David Cantor also reviewed sections of this paper, and the author thanks each of them for their time, suggestions and advice.

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SYNOPSIS

This paper provides a legal discussion of the applicability of refugee law in situations where disaster and/or adverse effects of climate change interact with conflict and/or violence (so-called “nexus situations”). In doing so, it also offers insights on the applicability of refugee law when people flee across international borders in the context of disaster and adverse effects of climate change.

A primary objective is to enhance appreciation of regional refugee criteria, as an indispensable step in understanding their applicability to nexus situations and other contexts such as disaster, when people flee across international borders. The paper examines the regional refugee definitions in Africa and Latin America, canvassing literature on the scope and meaning of pertinent terms, including serious disruptions to public order. Literature that discusses the applicability or application of regional refugee criteria in situations of conflict, disaster and nexus situations are highlighted and reviewed. The paper demonstrates the paucity of in-depth scholarly engagement with the regional refugee definitions, and the lack of authoritative guidance to support States and other decision makers to apply regional refugee criteria in practice.

Discussion of the 1951 Refugee Convention definition begins with an overview of concerns raised by scholars and courts regarding its limited applicability to situations of disaster and climate change. The paper synthesizes the elements of the definition that scholars and courts have identified as presenting challenges for claimants and some of the conditions under which refugee claims based on the Convention definition may be successful. Drawing on New Zealand jurisprudence, and appreciating the socio-political dimensions embodied in disasters, the paper presents three thematic considerations, which may enliven deeper engagement with the applicability of the 1951 Refugee Convention in the context of disaster or nexus situations.

Overall, this paper aims to raise awareness and support knowledge production through a working analysis on the applicability of refugee law in a time of climate change, disaster and conflict, and thereby, to promote the robust and rigorous implementation of refugee law in practice. These goals align with efforts to promote responsibility sharing and with the commitments and affirmations States have made under the New York Declaration for Refugees and Migrants and the Global Compact on Refugees.

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1. INTRODUCTION

For years, high-level forums have acknowledged that multiple factors compel human movements across borders. In the 2016 *New York Declaration for Refugees and Migrants (New York Declaration)*, States highlighted “armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses”, as well as “adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors.”¹ In this negotiated UN General Assembly Declaration, States recognized “[m]any [people] move, indeed, for a combination of these reasons”,² that refugees are among such movements, and efforts are needed to strengthen their protection. Within the section on commitments for refugees, States reaffirmed that “international refugee law, [*inter alia*], provide[s] the legal framework to strengthen the protection of refugees” and committed to “ensure, in this context, protection for all who need it.”³ States took “note of regional refugee instruments, such as the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa and the Cartagena Declaration on Refugees”,⁴ also acknowledging the significance of regional refugee instruments for protecting refugees.

The *Global Compact on Refugees (GCR)*, which aims to strengthen the functioning of the refugee regime, noted that “[w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.”⁵ Recognizing that “in certain situations, external forced displacement may result from sudden-onset natural disasters and environmental degradation”, within a narrative that appreciated the “composite character” of human movements, the GCR acknowledged the “complex challenges for affected States”.⁶ The GCR reinforced the need for fair and efficient determination of individual international protection claims to duly determine status in accordance with applicable international and regional obligations, in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.⁷ In essence, even when movements are complex, mixed or large scale, if obligations under international or regional refugee

¹ United Nations General Assembly (UNGA), “New York Declaration for Refugees and Migrants”, A/RES/71/7, 3 October 2016, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf, accessed: July 2019 (New York Declaration), paragraph 1. The New York Declaration was the negotiated outcome of the most high profile plenary meeting on improving responses to human movements at the UNGA. It is politically significant, but not legally binding.

² *Ibid.*

³ *Ibid.*, paragraph 66.

⁴ *Ibid.* Internal citations omitted.

⁵ UNGA, “Report of the United Nations High Commissioner for Refugees: Part II: Global Compact on Refugees”, A/73/12 (Part II), 13 September 2018, https://www.unhcr.org/gcr/GCR_English.pdf, accessed: July 2019 (GCR), paragraph 8.

⁶ *Ibid.*, paragraph 12. It also noted that States “may seek support from the international community to address [such challenges].”

⁷ *Ibid.*, paragraph 61.

laws apply, they must be implemented robustly.⁸

UNHCR's *Strategic Directions 2017-2021 (Strategic Directions)* also reflect these themes and contain commitments on strengthening the implementation of the refugee regime.⁹ The Strategic Directions recognize that conflict, serious human rights abuses, weak rule of law, non-inclusive governance, effects of climate change and 'natural' disasters are among the factors that compel human movement and that such factors often overlap and reinforce others as root causes of displacement.¹⁰ Under the overarching theme of protection, one of five core strategic directions, UNHCR committed to, *inter alia*:

1. Contribute to advancing legal, policy and practical solutions for the protection of people displaced by the effects of climate change and natural disasters, in recognition of the acute humanitarian needs associated with displacement of this kind, and its relationship to conflict and instability;¹¹
2. Strengthen regional and national protection frameworks and capacities, working closely with States and other relevant institutions and actors;¹²
3. Engage with governments and strategic partners on how to respond to mixed flows of asylum-seekers and migrants in ways that address the concerns of States, including national security considerations, while ensuring that rights are respected and that refugees have access to protection and solutions;¹³ and
4. Pursue creative, principled, and pragmatic approaches to the challenges of forced displacement that are based on a dynamic interpretation and the progressive development of law and practice, are responsive to current trends, focused on solutions, and supported by research, analysis and a strong evidence base.¹⁴

⁸ In paragraph 63, the GCR noted that "where appropriate, stakeholders with relevant mandates and expertise will provide guidance and support for measures to address *other* protection and humanitarian challenges. This could include measures to assist those forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements, where appropriate." (Emphasis added; internal citations omitted.) These statements imply that when obligations pursuant to refugee law apply, they should be implemented to promote the overall objectives of the GCR. That is, to strengthen the *functioning* of the existing refugee regime, including by minimizing protection gaps and by ensuring eligible persons find and enjoy international protection based in refugee law. Where there are *other* protection and humanitarian challenges, stakeholders are requested to provide guidance and support on measures, including temporary protection and humanitarian stay arrangements that could be used to address these challenges, having taken into account applicable national and regional instruments. Although the New York Declaration and the GCR are framed around 'large-scale' movements (the term "large-scale" is not defined), the commitments and proposed measures are also applicable to 'smaller-scale' and indeed, cross-border movements generally. Strengthening the implementation of the refugee regime, including through directed improvements that facilitate identification and determination of international protection claims in accordance with the 1951 Convention and regional refugee instruments is at the heart of the regime and UNHCR's mandate.

⁹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR's Strategic Directions 2017–2021", 2017, <https://www.unhcr.org/5894558d4.pdf>, accessed: July 2019.

¹⁰ *Ibid.*, p. 7.

¹¹ *Ibid.*, p. 18. Excerpted largely verbatim. See more generally, p. 16-18.

¹² *Ibid.*, p. 17. Excerpted largely verbatim.

¹³ *Ibid.*, p. 18. Excerpted largely verbatim.

¹⁴ *Ibid.*, p. 17. Excerpted largely verbatim. Aligned with these goals, UNHCR's priorities and activities on climate change and disaster displacement covers four key themes, which include legal advice, guidance and norm development; policy coherence; and

A UNHCR-commissioned study, *In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change (In Harm's Way)*, shed new light on refugee-law based State responses in contexts where conflict and/or violence and disaster and/or the adverse effects of climate change interacted (**nexus dynamics**) to influence cross-border movements (**nexus-related cross-border movements**).¹⁵ The study described State practice on the use of refugee law to respond to nexus-related cross-border movements. It drew attention to the applicability of refugee law for addressing international protection claims in such situations.

Scholarly research on the interactions between conflict or violence, disaster or the adverse effects of climate change, and migration or displacement has focused on pathways, correlations and causal relationships, or security-related implications. Less is written on how refugee law, including regional refugee definitions apply when the three factors interact.¹⁶ A paper prepared for the Nansen Initiative,¹⁷ had raised the potential of regional refugee criteria.¹⁸ The Nansen Initiative's *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Nansen Initiative Protection Agenda)* emphasized the need to enhance the use of so-called "humanitarian protection measures", including refugee-law based responses.¹⁹ It recognized the applicability of refugee law, including regional refugee criteria when people flee nexus

research that underpins operational and policy gaps. For more on UNHCR's priorities and activities, see: <https://www.unhcr.org/climate-change-and-disasters.html>, accessed: July 2019.

¹⁵ Weerasinghe, "In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change", December 2018, UNHCR, <https://www.refworld.org/docid/5c2f54fe4.html>, accessed: July 2019 (In Harm's Way). For a shorter English-language Overview, see <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5c4987324>. French and Spanish overviews are also available.

¹⁶ This does not mean research on refugee law-based international protection in the context of disaster or adverse effects of climate change does not exist (see e.g. section V and VI of this paper), but rather that research which also examines the added elements of conflict and/or violence (i.e., nexus dynamics) in depth, when considering the applicability of refugee law, appears limited.

¹⁷ The Nansen Initiative comprised a series of political, strategic and technical efforts to develop a protection agenda for people displaced across borders in the context of disaster and adverse effects of climate change. For more information, see: <https://www.nanseninitiative.org/>, accessed: July 2019.

¹⁸ Wood, "Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts", Nansen Initiative Technical Paper, 2013, http://www.nanseninitiative.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf, accessed: July 2019 (Nansen Initiative Paper), p. 23 and section 2.2 more generally. See also, Kolmannskog, "'We are in Between': Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during 2011 and 2012 Drought", *International Journal of Social Science Studies*, 2014, Vol. 2, No. 1.

¹⁹ The Nansen Initiative, "Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change", Vols. I and II, 2015, <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> and <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf>, accessed: July 2019 (Nansen Initiative Protection Agenda). The Agenda was endorsed by 109 government delegations and mentioned in the New York Declaration. It does not explicitly reference the term "international protection". Instead, it uses "humanitarian protection measures" to refer to mechanisms that provide for admission and/or stay. The Agenda states that the term "refers to the laws, policies and practices used by States to permit the admission and stay of cross-border disaster-displaced persons on their territory (Vol. 1, p. 17). Under this formulation, the Agenda notes "humanitarian protection measures may be based on regular immigration law, exceptional immigration categories or provisions related to the protection of refugees or similar norms of international human rights law." (Vol. I, p. 25). Enhancing the use of humanitarian protection measures is one of three priorities for action (Vol. 1, p. 19).

dynamics.²⁰

Recognizing the potential of refugee law, *In Harms' Way* included a set of recommendations to strengthen the implementation of refugee-law based international protection in the context of nexus-related cross-border movements.²¹ Many of the recommendations rest on the need for greater clarity and authoritative guidance on the applicability and interpretation of refugee law, including regional refugee definitions. Accordingly, the principal recommendation suggests that UNHCR develops legal interpretive guidance to facilitate the coherent and consistent application by decision-makers of refugee law in practice.²²

The recommendations offered by *In Harm's Way* build on UNHCR's efforts to address protection challenges associated with disaster and adverse effects of climate change.²³ This includes a 2011 expert roundtable, which recognized that "the 1951 Convention and some regional refugee instruments provide answers to certain cases of external displacement related to climate change, and these ought to be analyzed further".²⁴

In December 2018, at the 24th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC) in Poland (COP 24), the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts highlighted the value of guidance. The Executive Committee presented

²⁰ *Ibid.*, Vol. I, pp. 27-28. The Agenda recognizes the multi-causality prompting human movements, referencing both conflict and violence in this context (see e.g., Vol. I, pp. 6 and 15). It also recognizes cross-border movements occur in situations where disaster and conflict overlap (see e.g., Vol. I, pp. 24 and 27).

²¹ Weerasinghe, *In Harm's Way*, section 5, n. 15.

²² *Ibid.*, section 5.1.

²³ See e.g., documents and links available on UNHCR's Climate Change and Disaster Displacement webpage: <https://www.unhcr.org/climate-change-and-disasters.html>, accessed: July 2019. See also, e.g. Goodwin-Gill and McAdam, "Climate Change, Disasters, and Displacement", 2017, UNHCR, <http://www.unhcr.org/en-my/596f25467.pdf>, accessed: July 2019; McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010-2013", *Refugee*, 2014, Vol. 29, No. 2; McAdam, "From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement", *University of New South Wales Law Journal*, 2016, Vol. 39, No. 4. Addressing displacement related to disasters and climate change was also a key theme at 2015 High Commissioner's Dialogue on Protection Challenges, in which the relevance of refugee frameworks was referenced. See e.g. "Co-Chair's Summary: Thematic Session 2: Addressing 'New' Root Causes: Urbanisation, Food Insecurity, Water Scarcity, Natural Hazards and Climate Change", 2015, <http://www.unhcr.org/58be72337>, accessed: July 2019.

²⁴ UNHCR, "Summary of Deliberations on Climate Change and Displacement", April 2011, <http://www.unhcr.org/4da2b5e19.pdf>, accessed: July 2019, p. 1. The full quote is as follows: "While the 1951 Convention and some regional refugee instruments provide answers to certain cases of external displacement related to climate change, and these ought to be analysed further, they are limited." Arguably, this framing was specific to consideration of displacement related *only* to climate change, and not necessarily nexus dynamics. At paragraph 9, the Summary also noted "some regional refugee instruments, such as the 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, extend the definition of a 'refugee' to persons fleeing 'events seriously disturbing public order', which may equally apply to persons fleeing sudden-onset disasters. However, this position has yet to be fully tested." Principle VII of ten Nansen Principles recommended in 2011 by experts and policymakers at an influential conference, "to guide responses to some of the urgent and complex challenges raised by displacement in the context of climate change and other environmental hazards" also reinforces that "existing norms of international law should be fully utilized, and normative gaps addressed." See "The Nansen Conference: Climate Change and Displacement in the 21st Century", 2011, <http://www.unhcr.org/4ea969729.pdf>, accessed: July 2019, p. 5.

a set of recommendations on integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change, which were based on the work of the Task Force on Displacement (TFD). At COP 24, “Parties, bodies under the Convention and the Paris Agreement, United Nations agencies and relevant stakeholders” were invited to consider the recommendations, which included a call for guidance as noted below:²⁵

Invite United Nations agencies, relevant organizations and other stakeholders, as appropriate and in accordance with their respective mandates: To continue developing and sharing good practices, tools and *guidance* in relation to averting, minimizing and *addressing displacement related to the adverse impacts of climate change*, inter alia, in: *Applying international legal instruments and normative frameworks*, as appropriate[.]²⁶

Against this backdrop, this paper seeks to inform interpretive guidance on the application of refugee law in the context of nexus-related cross-border movements.

- Part II provides a brief spotlight on contemporary nexus dynamics;
- Part III discusses the regional refugee definition in Africa, and in particular the meaning and scope of “events seriously disturbing public order” in Article I(2) (ESDPO) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (**1969 OAU Convention**);²⁷
- Part IV discusses the regional refugee definition in Latin America, and in particular the meaning and scope of “other circumstances which have seriously disturbed public order” in Conclusion III(3) (OCSDPO) of the 1984 Cartagena Declaration on Refugees (**1984 Cartagena Declaration**);²⁸
- Part V discusses applicability of ESDPO and OCSDPO in situations of: (a) conflict or violence; (b) disaster; and (c) nexus dynamics, and relevant State practice;
- Part VI discusses the 1951 Convention relating to the Status of Refugees²⁹ and its 1967

²⁵ “Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts”, Decision 10/CP.24, paragraph 3, in United Nations Framework Convention on Climate Change (UNFCCC), “Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018”, FCCC/CP/2018/10/Add.1, 19 March 2019, <https://unfccc.int/sites/default/files/resource/10a1.pdf>, accessed: November 2019.

²⁶ Ibid., Annex on “Recommendations from the report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts on integrated approaches to averting, minimizing and addressing displacement related to the adverse impacts of climate change”, paragraph (1)(h)(iii)d. Emphasis added.

²⁷ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974), 1001 UNTS 45, <https://www.refworld.org/docid/3ae6b36018.html>, accessed: July 2019 (1969 OAU Convention).

²⁸ Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees, 22 November 1984, <https://www.refworld.org/docid/3ae6b36ec.html>, accessed: July 2019 (1984 Cartagena Declaration).

²⁹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 1989 UNTS 137, <https://www.refworld.org/docid/3be01b964.html>, accessed: July 2019.

Protocol relating to the Status of Refugees³⁰ (together the **1951 Convention**);³¹

- Part VII presents a summary and conclusions.

This paper is based on a desk review of selected documents, predominantly salient scholarly material; UNHCR, inter-governmental and regional documents; and some jurisprudence, as well as discussions with experts. Accordingly, the paper does not profess to present an exhaustive review of the materials relevant to the themes canvassed. The research was carried out between December 2018 and May 2019.

2. NEXUS DYNAMICS AND NEXUS SITUATIONS

Nexus dynamics occur in countries and regions across the globe. For example, between 2004 and 2014, an estimated 58 per cent of disaster deaths and 34 per cent of disaster-affected people were located in the 30 top countries listed in the Fragile States Index.³² Displacement associated with nexus dynamics is mainly internal, however, cross-border movements also occur, and may be preceded by internal movements. This section introduces situations in which nexus-related cross-border movements occurred or endure to contextualize subsequent discussions on the applicability of refugee definitions. The examples aim to demonstrate some of the diversity in nexus dynamics. They are not exhaustive, since such a list would be difficult to capture, especially as climate change intensifies and evolves. Nonetheless, the need for further research on the nature, causes and character of nexus dynamics to enhance knowledge and consideration of the applicability of refugee law is evident.³³

Somalia

Between late 2010 and early 2012, Somalia experienced severe food insecurity.³⁴ On 20 July 2011, the UN declared famine in certain parts of the country and extended the

³⁰ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967), 606 UNTS 267, <https://www.refworld.org/docid/3ae6b3ae4.html>, accessed: July 2019.

³¹ 148 States are parties to one or both instruments. UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”, April 2015, <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>, accessed: July 2019. Among other things, the Protocol removed the temporal restriction in the Convention, which had limited the refugee definition in article IA(2) to include “as a result of events occurring before 1 January 1951”.

³² Overseas Development Institute (ODI), “When Disasters and Conflict Collide: Facts and Figures”, 2016, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10537.pdf>, p. 5; See also Internal Displacement Monitoring Centre (IDMC), “Global Report on Internal Displacement”, 2019, <http://www.internal-displacement.org/global-report/grid2019/> (GRID 2019), including discussions of Afghanistan, Somalia and Nigeria.

³³ This paper does not examine or engage with discourse on the causal relationships between conflict and the adverse effects of climate change, which is a burgeoning area of research with inconclusive evidence, at least at the global level. Rather, for the purposes of the ensuing discussion, this paper simply recognizes that in some, and arguably in increasing situations, conflict and/or violence and disaster and/or the adverse effects of climate change co-exist and interact, influencing human movements, including internal and cross-border displacement.

³⁴ This paragraph is synthesized from Weerasinghe, In Harm’s Way, section 3.1.1.1, n. 15.

declaration to cover additional areas the following month. Multiple factors are identified as having caused the famine, among them, drought conditions affecting the Horn of Africa in 2010 and 2011. Seasonal rains had failed for two consecutive years, in late 2010 and between March and June 2011, with some concluding that the latter failure was influenced by anthropogenic climate change. Water shortage, crop and livestock failure, a drop in demand for labor, and an increase in local food prices, combined with a global spike in food prices to disrupt livelihoods and deplete resilience. Exacerbating these dynamics were historical and ongoing political volatility, governance challenges and conflict. Al-Shabaab, which controlled much of southern and central Somalia, imposed aggressive taxation practices and blocked trade, eroding social safety nets. Restrictions were imposed on mobility, limiting access to humanitarian aid, and it was reported, “Al-Shabaab not only tried to prevent population movement out of affected areas, but also forcibly relocated displaced people within their areas of control, or in some cases, forced people to return to their areas of origin”.³⁵ These conditions were compounded by State- and donor-driven counter-terrorism policies, military offensives and Al-Shabaab’s actions towards aid agencies and humanitarian personnel, which limited access to humanitarian assistance, particularly in areas influenced or controlled by Al-Shabaab. Internal and cross border displacement was staggering. During the crisis, more than 100,000 Somalis fled to each of Kenya and Ethiopia.³⁶

Haiti

On 12 January 2010, Haiti experienced its strongest earthquake in 200 years.³⁷ Over 220,000 people died and more than 300,000 were injured. Historically, Haiti has experienced long periods of political instability, often accompanied by violence. These factors influenced the State’s ability to sustain robust institutions, infrastructure, services and the rule of law. Poverty and inequality have prevailed. Crime and violence, including by armed gangs, have compromised public security. The earthquake’s impacts compounded Haiti’s fragility, destroying critical infrastructure, including buildings necessary for governance and the maintenance of law and order. Between 20–40 per cent of civil servants died, close to 400 national police officers were reported killed, missing or injured, and 10 members of the judiciary were reported to have died. Moreover, an estimated 5,000 prisoners escaped as chaos ensued. In this context, the State’s capacity to govern, undertake public administration activities and provide security and basic public services was further undermined. Violence and crime were reported to have increased. Sexual and gender-based violence and other human rights violations were carried out

³⁵ Maxwell and Majid, “Famine in Somalia: Competing Imperatives, Collective Failures, 2011-12”, Oxford University Press, 2016, p. 60.

³⁶ How Kenya and Ethiopia responded is discussed in Weerasinghe, *In Harm’s Way*, n. 15.

³⁷ This paragraph is synthesized from Weerasinghe, *In Harm’s Way*, section 3.2.1., n. 15.

with impunity. A cholera epidemic in late 2010 exacerbated the dire conditions. An estimated 1.5 million people were displaced to camps within the country at the peak of internal displacement, while many Haitians also travelled to other countries, particularly in the Americas.³⁸

The Lake Chad basin and Northeast Nigeria

The Lake Chad basin spans Algeria, Cameroon, Central African Republic (CAR), Chad, Libya, Niger, Nigeria and Sudan; some of the poorest, least developed and most fragile countries in the world.³⁹ The region is challenged by limited surface and groundwater, episodic and severe droughts and increasing desertification. Nigeria, Niger, Chad and Cameroon are in direct contact with Lake Chad, which has served as a hub for riparian communities. Research indicates that between 1960 and 2009, the lake shrunk by approximately 90 per cent, influenced also by the adverse effects of climate change. Parts of the region are also affected by conflict and violence. For example, northern Nigeria has experienced recurrent violent conflicts which are underpinned by historical grievances, marginalization and ethnic and religious rivalries, among other factors. In this landscape, the increasingly violent activities of the so-called “Boko Haram” surfaced, and led Nigeria to declare an emergency in Borno, Yobe and Adamawa in 2013. Boko Haram has since grown into a regional threat, and prompted a military response and counter-insurgency efforts. This complex and volatile crisis has affected significant populations in northeast Nigeria as well as in Cameroon, Chad and Niger. It has destroyed infrastructure, disrupted trade and livelihoods, impeded humanitarian access, resulted in food insecurity and contributed to social tensions. Internal and cross-border displacement has been, and continues to be, significant.

³⁸ How Brazil and Mexico responded to Haitian movements into their territories is discussed in Weerasinghe, In Harm’s Way, n. 15.

³⁹ The contents of this paragraph is drawn from: “Global International Wasters Assessment: Regional Assessment 43: Lake Chad Basin”, UNEP, 2004, http://www.droughtmanagement.info/literature/UNEP_lake_chad_basin_2004.pdf, accessed: July 2019; Global Water Partnership, “Transboundary Groundwater Factsheet: The Lake Chad Basin Aquifer System”, 2013, https://www.gwp.org/globalassets/global/toolbox/references/lake_chad_fact_sheet.pdf, accessed: July 2019; The Lake Chad Basin Commission (LCBC), “The Lake Chad Development and Climate Resilience Action Plan”, 2016, Vols. I and II, <http://documents.worldbank.org/curated/en/docsearch/report/102851>, accessed: July 2019; LCBC, “Report on the State of the Lake Chad Basin Ecosystem”, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2016, http://www.cblt.org/sites/default/files/download_documents/report_on_the_state_of_the_lake_chad_basin_ecosystem.pdf, accessed: July 2019; International Crisis Group (ICG), “Northern Nigeria: Background to Conflict”, 2010, <https://www.crisisgroup.org/africa/west-africa/nigeria/northern-nigeria-background-conflict>, accessed: July 2019; ICG, “The Boko Haram Insurgency”, <https://www.crisisgroup.org/boko-haram-insurgency>, accessed: July 2019; Mahmood and Ani, “Factional Dynamics within Boko Haram, 2018, <https://issafrica.s3.amazonaws.com/site/uploads/2018-07-06-research-report-2.pdf>, accessed: July 2019 and “Responses to Boko Haram in the Lake Chad Region: Policies, Cooperation and Livelihoods”, 2018, <https://issafrica.s3.amazonaws.com/site/uploads/2018-07-06-research-report-1.pdf>, accessed: July 2019; UNHCR, “International Protection Considerations with Regard to People Fleeing Northeastern Nigeria (the states of Borno, Yobe and Adamawa)”, October 2013: <http://www.refworld.org/docid/526fcea47.html>, accessed: July 2019; UNHCR, “Operational Portal: Refugee Situations: Nigeria Situation”, <https://data2.unhcr.org/en/situations/nigeriasituation>, accessed: July 2019; UNHCR and World Bank, “Forced Displacement by the Boko Haram Conflict in the Lake Chad Region”, 2016, <https://data2.unhcr.org/en/documents/details/52535>, accessed: July 2019.

Other Regions and Countries

Contemporary media reports and grey literature have also highlighted nexus dynamics in other countries and regions. In parts of **El Salvador, Guatemala and Honduras**, countries whose populations have been uprooted internally and across borders by violence, human rights violations and other political and socio-economic impacts associated with the actions of (organized) criminal actors, as well as repressive responses, there is growing attention on how the adverse effects of climate variability, including poor rainfall and drought, affect movements.⁴⁰ For example, studies suggest that people who live in the so-called “dry corridor” - an imprecise geographic area spanning the three countries - are exposed to poverty, climate change, extreme climate events, violence and food insecurity.⁴¹

In March 2019, in a context of severe food insecurity and ongoing conflict, **Afghanistan** experienced its worst flood in over seven years.⁴² UNHCR’s August 2018 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* provides a helpful summary of the nexus dynamics:

The ongoing conflict in Afghanistan continues to exact a heavy toll on the humanitarian situation in the country. As a result of the general rise in insecurity ... humanitarian access to affected populations remains limited. By the end of 2017, out of a total population of approximately 34.5 million people, 14 million lived in the 120 highest conflict-affected districts. The limited presence of humanitarian actors in conflict-affected areas in particular inhibits access to life-saving assistance for Afghanistan’s most vulnerable people. Decades of conflict and recurrent natural disasters have left Afghanistan’s population in a state of deep vulnerability, with many people’s coping mechanisms having been exhausted. The ongoing conflict further exacerbates these vulnerabilities through the destruction of livelihoods and the loss of livestock, growing rates of communicable diseases, increased displacement, continuous human rights abuses,

⁴⁰ See e.g., Milman et al., “The Unseen Driver Behind the Migrant Caravan: Climate Change”, *The Guardian*, 30 October 2018, <https://www.theguardian.com/world/2018/oct/30/migrant-caravan-causes-climate-change-central-america>, accessed: July 2019; United Nations World Food Program (WFP) et al., “Food Security and Emigration: Why People Flee and the Impact on Family Members Left Behind in El Salvador, Guatemala and Honduras”, August 2017, https://docs.wfp.org/api/documents/WFP-0000022124/download/?_ga=2.85460124.46423775.1540402016-1767178983.1540402016, accessed: July 2019.

⁴¹ See e.g., WFP et al., *ibid*; WFP et al., “Hunger Without Borders: The Hidden Links Between Food Insecurity, Violence and Migration in the Northern Triangle of Central America – An Exploratory Study”, n.d., https://documents.wfp.org/stellent/groups/public/documents/liaison_offices/wfp277544.pdf?_ga=2.132604110.1586832921.1553117283-1912000485.1553117283, accessed: July 2019.

⁴² Janjua and McVeigh, “‘Chilling Reality’: Afghanistan Suffers Worst Floods in Seven years”, *The Guardian*, 6 March 2019, <https://www.theguardian.com/global-development/2019/mar/06/chilling-reality-afghanistan-suffers-worst-floods-in-seven-years>, accessed: July 2019.

and higher crime levels. Similarly, the protracted conflict, poor governance and weak or corrupt institutions are reported to have led to a situation where disaster preparedness, risk reduction and emergency response mechanisms are weak or absent. As a result, natural disasters, including floods, mudslides, earthquakes, droughts and severe winter weather, are a further threat to people whose levels of resilience have already been worn down. ... The humanitarian situation in Afghanistan has been further aggravated by a severe drought, which is reported to be particularly affecting northern and western regions of the country.⁴³

During the 69th session of UNHCR's Executive Committee of the High Commissioner's Programme (ExCom) in October 2018, the then Assistant High Commissioner for Protection, Volker Türk, noted that "[a]ccess to and competition over water, has exacerbated communal tensions in **Sudan's Darfur** and Afghanistan."⁴⁴ Further, the Nansen Initiative's Protection Agenda explained that "[i]n **Central Africa**, flooding and drought have compounded the impacts of conflict and insecurity, food insecurity, and weak resilience in the region, contributing to higher numbers of people displaced within their own countries and abroad, such as following the 2010 and 2012 Sahel drought and floods."⁴⁵ Nexus dynamics can also be identified in other countries in the Horn of Africa, including **South Sudan**; in the Sahel, including **Mali**; and in the Middle East, including **Syria** and **Iraq**.⁴⁶ In parts of **South Asia** and **South East Asia** the adverse effects of climate change also interact with tensions and conflicts.⁴⁷

Refugee Law and Nexus Situations

In some nexus situations, including those highlighted above, the applicability of the 1951 Convention definition and/or regional refugee definitions for responding to claims for international protection will be incontestable. In others, if the intensity and visibility of conflict or violence is limited, or if a hazard or disaster, including those influenced by the adverse effects of climate change is a prevalent or prominent trigger of displacement, a fine-grained, context-specific understanding of the nature, causes and character of a given nexus situation may be important to facilitate recognition of refugee claims. In

⁴³ See UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, <https://www.refworld.org/publisher,UNHCR,COUNTRYPOS,AFG,5b8900109,0.html>, accessed: July 2019, pp. 31-32. Internal citations omitted.

⁴⁴ UNHCR, "Statement to the 69th Session of the Executive Committee of the High Commissioner's Programme: Statement by Volker Türk, Assistant High Commissioner for Protection", 4 October 2018, <https://www.unhcr.org/admin/dipstatements/5bb49b2f4/statement-69th-session-executive-committee-high-commissioners-programme.html>, accessed: July 2019. Emphasis added.

⁴⁵ The Nansen Initiative, Nansen Initiative Protection Agenda, Vol. II, p. 10, n. 19.

⁴⁶ Drawn from UNHCR internal database of articles and literature.

⁴⁷ See e.g., Nordqvist and Krampe, "Climate Change and Violent Conflict: Sparse Evidence From South Asia and South East Asia", SIPRI Insights on Peace and Security, No. 2018/4, September 2018, <https://www.sipri.org/sites/default/files/2018-09/sipriinsight1804.pdf>, accessed: July 2019.

essence, there may be a need to explain how the combined effects of a hazard, disaster or the adverse effects of climate change *and* conditions of conflict or violence on social, political, economic, security, human rights and humanitarian conditions relate to criteria in the applicable refugee definitions. An understanding of the scope and interpretation of applicable refugee definitions is a prerequisite for such an analysis. The next sections turn to these themes. Section III discusses the regional refugee definition in Africa, and section IV discusses the regional refugee definition in Latin America. The 1951 Convention definition is discussed in section VI.

3. REGIONAL REFUGEE DEFINITION IN AFRICA

3.1. Introduction

Africa has adopted a binding refugee protection instrument focused on aspects of refugee problems particular to the region. Drafting began soon after the establishment of the Organization of African Unity (OAU) in 1963, and “at a time in history when the continent was gripped by the struggle for liberation, following the independence of many African States in the late 1950s and the 1960s.”⁴⁸ Insights on the 1969 OAU Convention’s drafting history can be gleaned from Sharpe who, based on her archival research, seeks to reconcile conflicting accounts and address misconceptions associated with the treaty, given the lack of *travaux préparatoires*.⁴⁹

[T]he process of independent state-building, coupled with ongoing minority rule in Southern Africa, brought two concerns to the fore. States wanted to deal humanely with people fleeing the anti-colonial struggle and with freedom fighters combating persistent colonialism. However, they did not want international relations to be undermined by individuals intent on subverting newly independent countries of origin.⁵⁰

Sharpe elaborates that:

the initial impetus for a regional refugee instrument was to render international refugee law applicable in Africa and to address the issue of subversion. When the former was achieved in 1967 with the adoption of the Protocol relating to the status

⁴⁸ Sharpe, “The Regional Law of Refugee Protection in Africa”, 2018, Oxford University Press, p. 22-23 quoting Nyadunga “Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa”, *German Yearbook of International Law*, 2004, Vol. 47, p.86.

⁴⁹ *Ibid.*, Chapter 2.

⁵⁰ *Ibid.*, p. 41.

of Refugees ... addressing refugee issues particular to Africa became the focus of the drafting initiative.⁵¹

In addition to replicating Article 1A(2) of the 1951 Convention in Article I(1), the 1969 OAU Convention includes additional refugee criteria that expands the range of persons able to benefit from recognition as refugees. Article I(2) defines a refugee as follows:

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 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.⁵²

Forty-eight of the 55 member States of the African Union (AU) (the successor to the OAU) have ratified the treaty.⁵³ Forty-six States have adopted domestic refugee laws.⁵⁴ The regional refugee definition is referenced in the domestic laws of 37 States, two of which are not Parties to the 1969 OAU Convention.⁵⁵ In this context, understanding who qualifies as a refugee under the regional refugee definition is integral to efforts to develop interpretive guidance since the 1969 OAU Convention’s “provisions represent the crucial point of agreement among its states parties regarding the scope and content of refugee protection in the African context.”⁵⁶

3.2. Commentary on the Regional Refugee Definition in Africa

Elucidating a robust summary on doctrinal implications of key elements of Article I(2), as a first step on the path to assessing its applicability to international protection in the context of nexus-related cross-border movements, is challenging.⁵⁷ This is because jurisprudence and scholarly analysis on who qualifies as a refugee pursuant to Article

⁵¹ Ibid., p. 16. Internal citations omitted.

⁵² 1969 OAU Convention, n. 27.

⁵³ For States parties, see <https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf>. This document was last updated on 16 May 2019, accessed: July 2019. This list does not include Morocco, which is a State Party (<https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028010433e&clang=en>) or Djibouti, which is also a State Party (<https://www.refworld.org/pdfid/5072836f2.pdf>)

⁵⁴ Cantor and Chikwanha, “Reconsidering African Refugee Law”, *International Journal of Refugee Law*, November 2019, Advance Article, pp. 5-6. Three of these States, Namibia, Somalia and Madagascar, are signatories to the 1969 OAU Convention.

⁵⁵ Ibid., pp. 11-12. See also, Wood, “In Search of the African Refugee: A Principled Interpretation of Africa’s Expanded Refugee Definition”, 2018, Unpublished PhD Thesis, Annex 3.

⁵⁶ Wood, *ibid.*, p. 3.

⁵⁷ This paper does not provide an independent analysis of the object and purpose of the 1969 OAU Convention or the meaning of terms in the regional refugee definition (including as interpreted in accordance with the rules set out in the Vienna Convention on the Law of Treaties). Rather, this paper draws on scholarly and grey literature and UNHCR documents to highlight consensus and tension points. Accordingly, this paper does not cross-refer to provisions in primary sources, such as the 1969 OAU Convention, to add further weight to the points raised in this section III.

I(2) of the 1969 OAU Convention is limited, at least as compared to the 1951 Convention.⁵⁸ Empirical studies canvassing State practice on the use of Africa's regional refugee definition to recognize refugee status has suffered a similar fate.⁵⁹ The OAU did not, and the AU has not yet, produced guidance on the scope of the regional refugee definition. While UNHCR has developed a *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees (1951 Convention Handbook)*,⁶⁰ an analogous handbook with legal interpretation, explanations and procedural standards for determining refugee status under the 1969 OAU Convention, including pursuant to regional refugee criteria, does not exist.

More recently however, guidance from UNHCR has begun to shed light on the scope and potential of Africa's regional refugee definition, facilitating efforts to determine its reach in the context of nexus-related cross-border movements. UNHCR has continued to issue legal positions on specific questions of international refugee law. Notably, in 2016, UNHCR issued *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions (GIP 12)*.⁶¹ This document contains 17 substantive paragraphs on Article I(2).⁶² Some of UNHCR's earlier Guidelines on International Protection also include brief discussions on the regional refugee definition.⁶³ In 2017, UNHCR also issued *Legal Considerations on Refugee Protection for People Fleeing Conflict and Famine Affected Countries (Legal Considerations on Conflict and Famine)*.⁶⁴ While adding little on the meaning of Article I(2), the document outlines the applicability of Africa's regional refugee criteria for people fleeing conflict and famine affected countries.⁶⁵ More generally, since about 2013,

⁵⁸ See e.g., Sharpe, n. 48; Wood, *ibid.* But see more recently, Cantor and Chikwanha, n. 54

⁵⁹ *Ibid.*, See also Sharpe, "The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination", January 2013, UNHCR, <https://www.refworld.org/docid/50fd3edb2.html>, accessed: July 2019; Wood, "Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition", *International Journal of Refugee Law*, 2014, Vol. 26, Issue. 4 (Expanding Protection in Africa) as exceptions.

⁶⁰ UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1969 Protocol Relating to the Status of Refugees", February 2019, <https://www.refworld.org/docid/5cb474b27.html>, accessed: July 2019 (1951 Convention Handbook).

⁶¹ UNHCR, "Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions", December 2016, <https://www.refworld.org/docid/583595ff4.html>, accessed: July 2019 (GIP 12).

⁶² Paragraphs 44-60. The paragraphs on procedural and evidentiary issues also make some references to regional refugee definitions.

⁶³ See e.g., Guidelines on International Protection Nos. 4, 5, and 11, available at: <https://www.refworld.org/docid/5cb474b27.html>, accessed: July 2019.

⁶⁴ UNHCR, "Legal Considerations for People Fleeing Conflict and Famine Affected Countries", April 2017, <https://www.refworld.org/docid/5906e0824.html>, accessed: July 2019 (Legal Considerations on Conflict and Famine).

⁶⁵ More generally, see also, UNHCR, "Key Legal Considerations on the Standards of Treatment of Refugees Recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, December 2017, <https://www.refworld.org/docid/5a391d4f4.html>, accessed: July 2019.

in its profile- and country-specific Eligibility Guidelines, which advise decision makers on how to assess claims from asylum seekers fleeing specific situations, UNHCR has begun to include discussions on assessing claims pursuant to regional refugee definitions.⁶⁶ These documents also provide insights into UNHCR's views on the scope and applicability of regional refugee criteria.

Another critical source of commentary on the scope of Article I(2) and the meaning of its terms are two detailed monographs written by regional experts. In 2018, Marina Sharpe, who has written extensively on the 1969 OAU Convention, published *The Regional Law of Refugee Protection in Africa*, which dedicates the better part of a chapter to the scope of Article I(2).⁶⁷ In chapter 3, Sharpe interprets the terms of Article I(2) "in accordance with the Vienna Convention on the Law of Treaties ..., which provides an authoritative set of rules governing treaty interpretation"⁶⁸ and "also constitutes customary international law."⁶⁹

Also in 2018, Tamara Wood earned a PhD further to a thesis that aims to answer the question, "who qualifies as a refugee under Africa's expanded refugee definition".⁷⁰ Using established principles of treaty interpretation as provided under the Vienna Convention on the Law of Treaties (VCLT)⁷¹ and customary international law, Wood seeks to provide a "principled interpretation of the definition's terms" and in doing so, present "the first comprehensive and principled analysis of the definition in either literature or practice."⁷² Arguing that a principled interpretation is essential for the Article I(2) definition to achieve the expansive protection it envisages, as "[i]nconsistency and divergence in interpretation ... would clearly undermine the principled goal of ensuring a single, universal standard for access to refugee protection",⁷³ Wood articulates four interpretive principles that guide and inform her interpretation of the terms of Article I(2).⁷⁴ Wood's aim is to explain the scope of African States' refugee protection obligations under Article I(2) as a matter of law.

⁶⁶ See e.g., UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", August 2013, <https://www.refworld.org/docid/51ffdc34.html>, accessed: July 2019; and UNHCR's Eligibility Guidelines on El Salvador (2016), Honduras (2016) and Guatemala (2018).

⁶⁷ Sharpe, n. 48.

⁶⁸ *Ibid.*, p. 38. Emphasis added. Internal citations omitted.

⁶⁹ *Ibid.*, p. 39; The rules are discussed at pp. 39-41.

⁷⁰ Wood, n. 55, p. 2.

⁷¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

⁷² Wood, n. 55, p. 4.

⁷³ *Ibid.*, p. 11 quoting Hathaway and Foster, "The Law of Refugee Status", 2014, Cambridge University Press, pp. 3-4.

⁷⁴ *Ibid.*, Chapter 4. Wood provides an overview of the treaty interpretation principles set out in Article 31-33 of the VCLT and then identifies and discusses the four key principles of interpretation that she argues should form the main guiding principles for the definition's interpretation. "The four key principles are: 1) the VCLT's Article 31(1) 'general rule' of interpretation provides the primary guide to interpretation and should not be undermined by supplementary means of interpretation, such as the use of preparatory materials or isolated examples of state practice; 2) the object and purpose of the 1969 Convention is the humanitarian protection of refugees, meaning that the definition should be interpreted as inclusively as possible and with an emphasis on

In reaching their conclusions on the scope of Article I(2), both authors reflect on the significant limitations in available jurisprudence, scholarly analysis and guidance, notwithstanding widespread praise and celebration of the “expansiveness” and “objectiveness” of the regional refugee definition.⁷⁵ Wood explains that:

Within the scholarship, most major works on international refugee law contain only a brief mention of Africa’s regional refugee protection instrument. To date, not a single book has been published on the 1969 Convention or its expanded refugee definition [although, Wood notes Sharpe’s book as forthcoming]. While several academic articles have discussed the 1969 Convention and definition in fairly general terms, only two have attempted any kind of comprehensive analysis of the Article I(2) definition. These have made an important contribution to the literature, in particular by drawing attention to the definition and debunking some of the common assumptions about it. However, these articles may also be criticised for failing to articulate a clear interpretive framework and, at times, proposing analyses that appear inconsistent with international law.⁷⁶

The two articles Wood singles out are *Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On* by Rankin⁷⁷ and *Refugee Status Determination in Africa* by Edwards.⁷⁸ Indeed, Sharpe also identifies these works, as well as Okoth-Obbo’s *Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*,⁷⁹ as notable exceptions to the limited critical inquiry into aspects of the 1969 OAU Convention and its regional refugee definition.⁸⁰ Within their respective monographs, Wood and Sharpe discuss literature and jurisprudence, including the articles by Rankin and Edwards; identify existing claims, controversies and disagreements; and highlight evidence of State practice.

refugees’ protection needs; 3) the definition should not be limited by its colonial origins but should be interpreted in an ‘evolutionary’ manner, in light of its modern day meaning and subsequent developments in international law; and 4) parallel interpretations of the definition’s terms elsewhere in international law may provide a guide to the interpretation of the same terms in the definition, provided their use remains subject to the application of the interpretive principles as a whole.” (p.15). For ease of reference, Article 31(1) of the VCLT provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” According to Wood, this “fundamental principle of treaty interpretation comprises four components – good faith, ordinary meaning, context, and object and purpose”, and a dissection of these dimensions feature heavily throughout her PhD thesis, as she delves into ascertaining the meaning of the terms in Article I(2). (p. 87). See also, Wood, “Who is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa’s Expanded Refugee Definition”, *International Journal of Refugee Law*, November 2019, Advance Article.

⁷⁵ Wood, n. 55, pp. 7-9 and Chapter 2; Sharpe, n. 48, particularly Chapter 3.

⁷⁶ Wood, *ibid.* pp. 8-9. Internal citations omitted.

⁷⁷ Rankin, “Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On”, *South African Journal on Human Rights*, 2005, Vol. 21, Issue 3.

⁷⁸ Edwards, “Refugee Status Determination in Africa”, *African Journal of International and Comparative Law*, 2006, Vol. 14, Issue 2.

⁷⁹ Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa”, *Refugee Survey Quarterly*, 2001, Vol. 20, Issue 1.

⁸⁰ Sharpe, n. 48, Chapter 3, footnote 7.

Given their breadth, timeliness and unique specificity, and critical synthesis of commentary, jurisprudence and practice, the monographs by Sharpe and Wood, as well as UNHCR's GIP 12, underpin the forthcoming discussion of the meaning and scope of Article I(2)'s terms. In reviewing the discussion below, the respective lengths and comprehensiveness of each work should, however, be borne in mind. GIP 12 has 17 specific paragraphs that discuss the 1969 OAU Convention's regional refugee definition; Sharpe, a book chapter; and Wood, a full PhD thesis. In this context, it is inevitable that Wood provides the most detailed discussion of the matter. Sharpe's commentary is particularly helpful for also identifying State practice. GIP 12 reflects UNHCR's institutional stance in a context where the agency is yet to produce an overarching and authoritative handbook on Article I(2).

3.3. Object, Purpose and Approach

GIP 12 frames its discussion of the meaning of terms in Article I(2) by unequivocally stating that the 1969 OAU Convention "is protection and humanitarian-orientated and reflects trans-African solidarity."⁸¹ GIP 12 states that:

The situations mentioned in Article I(2) of the 1969 OAU Convention are to be given their ordinary meaning in their context and in light of their (protection-oriented) object and purpose. They should also, wherever possible, be interpreted in such a way that they remain relevant and applicable to situations that were not foreseeable when the 1969 OAU Convention was drafted.⁸²

Sharpe and Wood's interpretive exercises are also underpinned by an appreciation of the object and purpose of the OAU Convention, as necessitated by the VCLT. As an official account or *travaux préparatoire* of the elaboration of the 1969 OAU Convention does not exist, Sharpe's efforts have sought to correct the historical record from what she characterizes as misconceptions of the factors that prompted the OAU to adopt a regional instrument.⁸³ The historical context and motivations underpinning the adoption of the 1969 OAU Convention were briefly noted in section 3.1. As Sharpe further explains:

The project to draft a regional refugee instrument was initially aimed at making international refugee law applicable in Africa and addressing the issue of subversion. Particularly persuasive in respect of the former is that early drafts of the 1969 Convention included only the 1951 Convention refugee definition

⁸¹ UNHCR, GIP 12, n. 61, paragraph 46. Internal citations omitted.

⁸² *Ibid.*, paragraph 53. Internal citations omitted.

⁸³ Sharpe, n. 48, Chapter 2.

(without the dateline); dissatisfaction with the international refugee definition was simply not an initial factor motivating the adoption of a regional instrument. Once the 1967 Protocol was adopted, the principal objective of the regional Convention became addressing refugee issues particular to Africa, chiefly subversion.⁸⁴

In this regard, Sharpe prefaces her interpretation of Article I(2)'s terms by noting that the 1969 OAU Convention's "post-colonial context and object and purpose of dealing humanitarily with refugees while also safeguarding international relations must be borne in mind throughout".⁸⁵ Sharpe also contends that "[g]iven the 1969 Convention's object and purpose of refugee protection and the necessity of an evolutionary approach in giving effect to this, it is justified to interpret the 1969 Convention evolutively."⁸⁶

Highlighting disagreement in the literature, Wood also contends "the object and purpose of the 1969 Convention is the humanitarian protection of refugees, and that the definition must be interpreted in a way that promotes this protection."⁸⁷ This conclusion is one of four interpretive principles that guide and inform Wood's interpretation of Article I(2). For Wood, this conclusion also has three specific implications:

1. The definition should be interpreted as inclusively as possible, as its function is to provide rather than withhold protection. Therefore, a broad construction should generally be preferred in choosing between multiple possible meanings of the definition's terms;⁸⁸
2. Considerations that are not relevant to a refugee's need for protection should not be imported into the definition's criteria;⁸⁹ and
3. The 1969 OAU Convention and the regional refugee definition should not be limited by its colonial origins but should be interpreted in an evolutionary manner, in light of current circumstances, its modern day meaning and subsequent developments in international law.⁹⁰

This last implication or position is also another one of Wood's four interpretive principles that guide and inform her interpretation of Article I(2)'s terms.⁹¹

⁸⁴ Ibid., p. 33.

⁸⁵ Ibid., p. 42.

⁸⁶ Ibid., p. 40.

⁸⁷ Wood, n. 55, p. 103. For more on Wood's analysis see Chapter 4.4.3.

⁸⁸ Ibid., pp. 103 and 105.

⁸⁹ Ibid., pp. 103 and 106. Wood elaborates that "[t]his is particularly important when drawing on parallel interpretations of the definition's terms from elsewhere in international law" since "differences between the respective objects and purposes of different treaties may warrant different constructions of the same term in each." (p.106. Internal citations omitted).

⁹⁰ Ibid., pp. 15, 102-110.

⁹¹ Ibid., Chapter 4.4.4.

3.4. Article I(2) Test for Refugee Status

Before delving into the terms of the definition, it is worth highlighting the elements or test for refugee status under Article I(2), as identified in the three sources. In her extensive work, Wood proposes a two-part test for determining whether a person would qualify as a refugee pursuant to Article I(2).⁹²

1. Is the existence of one of the definition's four enumerated refugee-producing events established? The relevant event may occur in "either part or the whole" of the country of origin.⁹³
2. Is the requisite connection between the relevant event and a person's flight established? This connection is encapsulated in the requirement that, "owing to" one of the enumerated events, the person is "compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".⁹⁴

Wood's position is that the four enumerated events provide the *context* for the harm. That is, the *risk of harm* arises due to one of the four events, but they do not constitute the harm itself. Therefore, establishing the existence of one of the enumerated events is not sufficient for refugee status under Article I(2). The second part of the test must also be satisfied in order to show individual harm due to an uprooting event.⁹⁵

Sharpe does not articulate a two-fold test with the same precision, although her analysis of Article I(2) approaches the matter in a similar manner. She begins by elaborating on the scope and meaning of each of the enumerated events in Article I(2) and then explains the need to establish a connection or "nexus" between an enumerated event and flight, critiquing the "somewhat flawed consensus ... that article I(2) is susceptible to a completely objective application in RSD [refugee status determination]", when in fact, it is not.⁹⁶

⁹² Ibid., Chapter 5.

⁹³ Ibid., p. 121. Drawn directly from Wood. In Chapter 5, Wood argues that all four of the enumerated events remain relevant and each one must be considered in the determination of a claim.

⁹⁴ Ibid., p.121. Drawn directly from Wood.

⁹⁵ Ibid., pp. 124-125. Wood explains "each of the definition's enumerated events denotes harm (or the threat of harm) to a state or society as a whole, and not necessarily to an individual or the population. External aggression, for example, refers to threats to a state. 'Events seriously disturbing public order' describes harm to 'public order'. While the four events are clearly likely to have an impact on people, this impact is not reflected in the terms of the events themselves." (pp. 124-125. Internal citations omitted). See also Chapters 6 and 7.

⁹⁶ Sharpe, n. 48, pp. 54-55.

GIP 12 breaks down Article I(2)'s definition into three broad elements, which need to be considered as part of a holistic assessment of a claim for refugee status. It provides that Article I(2) protects as refugees, persons who:

1. Are outside their country of origin;
2. Having been compelled to leave their place of habitual residence;
3. Because one or more of the situations listed in the definition exists in their country of origin or nationality.⁹⁷

3.4.1. Every Person

As a preliminary matter, GIP 12, Sharpe and Wood support the position that the definition applies to *all persons* who satisfy its criteria, including persons whose country of origin or nationality is outside the African continent.

GIP 12	Marina Sharpe	Tamara Wood
Applies to all persons within the jurisdiction of a State Party. Not limited to persons whose country of origin or nationality is in Africa. ⁹⁸	Field of application is not limited to African refugees. ⁹⁹	Includes those from outside Africa. ¹⁰⁰

3.4.2. ESDPO

ESDPO was the final event to be included in the definition; earlier versions had included "internal subversion", then "internal disorder".¹⁰¹ In line with the approaches of Edwards and Rankin, Wood argues that ESDPO "denotes a class of situations with shared qualitative (disturbance to *public order*) and quantitative (a *serious* disturbance) components."¹⁰² Sharpe also agrees that interpreting ESDPO "raises issues of both meaning and threshold".¹⁰³ GIP 12 frames its discussion of this particular enumerated event by explaining that the phrase ESDPO "should be construed, in line with the 1969 OAU Convention's humanitarian object and purpose".¹⁰⁴

⁹⁷ UNHCR, GIP 12, n. 61, paragraph 49. Internal citations omitted. Drawn directly from GIP 12.

⁹⁸ UNHCR, GIP 12, n. 61, paragraph 47.

⁹⁹ Sharpe, n. 48, pp. 42-43.

¹⁰⁰ Wood, n. 55, pp. 122-123. Wood explains why this question is not merely academic, but relevant to practice.

¹⁰¹ Wood, n. 55, p. 176 and Chapter 7 more generally.

¹⁰² Wood, n. 55, p. 189. Acknowledging the scope for potential overlap between the definition's four enumerated events, Wood argues that preserving their status as independent bases for refugee protection may continue to be important for promoting access to refugee protection in practice. (pp. 131-132).

¹⁰³ Sharpe, n. 48, p. 47.

¹⁰⁴ UNHCR, GIP 12, n. 61, paragraph 56.

(a) Does ESDPO cover event(s) of a non-international character?

Sharpe and Wood assert that ESDPO includes purely domestic disturbances.¹⁰⁵ GIP 12 is not explicit on the issue, but does highlight events that may not necessarily involve an international dimension in its discussion of ESDPO.

GIP 12	Marina Sharpe	Tamara Wood
Explanation of potential ESDPO encompasses events, which may not necessarily involve an international dimension. ¹⁰⁶	Does not exclude purely domestic disturbances. ¹⁰⁷	Historical evolution of phrase suggests that it was precisely intended to encompass wholly internal events. ¹⁰⁸

(b) Can a singular event result in a disturbance to public order?

Reference to plural “events” in the phrase ESDPO has raised the question whether a single “event” could also result in a serious disturbance to public order.¹⁰⁹ Both GIP 12 and Wood agree that one-off acts are sufficient for the purposes of the definition. Sharpe agrees implicitly, and addresses the matter indirectly through the lens of the “serious” threshold (which is discussed further below). Wood elaborates that the distinction between the singular and plural is unlikely to present issues in practice as “many ‘one-off’ events have impacts that last much longer than the event itself”¹¹⁰ and disturbances result “not only from a single event, but from its effects or the further events that follow it”.¹¹¹ Therefore, the “relevant disturbance to public order is ... not properly characterised a [*sic*] single, one-off event.”¹¹²

GIP 12	Marina Sharpe	Tamara Wood
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¹⁰⁵ The question of whether the term covers events of a non-international character had arisen due to the fact that the other three enumerated events all involve an international element.

¹⁰⁶ UNHCR, GIP 12, n. 61, paragraph 56.

¹⁰⁷ Sharpe, n. 48, pp. 47-48.

¹⁰⁸ Wood, n. 55, pp. 176-177.

¹⁰⁹ See e.g., *ibid.*, p.190.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, p. 191.

¹¹² *Ibid.* Wood elaborates that “part two of the definition’s test for refugee status – the ‘compelled to leave’ component – requires that the refugee face a real chance of serious harm owing to a relevant event if returned to his or her country of origin. A refugee fleeing a one-off event is unlikely to be able to satisfy this part of the definition’s criteria if the risk posed by the event ceases following the event itself.” Internal citations omitted.

<p>May be prompted by one-off acts or incidents, or a series of acts or incidents of a systematic or cumulative nature.¹¹³</p>	<p>The use of plural “events” rather than the singular “event” suggests that a one-time occurrence that does not itself lead to further disruption would not qualify as “serious”.¹¹⁴ In other words, a singular event with serious effects can qualify as ESDPO.</p>	<p>Does not require a series of acts or incidents. Agrees with GIP 12.¹¹⁵</p>
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(c) What is the meaning of “public order” and what constitutes a disturbance to public order?

The scope of ESDPO turns largely on the meaning of the technical legal term “public order”. A consensus position on its meaning in Article I(2) of the 1969 OAU Convention is difficult to ascertain from the three documents under scrutiny. The commentary appears to diverge on the outer reaches of the term “public order”. Nonetheless, particular aspects of Wood and Sharpe’s conclusions and GIP 12’s guidance do align to provide greater clarity on the term as it relates to Article I(2).

GIP 12’s four paragraphs on ESDPO discuss the phrase in its entirety, rather than breaking down the phrase into individual elements. This means a clear and precise conception of the meaning of “public order” as interpreted by UNHCR is unavailable.¹¹⁶ GIP 12 states that ESDPO “should be construed, in line with the 1969 OAU Convention’s humanitarian object and purpose, to include events that impact 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.”¹¹⁷ GIP 12 does, however, helpfully elaborate a non-exhaustive list of situations that may constitute ESDPO, as well as factual indicators that may evidence the existence of ESDPO, as they pertain to situations of armed conflict and violence. These are highlighted in section 5.1.

Both Sharpe and Wood discuss “public order” specifically and parse existing commentary. They review references to “public order” or “*ordre public*” in the 1951 Convention, other provisions of the 1969 OAU Convention, the 1984 Cartagena

¹¹³ UNHCR, GIP 12, n. 61, paragraph 57.

¹¹⁴ Sharpe, n. 48, p. 52.

¹¹⁵ Wood, n. 55, pp. 190-191.

¹¹⁶ However see also discussion in section 4.4.2(a) of this paper.

¹¹⁷ UNHCR, GIP 12, n. 61, paragraph 56.

Declaration, human rights treaties, and elsewhere in international law. Both recognize that the term often appears alongside “national security”. Sharpe explains that “the use of ‘public order’ alongside ‘national security’ in the ICCPR [International Covenant on Civil and Political Rights], as well as in articles 28 and 32 of the 1951 Convention, suggests that the term involves issues which, while serious, are less grave than those implicated by ‘national security’.”¹¹⁸ Sharpe synthesizes and draws on Rankin and Edwards in reaching her conclusions.¹¹⁹ She appears to agree with Rankin’s conclusion that public order is a concept that looks to the basic standards governing the State in its relation to the community and its members. She appears to agree with Edwards that public order can also relate to localized insecurity or chaos, that its meaning will depend on the context and each of administrative, social, political and moral order may be involved. Sharpe concludes by contending that “public order” on its ordinary meaning alone is a “very general term”, which may have been “included for precisely this reason, and its related ability to function as a ‘basket clause capturing a generic set of refugee producing situations’.”¹²⁰ For Sharpe, such an expansive meaning is consistent with the humanitarian object and purpose of the 1969 OAU Convention.

By contrast, Wood rejects the suggestion that ESDPO acts as a “basket clause”.¹²¹ She contends that “public order” refers to the level of law and order prevailing in a given country or region, which should be assessed according to the effective functioning of law and order mechanisms, including government, police, security and judicial mechanisms. Wood argues against the broader position that the term also encompasses notions of human rights and fundamental principles of society, notwithstanding the fact that the French version of the 1969 OAU Convention uses “*ordre public*” which does encapsulate such notions.¹²² Indeed, as Sharpe explains, the “concept of ‘ordre public’ is broad, not unlike the common law’s ‘public policy’.”¹²³ Wood’s more limited reading of “public order” is based on the use of the term in African regional human rights law and the significance of this when resolving the potential conflict between the English and the French versions of the 1969 OAU Convention.¹²⁴

Wood is perhaps the clearest in articulating what then, may constitute a *disturbance* to public order. A disturbance to public order (i.e., to the level of law and order prevailing

¹¹⁸ Sharpe, n. 48, p. 49.

¹¹⁹ *Ibid.*, pp. 48-49.

¹²⁰ *Ibid.*, p. 49, quoting Rankin, n. 77, p. 423. Sharpe also explains that Edwards expresses a contrary view, n. 78.

¹²¹ Wood, n. 55, p. 178.

¹²² *Ibid.* Unlike other analyses of ESDPO, which are largely confined to the meaning of the terms in the English version of the treaty, Wood also considers the meaning of the French term “*ordre public*”, which appears in the equally authoritative French version. She sets out the respective meanings under international law, noting the significant differences, and explains why the English-language meaning is preferred. (Chapter 7.1.3.2.)

¹²³ Sharpe, n. 48, p. 49.

¹²⁴ Wood, n. 55, Chapter 7.1.3.2.

in a given country or region) occurs when there is a disruption to the effective functioning of law and order mechanisms (including government, police, security and judicial mechanisms).¹²⁵ Whether there is a disturbance “should be assessed relative to the level of law and order that can usually be expected in a reasonably stable and well-functioning state or region” and not the “level of order [*sic*] that has historically prevailed in a particular state or region.”¹²⁶

GIP 12	Marina Sharpe	Tamara Wood
<p>ESDPO should be construed, in line with the Convention’s humanitarian object and purpose, to include events that impact the maintenance of public order (<i>ordre public</i>) 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.¹²⁷</p> <p>Each situation should be assessed individually.¹²⁸</p>	<p>On its ordinary meaning alone, public order is a very general term, which was perhaps included in Article I(2) for this reason and its ability to function as a basket clause capturing a generic set of refugee producing situations.¹²⁹</p>	<p>Public order refers to the level of law and order prevailing in a given country or region of origin. Public order should be assessed according to the effective functioning of law and order mechanisms, including government, police, security, and judicial mechanisms.</p> <p>A disturbance to public order occurs when there is disruption to the effective functioning of law and order mechanisms. This should be assessed relative to the level of law and</p>

¹²⁵ Ibid., 189 and Chapter 7.1.3.3.

¹²⁶ Ibid., 178.; see also Chapter 7.1.3.3. Wood elaborates that: “[a]ssessing a disturbance to law and order relative to the historically prevailing level of law and order in a country such as Somalia would ... result in the application of a higher threshold of disturbance than in a country where law and order mechanisms usually operate quite effectively. A differentiated approach such as this would be inconsistent with the context of the definition ... – in particular, with the 1969 Convention’s obligation on states parties to apply the Convention without discrimination, including as to race or nationality. It would also be inconsistent with the protection-oriented object and purpose of the 1969 Convention Where public order is compromised for a long period of time, the vulnerability and protection needs of the population arguably increase, and so a higher threshold for refugee status should not be imposed on such a population. An important implication of this interpretation is that there does not need to be a recent change in public order, nor a particular ‘triggering’ event, in order to establish the existence of ‘events seriously disturbing public order’. In some cases there may be a particular change or trigger, or indeed there may be several that cumulatively amount to a relevant disturbance. However, ‘events seriously disturbing public order’ may also be ongoing, such that in some states or regions the general operation of law and order mechanisms could be considered to be in a continual state of disturbance.” (pp. 196-197).

¹²⁷ UNHCR, GIP 12, n. 61, paragraph 56.

¹²⁸ Ibid., paragraph 57.

¹²⁹ Sharpe, n. 48, pp. 48-49.

		<p>order that can usually be expected in a reasonably stable and well-functioning state or region and not according to the level of law and order that has historically prevailed in a particular state or region.</p> <p>Establishing a disturbance to public order requires an assessment of the prevailing level of law and order against the level of law and order that could usually be expected in a generally stable and well-functioning state.¹³⁰</p>
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(d) What is a serious disturbance to public order?

GIP 12, Sharpe and Wood elaborate on the threshold of disturbance that would be necessary to ground a claim for refugee status. GIP 12 suggests that “public disorder events likely to disrupt the normal functioning of the institutions of the state and affect internal and external security and stability of the state and society” would be regarded as serious.¹³¹ Sharpe accepts this position, but questions the meaning of “external security of the state and society”.¹³² Wood acknowledges the difficulties inherent in determining the appropriate threshold in the abstract. She proposes a case-by-case analysis for determining if a given disturbance to public order should be regarded as serious, which takes into account the nature, extent and duration of the disturbance. Given the many ways in which public order may be seriously disturbed, Wood cautions against a closed list of criteria for establishing the existence of ESDPO. She does however, propose two indicia; these are: (1) the satisfaction of certain disturbance-related thresholds from elsewhere in international law; and (2) the presence of widespread violations of

¹³⁰ Wood, n. 55, p. 178 and Chapter 7.1.3.3, especially p. 196.

¹³¹ UNHCR, GIP 12, n. 61, paragraph 56.

¹³² Sharpe, n. 48, p. 52.

fundamental human rights.¹³³ Importantly, she acknowledges that these indicia are only and potentially indicative, but certainly not required or determinative to establish the existence of ESDPO.¹³⁴

GIP 12	Marina Sharpe	Tamara Wood
<p>The threshold of “serious” refers to public disorder events likely to disrupt the normal functioning of the institutions of the state and affect internal and external security and stability of the state and society.</p> <p>Provides insights on situations that may be regarded as ESDPO as well as possible factual indicators that may evidence the existence of ESDPO.¹³⁵</p>	<p>Accepts GIP 12 position, but notes the meaning of “external security of the state and society is not clear.”</p> <p>Indicates a preference for reference to the State <i>or</i> society in GIP 12, since State structures can be propped up through illegitimate means, such as unlawful use of force.</p> <p>The use of plural events rather than the singular event in ESDPO, suggests that a one-time occurrence that does not itself lead to further disruption would not qualify as “serious”.¹³⁶</p>	<p>The serious threshold is to be determined on a case-by-case basis, taking into account the nature, extent and duration of the disturbance to public order.</p> <p>Other indicia, including the satisfaction of disturbance-related thresholds from elsewhere in international law; and the presence of widespread violations of fundamental human rights, may provide evidence of the existence of ESDPO. However, neither is required to establish the existence of ESDPO as they are not determinative.¹³⁷</p>

3.4.3. *In Either Part or the Whole of his Country of Origin or Nationality*

The phrase, “in either part or the whole of his country of origin or nationality” attaches to the end of the phrase ESDPO in Article I(2). The three sources agree this phrase means it is not necessary for a putative refugee to show an enumerated event affects his or her

¹³³ One area of further research concerns analysing if widespread violations of fundamental human rights falls within the meaning of ESDPO under Article I(2) since widespread violations of human rights is not explicitly enumerated. This is in contrast to Conclusion III(3) of the 1984 Cartagena Declaration. See discussion in section 4.1. of this paper.

¹³⁴ Wood, n. 55, pp. 178, 197-198, and Chapter 7.1.3.5.

¹³⁵ UNHCR, GIP 12, n. 61, paragraphs 56, 58-59.

¹³⁶ Sharpe, n. 48, p. 52.

¹³⁷ Wood, n. 55, pp. 178, 197-198, and Chapter 7.1.3.5.

whole country. Sharpe contends that the qualification relates only to ESDPO and not the other enumerated events in the definition.¹³⁸ Wood’s analysis recognizes that the qualification may be relevant to other enumerated events. She also explains the importance of establishing the geographic scope of an event(s) for other aspects of the Article I(2) definition, particularly for determining whether a person was compelled to leave his or her place of habitual residence as a result of it (see section 3.4.5).¹³⁹

GIP 12	Marina Sharpe	Tamara Wood
<p>Not necessary to show that the relevant event(s) affects the whole of his or her country of origin or nationality.</p> <p>According to the ordinary meaning of the definition’s terms, ESDPO may take place in either part or the whole of the country.¹⁴⁰</p>	<p>Not necessary to show that the relevant event(s) affects the whole of his or her country of origin or nationality.</p> <p>Likely relates only to ESDPO and not the other enumerated events in Article I(2).¹⁴¹</p>	<p>Not necessary to show that the relevant event(s) affects the whole of his or her country of origin or nationality.</p> <p>Establishing geographic scope of an event(s) is important for determining whether a person was compelled to leave his or her place of habitual residence as a result of it (i.e., the place of habitual residence must be within the area affected by the event(s)).</p> <p>Rejects suggestion that this component of the definition removes the need to consider whether a putative refugee has an internal flight or relocation alternative.¹⁴²</p>

3.4.4. “Owing to” One of the Enumerated Events, a Refugee “Is Compelled to Leave”

¹³⁸ Sharpe, n. 48, p. 59.

¹³⁹ Wood, n. 55, p. 133.

¹⁴⁰ UNHCR, GIP 12, n. 61, paragraphs 57.

¹⁴¹ Sharpe, n. 48, p. 59.

¹⁴² Wood, n. 55, p. 133. Internal flight or relocation alternative is discussed in section 3.4.6 of this paper.

Wood and Sharpe explain that the common characterization of the regional refugee definition as “objective” has derived largely from the four enumerated events, which describe conditions in the country of origin rather than an individual’s predicament. They (as well as Edwards and arguably Rankin) have challenged this depiction, given the textual references to “compelled to leave” and “owing to” in the definition. GIP 12, Wood, and Sharpe (who also draws on jurisprudence) agree Article I(2) requires an assessment of the individual connection between the enumerated event and flight.¹⁴³

In Sharpe’s words “the mere existence of [an enumerated event] somewhere in the country of origin or nationality is not sufficient to ground a claim for refugee status under Article I(2).”¹⁴⁴

The second textual element suggesting that the nexus between the [enumerated event] and flight ought to be more than merely presumptive is ‘owing to’. The ordinary meaning of ‘owing to’ is analogous to ‘as a result of’, ‘due to’ or ‘because of’. Under the article I(2) definition, a refugee is someone who, as a result of, due to or because of [an enumerated event], flees his or her place of habitual residence. Put this way it becomes clear that flight must be connected to a risk of harm to the individual stemming from [an enumerated event].¹⁴⁵

For Sharpe, the nature of the nexus is elaborated by the “place of habitual residence” element and does not require in-depth scrutiny of the reasonableness of an individual’s flight. The question is one of geographic proximity between an enumerated event and an individual’s habitual residence.

Thus, in principle, refugee status under the 1969 Convention’s article I(2) should depend on an assessed, as opposed to an assumed, geographic nexus between the [enumerated event] and the individual’s flight. ... However, ... in situations in which the [enumerated event] affects the whole of the country of origin or nationality, the existence of such a nexus may, as a purely procedural matter, be presumed. Any other approach would belabour the obvious and, particularly in large-scale influxes, risks overwhelming already strained RSD [refugee status determination] processes.¹⁴⁶

GIP 12 also addresses this element noting that “[b]y including the language of ‘compulsion’ in the definition, Article I(2) ... emphasizes the seriousness of the

¹⁴³ See e.g., Wood, n. 55, Chapters 5.3.1, 5.3.2 and Chapter 8; Sharpe, n. 48, pp. 55-60.

¹⁴⁴ Sharpe, n. 48, p. 56.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, p. 59.

situation.”¹⁴⁷ As with Sharpe, GIP 12 seems to suggest that the relevant nexus is one of geographic proximity between an enumerated event and place of habitual residence. GIP 12 cites the dictionary meaning of “to compel” and explains that the “[r]eference 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, i.e. the situation must have an impact on the person’s place of habitual residence.”¹⁴⁸ Under GIP 12, what matters is whether “the situation in question is sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country”.¹⁴⁹ GIP 12 does not expand on when flight would be objectively reasonable, but does add that:

Article I(2) of the 1969 OAU Convention does not require a personalized or discriminatory threat or risk of harm. 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. As Article I(2) emphasizes the assessment of the seriousness of the situation in question more than motives for flight or the risk of harm, decision-makers should assess whether flight from the country of origin or nationality is objectively reasonable.¹⁵⁰

Wood’s commentary is more detailed and arguably, in some respects out of step with GIP 12. She begins by explaining why the connection between the enumerated event and an individual’s flight is a particularly important component of the definition’s criteria for refugee status. Given how widely the enumerated events are drawn, being clear about if and when persons exposed to such events will qualify for refugee status is necessary to ensure only those with a genuine need for international protection are entitled to it, so as to maintain the integrity of the refugee regime and State commitment to it.¹⁵¹ Wood contends that determining whether “an individual was compelled to leave requires an assessment of the risk of harm to the person if returned to his or her country of origin”.¹⁵² Specifically, she “proposes that a person who faces a *real chance* of experiencing *serious harm* if returned should be considered ‘compelled to leave’ within the meaning of the definition.”¹⁵³ Wood draws these thresholds of risk (i.e. real chance) and harm (i.e. serious harm) from the “dominant understanding of a ‘well-founded fear of being persecuted’” under the 1951 Convention.¹⁵⁴

¹⁴⁷ UNHCR, GIP 12, n. 61, paragraph 50.

¹⁴⁸ *Ibid.* The paragraph elaborates that “[t]he ‘place of habitual residence’ element has no other separate legal effect.”

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, paragraph 51. Internal citations omitted.

¹⁵¹ Wood, n. 55, p. 208; Sharpe also highlights these overarching objectives.

¹⁵² *Ibid.*, p. 209.

¹⁵³ *Ibid.* Emphasis added.

¹⁵⁴ *Ibid.*, p. 210.

Against Wood's argument, a footnote in GIP 12 appears to suggest that a threat or risk of harm is not necessary to be granted refugee protection under Article I(2):

Article I(2) of the 1969 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 1969 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.¹⁵⁵

In this respect, Wood questions whether, "a refugee really [can] be objectively compelled to leave if he or she does not face a threat or risk harm"?¹⁵⁶ While the above qualification in GIP 12 may have been added to deter consideration of a "personalized or discriminatory threat or risk of harm", which is not required under Article I(2), this ambiguity would benefit from further clarity.¹⁵⁷

Wood explains that pursuant to her interpretation, the inquiry is also a forward-looking assessment of the risk of future harm.¹⁵⁸ Sharpe agrees.¹⁵⁹ Wood elaborates that "a prospective assessment of the risk of harm to the refugee should take account of events that have not even occurred yet, but that are imminent or likely to occur in the near future", since the "nature of the [enumerated events] is inherently fluid and situations can change frequently and quickly. [For example,] a relatively minor disturbance [can] escalate into a serious disturbance of public order."¹⁶⁰ GIP 12 also arguably recognizes this possibility, at least implicitly.¹⁶¹

Under Wood's interpretation:

¹⁵⁵ UNHCR, GIP 12, n. 61, footnote 110.

¹⁵⁶ Wood, n. 55, p. 214.

¹⁵⁷ The text that attaches to footnote 110 of GIP 12 states that "Article I(2) of the 1969 OAU Convention does not require a personalized or discriminatory threat or risk of harm." (Paragraph 51.)

¹⁵⁸ Wood recognizes the "compelled to leave" requirement is phrased in the past tense, "apparently pointing to a retrospective assessment of the refugee's reasons for flight, rather than an assessment of the future risk of harm." (p. 211) She explains that a retrospective assessment would exclude *sur place* claims. (p. 212) Wood elaborates that "[w]hile the ordinary meaning ... may suggest a purely retrospective assessment of a refugee's flight, such an assessment would appear to be at odds with the protection-orientated purpose of the refugee regime ... which emphasises protection from *future* harm. It would be difficult to reconcile with the definition's context ... most notably, with the 1969 Convention's prohibition on *refoulement*, which prevents states parties to the 1969 Convention from returning a refugee to a situation 'where his life, physical integrity or liberty *would be* threatened.'" (p. 214).

¹⁵⁹ Sharpe, n. 48, p. 62.

¹⁶⁰ Wood, n. 55, p. 225.

¹⁶¹ UNHCR, GIP 12, n. 61, paragraph 52 which notes that *sur place* claims are accepted under Article I(2).

the 'compelled to leave' requirement calls for an objective assessment of the risk of serious harm to the refugee if returned to his or her country of origin. Such an assessment should take into account the predicament and circumstances of the individual refugee, but it does not require an investigation of his or her subjective beliefs or state of mind.¹⁶²

In other words, the inquiry is on the individual's objectively ascertainable circumstances, rather than his or her subjective state of mind. Sharpe also supports an objective and individualized assessment of risk.¹⁶³ Sharpe, Wood and GIP 12 are aligned in accepting that a personalized risk of harm is not needed. Even though the assessment is at the individual level, this does not preclude groups of persons from being protected under the definition.

According to Wood:

assessing the risk of serious harm faced by an individual involves weighing a range of factors, including the severity of the potential harm, the current circumstances and future prospects in the country of origin, and individual circumstances. ... In many, if not most, cases, demonstrating the requisite risk of harm under the [regional] refugee definition will not be onerous. It is evident that the definition's four enumerated events were chosen ... precisely because of their propensity to cause harm to affected populations. In many cases, mere presence in an area affected by one of these events will be sufficient to demonstrate a real chance of serious harm, and thus to satisfy the compelled to leave requirement. However, this will not always be the case. As has been noted in relation to the [1951 Convention] definition, 'some persons will experience different degrees of harm as the result of a common threat or action'. Where the relevant enumerated event has less serious or widespread impacts ... mere exposure to the event may not be sufficient. In such cases a more detailed inquiry into the applicant's circumstances may be required in order to demonstrate that he or she would face a real chance of serious harm from the event if returned to his or her country of origin.¹⁶⁴

This commentary seems to suggest that notwithstanding Wood's test and insistence on inquiring into whether an individual will face a real chance of serious harm if returned, in some cases geographic proximity to a enumerated event (through habitual residence,

¹⁶² Wood, n. 55, p. 222.

¹⁶³ Sharpe, n. 48, pp. 55-57.

¹⁶⁴ Wood, n. 55, pp. 219-220. Internal citations omitted.

as discussed below) may be sufficient to establish the requisite compulsion.¹⁶⁵ In this respect, the three sources appear to align. In other situations however, Wood seems to suggest the need for a more fine-grained inquiry into the objective circumstances facing an individual.

For Wood, a number of other aspects are pertinent for assessing whether a putative refugee was compelled to leave. These include: (1) a geographical connection between the enumerated event and place of habitual residence; (2) a connection between the enumerated event and the risk of harm faced such that it is “owing to” the event that an individual is “compelled to leave”; and (3) the availability of an internal flight alternative.¹⁶⁶ Habitual residence and internal flight alternative are addressed in the next subsections. With regard to the “owing to” element of the definition, Wood explains that under the regional refugee definition, the risk of serious harm to an individual if returned should arise due to an enumerated event.¹⁶⁷

[I]t means that a person who faces a real chance of serious harm that is unconnected to one of the four enumerated ... events will not be entitled to protection It does not follow that the event must be the *only* consideration in the refugee’s flight, however. Such a requirement would be unnecessary and inconsistent with the approach taken under the international refugee definition, according to which the fear of persecution does not need to be the sole reason for the refugee’s flight. It would also be at odds with the nature of flight itself. It is well recognised that, even in situations of severe distress, individuals nearly always have multiple reasons for leaving.¹⁶⁸

Accordingly, a causal connection between the relevant event and flight is required, although the event need only be a direct or indirect contributing factor to flight, not necessarily the only or even the main cause of flight.¹⁶⁹

[A] risk of serious harm may be connected to an enumerated event in one of two ways. The first is directly – for example, where a situation ... poses a threat of serious harm to individuals and communities in the affected zone. However, the

¹⁶⁵ This is particularly relevant where refugee status is determined on the basis of a group, or so-called “prima facie” approach, rather than through a more detailed and fine-grained individual approach. For more on these approaches, see e.g., Weerasinghe, In Harm’s Way, n. 15, section 2.7. In the context of a group-based approach, refugee status could, for example, be decided based on an assessment of nationality and place of habitual residence, without the need for each refugee to demonstrate the existence of an ESDPO and the risk to him or her.

¹⁶⁶ Wood, n. 55, pp. 210-211 and Chapter 8 more generally.

¹⁶⁷ Ibid., p. 209 and Chapter 8.2.3.6.

¹⁶⁸ Ibid., p. 230. Internal citations omitted.

¹⁶⁹ Ibid., p. 209 and Chapter 8 more generally.

risk of harm may also be indirect – not an immediate effect of the relevant qualifying event but nevertheless ‘owing to’ it.¹⁷⁰

GIP 12	Marina Sharpe	Tamara Wood
<p>Cites the meaning of the verb ‘to compel’. By including the language of “compulsion” in the definition, Article I(2) emphasizes the seriousness of the situation.</p> <p>Reference to one’s “place of habitual residence” must be understood as a part of the compulsion to leave and seek refuge in another country. That is, the situation must have an impact on the place of habitual residence. In essence this component of the definition will be satisfied if the enumerated event is sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country.</p> <p>Does not require a personalized or discriminatory threat or risk of harm. Emphasizes</p>	<p>Requires a nexus between one of the enumerated events and the individual’s flight.</p> <p>This nexus or connection is one of geographic proximity between the enumerated event and the person’s habitual residence.¹⁷³</p>	<p>When there is a <i>real chance</i> of experiencing <i>serious harm</i> if returned to country of origin or nationality.</p> <p>Forward-looking assessment of risk of future harm that takes account of events yet to occur.</p> <p>Inquiry is on the individual’s objectively ascertainable circumstances. That is, the assessment should take into account the <i>predicament</i> and circumstances of the individual refugee, but it does not require an investigation of his or her subjective beliefs or state of mind.</p> <p>Risk of serious harm to the individual if returned must arise due to an enumerated event. That is, a causal connection is required, but the event need only be a contributing factor to</p>

¹⁷⁰ Ibid., p. 231.

¹⁷³ Sharpe, n. 48, pp. 55-60.

<p>the assessment of the seriousness of the situation in question more than motives for flight or the risk of harm. Accordingly, the assessment is whether flight from the country of origin or nationality is objectively reasonable. However, GIP 12 does not expand on when the flight would be objectively reasonable.¹⁷¹</p> <p>A footnote also provides that “Article I(2) ... 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) ... protecting people from being returned to their 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.”¹⁷²</p>		<p>flight, not necessarily the only or even the main cause of flight.</p> <p>A risk of harm may be connected to an enumerated event directly (where a situation poses a threat of serious harm to individuals and communities in affected zones) or indirectly (where the risk of harm is not an immediate effect of the relevant qualifying event, but nonetheless, owing to it).</p> <p>A full analysis of the compelled to leave requirement includes a geographical connection between the relevant enumerated refugee-producing event and the refugee’s place of habitual residence. It also requires an assessment of the availability of an internal flight alternative.¹⁷⁴</p>
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3.4.5. Place of Habitual Residence

¹⁷¹ UNHCR, GIP 12, n. 61, paragraphs 50-51.

¹⁷² *Ibid.*, footnote, 110.

¹⁷⁴ Wood, n. **Error! Bookmark not defined.**, Chapter 8.

GIP 12, Sharpe and Wood parse the role played by the phrase, “place of habitual residence”, in Article I(2) since a putative refugee must be “compelled to leave his place of habitual residence”. Consensus exists that an enumerated event must have an impact on the place of habitual residence of the putative refugee. This requires an assessment of the geographic scope of an event and an individual’s place of habitual residence, both of which are questions of fact to be assessed in light of available evidence.

GIP 12	Marina Sharpe	Tamara Wood
<p>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, i.e. the situation must have an impact on the person’s place of habitual residence.</p> <p>The “place of habitual residence” element has no other or separate legal effect.</p> <p>Thus, when the situation in question is sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country, she or he needs to be protected.¹⁷⁵</p>	<p>The Article I(2) definition requires physical proximity between an enumerated event and a person’s place of habitual residence. In other words, refugee status under Article I(2) depends on an assessment of whether the enumerated event affected a person’s home.¹⁷⁶</p>	<p>Only those who reside in an area impacted by one of the definition’s enumerated events will be entitled to protection.</p> <p>Place of habitual residence is a question of fact to be determined on the basis of available evidence. Certain criteria may guide such a determination. At a minimum, habitual residence implies more than mere presence or short-term residence. Persons visiting an area when an enumerated event occurs, are not, habitually resident.</p> <p>The geographic scope of an event is also a question of fact to be determined in light of available evidence. The potential for future changes in the geographical scope of an</p>

¹⁷⁵ UNHCR, n. 61, paragraph 50.

¹⁷⁶ Sharpe, n. 48, pp. 57-59.

		event must be considered. ¹⁷⁷
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3.4.6. Internal Flight or Relocation Alternative

A consensus position on whether the Article I(2) definition obviates consideration of an internal flight or relocation alternative (IFA) is elusive. GIP 12 states that an IFA is not generally relevant for refugees coming within the purview of Article I(2) of the 1969 OAU Convention.¹⁷⁸ GIP 12 does, however, include a possible exception relating to situations where a given enumerated event is *indisputably* confined to a particular part of the country of origin or to a particular region or city and the State is willing and able to protect its citizens in other areas.¹⁷⁹ Sharpe bases her conclusion that IFA is not a relevant consideration under Article I(2) on a review of State practice, arguing the 1969 OAU Convention must be viewed as neutral to the possibility and therefore, the question of whether refugee status determination (RSD) under Article I(2) should consider IFA is best answered through a review of subsequent State practice in the application of the treaty. While acknowledging limited State practice evidenced through case law, she asserts that the available cases universally reject the IFA requirement.¹⁸⁰

Notwithstanding widespread commentary to the contrary, Wood rejects suggestions that consideration of IFA is irrelevant to RSD under Article I(2), and argues that a principled interpretation supports its application.¹⁸¹ In contrast to Sharpe, Wood asserts that State practice with respect to IFA has been equivocal. She contends that the question of whether a person can access meaningful and effective protection elsewhere in the country remains in play since the 1969 OAU Convention, like the 1951 Convention, establishes a system of international protection for persons who are unable to secure the protection of their home State.¹⁸² Given this overarching purpose of the refugee regime and the 1969 OAU Convention, those who can access meaningful and effective protection in their country, are not entitled to it elsewhere.

Wood bases her argument on the text of Article I(2) and its context. With respect to the text, Wood argues that the phrase “compelled to leave his place of habitual residence *in*

¹⁷⁷ Wood, n. 55, Chapter 8.2.3.4.

¹⁷⁸ UNHCR, GIP 12, n. 61, paragraph 60; See also 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, <https://www.refworld.org/docid/3f2791a44.html>, accessed: July 2009 (GIP 4), paragraph 5. Note that in contrast to GIP 12, GIP 4 is unequivocal, stating that “[c]onsideration of possible internal relocation areas is not relevant for refugees coming under the purview of Article I(2) of the [1969 OAU Convention].”

¹⁷⁹ UNHCR, GIP 12, n. 61, paragraph 60.

¹⁸⁰ Sharpe, n. 48, pp. 60-62.

¹⁸¹ Wood, n. 55, Chapter 8.2.3.5.

¹⁸² Wood, Nansen Initiative Paper, n. 18, pp. 28-29; Wood, *ibid.*

order to seek refuge in another place outside his country of origin or nationality”, suggests that where meaningful and effective protection is available, a person may have been compelled to leave his or her place of habitual residence, but is arguably not compelled to seek refuge in a place *outside* that country.¹⁸³ On context, Wood argues her stance is supported by the 1969 OAU Convention’s central concern with not returning persons to “a territory where his life, physical integrity or liberty would be threatened”.¹⁸⁴ She concludes that return to a place that is safe would not breach the Convention’s *non-refoulement* provision, but accepts that the breadth of the enumerated events is such that cases where IFA is available and reasonable may be few.¹⁸⁵

GIP 12	Marina Sharpe	Tamara Wood
<p>Consideration of an IFA is not generally relevant to RSD under Article I(2), which covers situations that affect either “part” or the “the whole” of the refugee’s territory. As the focus is on situations that seriously disrupt State and societal structures, people cannot be required to relocate to other parts of the country, even if the situation in these parts may be less disrupted.</p> <p>The only exception is if the situation is indisputably confined to a particular part of the country, region or city, and the State is able and willing to protect its citizens in other areas.</p> <p>Consideration of the likely</p>	<p>IFA is not a relevant consideration in RSD under Article I(2).¹⁸⁷</p>	<p>IFA is a relevant consideration under Article I(2).</p> <p>However the nature of the circumstances that give rise to a refugee claim under the regional refugee definition, and the breadth of the enumerated refugee-producing events, mean that cases where an IFA is available and reasonable may be few.¹⁸⁸</p>

¹⁸³ Wood, n. 55, Chapter 8.2.3.5; 1969 OAU Convention, n. 27, Article I(2). Emphasis added.

¹⁸⁴ Wood, *ibid*; 1969 OAU Convention, *ibid.*, Article II(3).

¹⁸⁵ Wood, *ibid*. Wood, Nansen Initiative Paper, n. 18, pp. 28-29.

¹⁸⁷ Sharpe, n. 48, pp. 60-62.

¹⁸⁸ Wood, n. 55, Chapter 8.2.3.5.

spread of the situation and accompanying violence and disorder into other areas would need to be carefully assessed, with a forward-looking perspective. ¹⁸⁶		
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3.4.7. Sur Place Claims

Finally, GIP 12, Sharpe and Wood all agree that Article I(2) permits *sur place* claims.

GIP 12	Marina Sharpe	Tamara Wood
<i>Sur place</i> claims are accepted under the OAU Convention. ¹⁸⁹	Yes. A restrictive approach would create a protection gap for individuals visiting the putative host country. ¹⁹⁰	Yes. A prospective assessment of the risk of harm allows for the inclusion of <i>sur place</i> claims. Assessment must take into account events that are imminent or likely to occur. The nature of the Article I(2)'s enumerated events is inherently fluid. Likely developments in the country of origin must be taken into account in assessing a real chance of future harm if returned. ¹⁹¹

4. REGIONAL REFUGEE DEFINITION IN LATIN AMERICA

4.1. Introduction

Unprecedented population movements, beginning in the 1960s and culminating in the 1980s, formed the backdrop to the development of regional refugee criteria in Latin

¹⁸⁶ UNHCR, GIP 12, n. 61, paragraph 60.
¹⁸⁹ UNHCR, GIP 12, n. 61, paragraph 52.
¹⁹⁰ Sharpe, n. 48, p. 60-62.
¹⁹¹ Wood, n. 55, Chapter 8.2.3.5.

America. Long-established regional instruments and custom for granting diplomatic or territorial asylum through a constitutive act to politically persecuted individuals who were often high-profile and well-resourced was untenable in the face of large-scale, lesser-resourced groups fleeing political turmoil, human rights violations, violence and conflict *en masse*. Ratification and implementation of the 1951 Convention's regime, by contrast a declaratory status, which required evidence of a well-founded fear of being persecuted on Convention grounds, was also in its infancy in the region. Growing recognition of the limitations of these existing frameworks and institutions (that of the regional notion of *asylum* and of *refugee status* as reflected in the 1951 Convention) to address burgeoning cross-border movements and protection needs, gave rise to the 1984 Cartagena Declaration and its regional refugee definition.

Conclusion III(3) of the 1984 Cartagena Declaration, recommends as follows:

To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, *includes among refugees persons who have fled their country because their lives, safety 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.*¹⁹²

Three years earlier, in 1981, a conclusion adopted at a colloquium organized in Mexico had called for protection to be extended to a category of persons very similar to those covered under Article I(2) of the OAU Convention.¹⁹³ One notable difference was the inclusion of "mass violations of human rights" as a specific circumstance that could also ground a claim for refugee status.¹⁹⁴ Further efforts to promote the adoption of a regional definition were undertaken by the Inter-American Commission on Human Rights (IACHR) – which had promoted a definition that included the element of a threat to life

¹⁹² 1984 Cartagena Declaration, n. 28, Conclusion III(3). Emphasis added.

¹⁹³ See e.g., Fortín, "Doctrinal Review of the Broader Refugee Definition Contained in the Cartagena Declaration", in UNHCR, "Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees", 2005, <https://www.acnur.org/fileadmin/Documentos/archivo/3868.pdf>, accessed: July 2019; Cantor and Trimiño Mora, "A Simple Solution to War Refugees?", in Cantor and Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, 2014, Brill Nijhoff.

¹⁹⁴ Cantor and Trimiño Mora, *ibid.*; Fortín, *ibid.*

and consideration of internal remedies,¹⁹⁵ – and by UNHCR, which had undertaken a UNHCR-Organization of American States (OAS) comparative legal study that endorsed the Mexico conclusion’s broader criteria.¹⁹⁶ The 1984 Cartagena Declaration’s regional refugee definition includes elements from Article I(2) of the 1969 OAU Convention, the definition proposed at the Mexico colloquium and the definition promoted by the IACHR.

While prominent institutions, including the United Nations General Assembly, the OAS General Assembly, the Inter-American Court of Human Rights (IACrtHR), the IACHR and UNHCR’s ExCom have recognized and pronounced support, and subsequent State-attended decennial commemoration events have endorsed and elaborated on its landmark conclusions, the 1984 Cartagena Declaration is nonetheless, non-binding.¹⁹⁷ This means the terms in Conclusion III(3) of the Declaration should not necessarily be subject to the same rules of treaty interpretation in the VCLT.

Cantor and Trimiño Mora explain that influential earlier studies (discussed below), which sought to provide interpretive guidance on the regional refugee definition have approached the task as if the Declaration were a treaty, “firstly by treating its language as if it had been drafted with a similar degree of precision to that of a treaty and, secondly, by assimilating the terminology to recognisable concepts of international law.”¹⁹⁸ Since the “Cartagena Declaration is not a treaty and is not required to be interpreted as such”, they contend that “any attempt to strictly apply the rules of treaty interpretation ... risks imputing to the Declaration’s exhortatory language a degree of weight and precision that was not necessarily intended by the adopting States.”¹⁹⁹ In addition, Cantor and Trimiño Mora rightly point out that unlike the 1969 OAU Convention, which imposes binding obligations on State parties, States in Latin America who incorporate the regional refugee criteria into domestic laws and policies are not obliged to do so, or to follow the language precisely. As a consequence, the regional refugee criteria have legal effect only through domestic incorporation.²⁰⁰

¹⁹⁵ Ibid.; Arboleda, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism”, *International Journal of Refugee Law*, 1991, Vol. 3, No.2.

¹⁹⁶ Cantor and Trimiño Mora, *ibid.*

¹⁹⁷ Espiell et al., “Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America”, 1990, <https://www.refworld.org/docid/4370ca8b4.html>, accessed: July 2019; UNHCR, GIP 12, n. 61, paragraph 63.

¹⁹⁸ Cantor and Trimiño Mora, n. 193, p. 209.

¹⁹⁹ Ibid., p. 213..

²⁰⁰ Ibid.. pp. 213-215.

The domestic laws of 15 States incorporate regional refugee criteria drawn from 1984 Cartagena Declaration.²⁰¹ However, there is a large degree of variation from the language in Conclusion III(3), with elements omitted or added and changes in language. For example, some States have included a requirement that refugees be “forced to leave their country”, excised the threat element entirely, or changed the list of enumerated circumstances that could ground a claim in refugee status.²⁰² This level of variation means any attempt to understand and provide interpretive guidance on the scope and meaning of the definition in Conclusion III(3) will be subject to, *inter alia* States’ domestic implementation, domestic jurisprudential and regulatory interpretations and interactions with Constitutional provisions, including Constitutional rights to asylum.²⁰³

In a 2018 Advisory Opinion, the IACrtHR Court unanimously opined that:

Within the framework of the inter-American system the right to seek and receive asylum is configured as a human right to *seek and receive international protection* in a foreign territory, including refugee status *according to the relevant United Nations instruments or the corresponding national laws*, and territorial asylum according to the various inter-American conventions on the subject, under the terms set forth in paragraphs 61 to 163.²⁰⁴

In paragraph 132 of the same opinion, the Court elaborates:

Furthermore, in light of the progressive development of international law, the Court has considered that the *obligations deriving from the right to seek and receive asylum are operative with respect to those persons who meet the requirements of the expanded definition of the Cartagena Declaration*.²⁰⁵

Bearing in mind this background, the ensuing discussion seeks to highlight existing commentary on the regional refugee definition in the 1984 Cartagena Declaration to foster understanding of its applicability to international protection in the context of nexus-related cross-border movements. Interpretive guidance on the scope of the regional

²⁰¹ Cantor, “Cross-Border Displacement, Climate Change and Disasters: Latin America and the Caribbean; Study Prepared for UNHCR and the PDD at Request of Governments Participating in the 2014 Brazil Declaration and Plan of Action”, 2019, UNHCR and PDD, <https://www.unhcr.org/protection/environment/5d4a7b737/cross-border-displacement-climate-change-disasters-latin-america-caribbean.html>, accessed: November 2019, p. 23.

²⁰² See e.g., Cantor and Trimiño Mora, n. 193, pp. 213-215; See also Reed-Hurtado, “The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America”, June 2013, UNHCR, <https://www.refworld.org/docid/51c801934.html>, accessed: July 2019.

²⁰³ On Constitutional rights to asylum, see e.g., Harley, “Regional Cooperation and Refugee Protection in Latin America: A ‘South-South’ Approach”, *International Journal of Refugee Law*, 2014, Vol. 26, No. 1.

²⁰⁴ *Advisory Opinion OC-25/18, “The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights”*, Inter-American Court of Human Rights, (IACrtHR), 30 May 2018, section VI Opinion, paragraph 2. Emphasis added.

²⁰⁵ Internal citations omitted. Emphasis added. Cross refers to *Advisory Opinion OC-21/14*, n. 236, paragraph 79.

refugee definition and the meaning of its terms is necessary to promote cohesion, predictability, and implementation in practice. As noted below, States have recognized this need, and have requested guidance on the regional refugee definition.

4.2. Commentary on the Regional Refugee Definition in Latin America

The *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (CIREFCA Principles and Criteria)* was the first document to provide guidance on the regional refugee definition.²⁰⁶ It was prepared within the framework of the 1989 International Conference on Central American Refugees (CIREFCA) by three eminent persons engaged in the Inter-American system, and was formally endorsed by the 1994 San José Declaration on Refugee and Displaced Persons (**San José Declaration**).²⁰⁷ Two subsequent analyses, developed in the context of the 20th anniversary of the 1984 Cartagena Declaration, are also referenced as pertinent for understanding the scope of the regional refugee definition. *Reflections on the Application of the Broader Refugee Definition of the Cartagena Declaration in Individual Refugee Status Determination Procedures* by Santiago Corcuera and *Doctrinal Review of the Broader Refugee Definition Contained in the Cartagena Declaration* by Antonio Fortín draw, to varying extents, on the CIREFCA Principles and Criteria and its legal approach.²⁰⁸

As with the regional refugee definition in Africa, an authoritative UNHCR handbook with legal interpretation, explanatory information and procedural standards for determining refugee status pursuant to the criteria in Conclusion III(3) does not exist. However, GIP 12, which includes 25 substantive paragraphs on Conclusion III(3), provides what can be characterized as the most authoritative UNHCR guidance on its scope.²⁰⁹ A set of *Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration*, which derived from an expert roundtable held in 2013 in Montevideo as part of the overall process towards the development of GIP 12 (**Montevideo Summary Conclusions**) also provides pertinent commentary.²¹⁰ As with

²⁰⁶ Espiell et al., n. 197. This paper does not provide an independent analysis of the object and purpose of the 1984 Cartagena Declaration or the meaning of terms in the regional refugee definition. Rather, this paper draws on scholarly and grey literature and UNHCR documents to highlight consensus and tension points. Accordingly, this paper does not cross-refer to provisions in primary sources, such as the 1984 Cartagena Declaration, to add further weight to the points raised in this section IV.

²⁰⁷ San José Declaration on Refugee and Displaced Persons (adopted by the International Colloquium in Commemoration of the Tenth Anniversary of the Cartagena Declaration on Refugees), 5-7 December 1994, <https://www.refworld.org/docid/4a54bc3fd.html>, accessed: July 2019 (San José Declaration).

²⁰⁸ Corcuera, "Reflections on the Application of the Broader Refugee Definition of the Cartagena Declaration in Individual Refugee Status Determination Procedures", in UNHCR, "Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees", 2005, <https://www.acnur.org/fileadmin/Documentos/archivo/3868.pdf>, accessed: July 2019; Fortín, n. 193.

²⁰⁹ UNHCR, GIP 12, n. 61, paragraphs 61-85.

²¹⁰ UNHCR, "Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration", 7 July 2014, <https://www.refworld.org/docid/53c52e7d4.html>, accessed: July 2019 (Montevideo Summary Conclusions). Participants included experts from six countries in the region, drawn from government, judiciary, legal practitioners, international organizations, non-governmental organizations and academia.

the 1969 OAU Convention, earlier UNHCR Guidelines on International Protection include some discussion of the scope of Conclusion III(3).²¹¹ More generally, since 2013, UNHCR has begun to include guidance on assessing claims pursuant to the regional refugee criteria in its profile- and country-specific Eligibility Guidelines, which advise decision makers on how to assess claims from asylum seekers fleeing specific situations.²¹² These guidelines provide insights on UNHCR's views regarding the scope and applicability of Conclusion III(3).

Beyond the above-mentioned UNHCR documents, the CIREFCA Principles and Criteria, the analyses by Cocuera and Fortín, as well as the UNHCR-commissioned *Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America* by Reed-Hurtado and *A Simple Solution to War Refugees* by Cantor and Trimiño Mora,²¹³ salient English-language commentary on the regional definition's terms, particularly OCSDDPO, appears limited. In this context, drawing on the sources highlighted, and where relevant, the instruments adopted at decennial commemorations of the 1984 Cartagena Declaration, the following subsections synthesize commentary on the scope of pertinent terms in Conclusion III(3).

It is worth bearing in mind that while the CIREFCA Principles and Criteria received endorsement in the San José Declaration and appears to be regarded as 'authoritative' guidance by some practitioners,²¹⁴ more recently, its interpretations have been subject to significant criticism and its utility in providing meaningful guidance is questionable. For example, the Montevideo Summary Conclusions indicate "[t]here was consensus on the need to move beyond the, overly legalistic, approach presented in [the CIREFCA Principles and Criteria] 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."²¹⁵ Cantor and Trimiño Mora's critique of the document highlights its overly legalistic approach, its incongruence with practice, as well as the diminished distinctiveness of the situational elements.²¹⁶ Reed-Hurtado's critique echoes many of the same sentiments.

In its interpretation of the objective situations, especially in light of the evolution of international law, [the CIREFCA Principles and Criteria] does not adequately restate the law. First the exclusive reliance on IHL [International Humanitarian

²¹¹ See e.g., Guidelines on International Protection Nos. 4, 5, and 11, available at: <https://www.refworld.org/docid/5cb474b27.html>, accessed: July 2019.

²¹² See n. 66.

²¹³ Reed-Hurtado, n. 201, which focuses predominantly on practice; Cantor and Trimiño Mora, n. 193.

²¹⁴ See e.g., Reed-Hurtado, n. 201.

²¹⁵ UNHCR, Montevideo Summary Conclusions, n. 210, footnote 5.

²¹⁶ Cantor and Trimiño Mora, n. 193.

Law] for guidance on situations of generalized violence, foreign aggression, internal armed conflicts and other circumstances that seriously disturb public order is problematic. ... Situations such as 'generalized violence' and 'other circumstances that seriously disturb public order' are precisely those types of situations that reveal the gaps in protection and the need for other branches of international law to be considered in order to afford appropriate protection to people in need.²¹⁷

Reed-Hurtado adds that:

The document has transcended unabated and without critique and continues to be the most frequently, if not the only, source cited by most national authorities to interpret the regional refugee definition in current day practice. Given the limited doctrinal development of the regional refugee definition, this document from the 1980s has been wrongly elevated in importance by practitioners eager for guidance. ... The uncritical reliance on the [CIREFCA Principles and Criteria] compounded by a general on-going absence of appropriate guidelines is a key factor in explaining the slow development of the regional refugee definition.²¹⁸

This shift away from the interpretation in the CIREFCA Principles and Criteria is also arguably reflected in the fact that while the San José Declaration (10th anniversary) reaffirms its validity, the Mexico Declaration and Plan of Action (20th anniversary) references it simply within a suite of regional instruments that have contributed to progressive development of international refugee law,²¹⁹ while the Brazil Declaration and Plan of Action (30th anniversary) does not mention it at all.²²⁰ More importantly, chapter one of the Mexico Plan of Action states:

The Cartagena Declaration's refugee definition has been included in the national legislation of a significant number of countries. Nevertheless, during the preparatory process it was observed that *there is a need to clarify and specify the criteria for its interpretation, in particular, the restrictive interpretation of the exclusion clauses, the interpretation of the specific grounds and their application to individual cases*, using the jurisprudence of the human rights organs and tribunals and taking into account the legitimate security concerns of States, through a broad and open dialogue, with a view to systematizing doctrine and state practice.²²¹

²¹⁷ Reed-Hurtado, n. 201., p. 15.

²¹⁸ Ibid., pp. 15-16. Internal citations omitted.

²¹⁹ Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, 19 November 2004, <https://www.refworld.org/docid/424bf6914.html>, accessed: July 2019 (Mexico Declaration and Plan of Action), preamble.

²²⁰ Brazil Declaration and Plan of Action, 3 December 2014, <https://www.refworld.org/docid/5487065b4.html>: accessed: July 2019.

²²¹ Mexico Declaration and Plan of Action, n. 219, Mexico Plan of Action, Chapter One. Emphasis added.

Chapter two on “The International Protection of Refugees”, under “Research and Doctrinal Development”, the Mexico Plan of Action provides that:

Within this cooperation framework, it was recommended to initiate a consultative process aimed at *clarifying the content and scope of Conclusion III* of the Cartagena Declaration on Refugees, in order to strengthen the international protection of refugees in Latin America. *In this respect, the development of a Handbook on Procedures and Criteria for Application of the Refugee Definition of the Cartagena Declaration is foreseen.*²²²

In this context, chapter two includes specific requests to UNHCR (in cooperation with human rights bodies of the Inter-American System, as well as research and academic institutions) to implement a number of projects, including the development of the aforementioned handbook to deepen knowledge of international refugee law.²²³ Finally, GIP 12, which draws heavily on the Montevideo Summary Conclusions, does not limit itself to the restrictive interpretations in the CIREFCA Principles and Criteria.

4.3. Object, Purpose and Potential

At the outset, it is worth considering the objectives and purposes of the 1984 Cartagena Declaration and views on its prospective scope. The context leading up to the adoption of the regional definition was briefly noted in section 4.1. According to a 1992 UNHCR Working Group document, “[t]he immediate objective of the Cartagena Declaration was to provide a much-needed common framework, unifying criteria and programmes in order to meet the demands of the refugee situation in Central America.”²²⁴ An evaluation of the CIREFCA process indicates that the 1984 Cartagena Declaration “became an important complement” to the 1951 Convention “by responding to broad protection needs in the particular context of Central America.”²²⁵

²²² Ibid., Chapter Two. Emphasis added.

²²³ Ibid.

²²⁴ UNHCR, “Persons Covered by the OAU Convention Governing 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/199/SCP/CRP.6, <https://www.refworld.org/docid/3ae68cd214.html>, July 2019, paragraph 33. It elaborates that, “[i]n addition, the Declaration performed two important functions. One being to establish regional legislation dealing specifically with refugees; another to make governments of countries in the region more sensitive to the need to eliminate causes leading to the massive displacement of persons from their countries of origin.” The Montevideo Summary Conclusions reinforce these aspects. It states that “[t]he Colloquium focused on legal and humanitarian problems affecting those displaced by conflict and violence in Central America and, because of this focus, serves as a common and neutral language for states and other stakeholders to develop a harmonized regional refugee protection framework in the context of humanitarian crises. 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.” (n. 210, paragraph 1).

²²⁵ UNHCR, “Review of the CIREFCA Process”, 1 May 1994, <https://www.unhcr.org/research/evalreports/3bd410804/review-of-the-cirefca-process.html>, accessed: July 2019, paragraph 31.

Further insight on the objectives, as well as evolving views and expectations of the scope and utility, of the 1984 Cartagena Declaration can be gleaned from the declarations and plans of action adopted during decennial commemorative events, which witnessed increasing participation by States and other stakeholders. In the 1994 San José Declaration, adopted at the 10th anniversary, participants' conclusions included:

To recognize the overriding importance of the Cartagena Declaration in addressing refugee situations generated by the Central American conflicts of the past decade, and, consequently, to stress the appropriateness of resorting to the Declaration in order to *find solutions both to pending problems and to the new challenges posed by uprootedness* in Latin America and the Caribbean.²²⁶

To reaffirm the validity of the principles contained in the Declaration as elaborated in the ... [CIREFCA Principles and Criteria] ... and to reiterate, in particular, the value of the refugee definition contained in the Cartagena Declaration, which, by being based upon objective criteria, has constituted an *effective humanitarian instrument in support of State practice in extending international protection to persons in need thereof*, beyond the scope of the [1951 Convention].²²⁷

A decade later, the preamble to the Mexico Declaration and Plan of Action adopted by participating governments at the 20th anniversary in 2004 recognizes Latin America's contribution to the progressive development of international refugee law and in this respect, explicitly references the 1984 Cartagena Declaration, the CIREFCA Principles and Criteria, as well as the San José Declaration.²²⁸ The document also recognizes "the *enduring relevance* of the Cartagena Declaration ... and its importance in *continuing to guide public policies for refugee protection*" as well as the "importance of the [Declaration's] principles ... to the provision of protection ... and the need to carry out a more detailed analysis of its recommendations".²²⁹ In the Mexico Plan of Action, the preamble explains efforts to "analyze jointly the main challenges to the protection of refugees and other persons in need of international protection today in Latin America, and to identify courses of action to assist countries of asylum in the search for appropriate solutions within the *pragmatic and principled spirit* of the Cartagena Declaration on Refugees."²³⁰

²²⁶ San José Declaration, n. 207, section II. Emphasis added.

²²⁷ Ibid. Emphasis added.

²²⁸ Mexico Declaration and Plan of Action, n. 219, preamble.

²²⁹ Ibid. Emphasis added.

²³⁰ Ibid., Mexico Plan of Action, preamble. Emphasis added.

And finally in 2014, at the 30th anniversary event, participating governments adopted the Brazil Declaration and Plan of Action.²³¹ At the outset, this document states that the commemorative process on the 1984 Cartagena Declaration has “enabled us to *identify new humanitarian challenges* and to propose effective solutions to improve the protection for refugees, displaced and stateless persons in the region, in a *spirit of flexibility and innovation*”.²³² The preamble:

Highlight that the extended refugee definition of the Cartagena Declaration has been incorporated in large measure by the majority of Latin American countries in their internal legislation, and recognize the existence of new challenges regarding international protection for some countries of the region that need to *continue making progress in the application of the regional extended refugee definition, thus responding to the new international protection needs* caused, among others, by transnational organized crime[.]²³³

Although the above paragraph explicitly refers only to “transnational organized crime”, other paragraphs of the Declaration also highlight “changes in the dynamics of international migration within the continent, particularly the *increase in mixed movements*, which may include people who are in need of international protection”.²³⁴ And, for the first time in a decennial commemorative document, the preambular paragraphs also recognize challenges related to cross-border displacement due to climate change and ‘natural’ disasters.²³⁵

The specific humanitarian context and purposes that drove the development of the 1984 Cartagena Declaration and its conclusions are emphasized by these instruments. As reflected in the declarations and plans of action adopted at commemoration events, the 1984 Cartagena Declaration was arguably intended as a humanitarian, pragmatic and principled instrument for addressing the problems of the day, but also with sufficient flexibility and scope for innovation to endure and accommodate new challenges and international protection needs.

Also in 2014, in an unanimous IACrTHR Advisory Opinion on the *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*:

the Court notes that the developments produced in refugee law in recent decades

²³¹ Brazil Declaration and Plan of Action, n. 220.

²³² *Ibid.*, preamble. Emphasis added.

²³³ *Ibid.* Emphasis added.

²³⁴ *Ibid.* Emphasis added.

²³⁵ *Ibid.*

have led to state practices, which have consisted in granting international protection as refugees to persons fleeing their country of origin due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order. Bearing in mind the progressive development of international law, the Court considers that the obligations under the right to seek and receive asylum are operative with respect to those persons who meet the components of the expanded definition of the Cartagena Declaration, which responds not only to the dynamics of forced displacement that originated it, *but also meets the challenges of protection derived from other displacement patterns that currently take place*. This criterion reflects a tendency to strengthen in the region *a more inclusive definition* that must be taken into account by the States to grant refugee protection to persons *whose need for international protection is evident*.²³⁶

In their approach to interpretation, Cantor and Trimiño Mora seek to “lay the foundations for adopting a broader and more contextual interpretation” to “recover the original intended emphasis upon flexibility in the Cartagena definition” given that it “was not limited to the contemporary historical circumstances but was also intended to provide scope for addressing refugee problems ‘that could arise in the future’.”²³⁷ Cantor and Trimiño Mora highlight the remarks of two former UNHCR staff members who were closely involved in the drafting of the 1984 Cartagena Declaration, contending that a “serious analysis of [the Declaration] must surpass the static vision that focuses exclusively on the content of the document adopted in 1984.”²³⁸ They also note that “the need for latitude and flexibility was recognized by earlier studies [referring to, for example the CIREFCA Principles and Criteria] even if the Conventional approach that they employed could not guarantee the end result.”²³⁹ Reed-Hurtado also argues that the CIREFCA Principles and Criteria “should be recalled primarily as a historical reference. Contemporary interpretation should recover the ‘spirit’ of Cartagena and invoke the basic principles of protection.”²⁴⁰

In this regard, the Montevideo expert meeting aptly summarizes that the “humanitarian- and protection-orientation of the instrument calls for an inclusive, evolving and flexible interpretation.”²⁴¹ GIP 12 largely mimics this wording,²⁴² having noted that the adoption of the 1984 Cartagena Declaration “represented a humanitarian and pragmatic response

²³⁶ *Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”*, IACrtHR, 19 August 2014, paragraph 79. Emphasis added.

²³⁷ Cantor and Trimiño Mora, n. 193, pp. 209, 215, and 208, respectively.

²³⁸ *Ibid.*, p. 215; See also Reed-Hurtado, n. 201., p.11.

²³⁹ *Ibid.*, p. 216.

²⁴⁰ Reed-Hurtado, n. 201., p.16.

²⁴¹ UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 3.

²⁴² UNHCR, GIP 12, n. 61, paragraph 65.

to the movements of people from conflict and other situations characterized by indiscriminate threats to life, security or freedom.”²⁴³ Before elaborating on the meaning of each of the enumerated circumstances, GIP 12 explains that its interpretation is “[g]uided by the protection purpose of the Cartagena Declaration, [and that] the circumstances referred to in the Cartagena refugee definition are to be given their ordinary meaning, wherever possible, and interpreted in an evolutionary way so that they remain relevant to situations not foreseeable when the Cartagena Declaration was drafted.”²⁴⁴ Importantly, both the Montevideo Summary Conclusions and GIP 12 frame the guidance on the regional refugee definition by explaining that “where the ordinary meaning is not clear, the text should be given a purposive or teleological interpretation.”²⁴⁵

4.4. Conclusion III(3) Test for Refugee Status

With the preceding background in mind, this section turns to the scope of the regional refugee definition in Conclusion III(3) and the meaning of key terms, as elucidated from the sources highlighted above. UNHCR’s GIP 12 undergirds the discussion. This is supplemented by the Montevideo Summary Conclusions, as well as scholarly commentary, in particular Cantor and Trimiño Mora’s paper, and to a lesser extent Fortín’s, paper. Less emphasis is placed on the CIREFCA Principles and Criteria, for the reasons discussed earlier. Corcuera’s analysis does not feature in detail either as the approach appears more closely tied to the CIREFCA Principles and Criteria. Indeed, Cantor and Trimiño Mora take aim at both Corcuera’s and Fortín’s analyses, explaining that they were influenced by the overly legalistic approach of the CIREFCA Principles and Criteria, and noting, *inter alia*, that the “interpretations advanced for supposedly distinct situation elements of the Cartagena definition is diminished overall by the large degree of definitional overlap.”²⁴⁶ By contrast, Cantor and Trimiño Mora emphasize a dynamic “interpretive approach that lays greater emphasis on the purpose and context of the 1984 Cartagena Declaration”, to “avoid the shortcomings of an overly legalistic or technical interpretation” and in doing so to also “respond to the consistent request of regional States for a more coherent interpretation” of the regional refugee definition.²⁴⁷

As with Article I(2) of the 1969 OAU Convention, GIP 12 identifies three elements. Persons who are protected as refugees under Conclusion III(3) are those who:²⁴⁸

²⁴³ Ibid., paragraph 61.

²⁴⁴ Ibid., paragraph 60. See also, UNHCR, Montevideo Summary Conclusions, n. 210, paragraphs 1-3.

²⁴⁵ UNHCR, GIP 12, n. 61, paragraph 65; Montevideo Summary Conclusions, n. 210, paragraph 3.

²⁴⁶ Cantor and Trimiño Mora, n. 193, p. 211 and more generally pp. 209-211.

²⁴⁷ Ibid., p.215.

²⁴⁸ UNHCR, GIP 12, n. 61, paragraph 68. The elements are drawn directly from GIP 12.

1. Are outside their country;
2. Because their life, security or freedom has been threatened,²⁴⁹
3. As a result of circumstances referred to in the definition existing in their country.

4.4.1. Outside Their Country

The Montevideo Summary Conclusions provide that the concept of being “out of the country” should be interpreted in line with the 1951 Convention definition’s understanding to encompass not only the country of nationality/citizenship but also, in the case of stateless persons, the country of habitual residence.²⁵⁰

4.4.2. OCSAPO

In Latin America, OCSAPO is the counterpart to the 1969 OAU Convention’s ESDPO. Despite acknowledgment in the CIREFCA Principles and Criteria that the enumerated grounds in the regional refugee definition are intended to be broad and encompassing, its interpretative guidance states “generalized violence, foreign aggression, internal conflicts and other circumstances which have seriously disturbed public order ... should better be understood in light of international humanitarian law provisions relating to armed conflicts which have categorized several situations involving different levels of violence.”²⁵¹ By contrast, GIP 12 explains that the:

circumstances referred to in the Cartagena refugee definition include, but are not limited to, generalized violence, foreign aggression, internal conflicts, and massive violation of human rights. Further, other circumstances which have seriously disturbed public order in the country may also result in threats to persons’ lives, security or freedom forcing them to flee their country.²⁵²

(a) Meaning of Public Order

In its interpretive guidance on OCSAPO, GIP 12 cross refers to paragraphs 56-59 which provide guidance on ESDPO in Article I(2) of the 1969 OAU Convention. Acknowledging that the notion of “public order” does not have a universally accepted definition, GIP 12

²⁴⁹ Footnote 125 of GIP 12 indicates that: “The original Spanish text of Conclusion III(3) of the Cartagena Declaration refers to ‘seguridad’, which is properly translated into English as ‘security’ rather than ‘safety’, which is the word used in the Cartagena Declaration”.

²⁵⁰ UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 13.

²⁵¹ Espiell et al., n. 197, paragraphs 26 and 28, respectively. On the interpretation provided by the CIREFCA Principles and Criteria, OCSAPO “must be man-made and cannot constitute natural disasters. They may, however, amount to no more than situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as long as they seriously disturb public order.” (Paragraph 33. Internal citations omitted).

²⁵² UNHCR, GIP 12, n. 61, paragraph 70.

explains that the term “can be interpreted in the context of the Cartagena refugee definition as referring to the peace, internal and external security as well as stability of the state and society, plus the normal functioning of the institutions of the state, based on respect for the rule of law and human dignity.”²⁵³ Such an explicit explanation of the specific notion of *public order* was not provided for Article I(2) of the 1969 OAU Convention, although very similar language featured in GIP 12’s explanation of what might amount to an ESPDO.²⁵⁴

(b) Serious

GIP 12’s discussion of OCSDPO does not elaborate separately on the threshold of “serious”, as it does for ESDPO. With respect to ESDPO, GIP 12 states that the “threshold of ‘serious’ refers to public disorder events likely to disrupt the normal functioning of the institutions of the state and affect internal and external security and stability of the state and society”, whereas with respect to OCSDPO, this language is captured within the notion of “public order”.²⁵⁵ GIP 12 states that OCSDPO “can take place in times of armed conflict within the meaning of IHL [International Humanitarian Law] and in peacetime.”²⁵⁶ This recognition, that serious disturbances to public order may occur in war and peacetime is not explicitly mentioned in GIP 12’s discussion of Article I(2)’s ESDPO, but it is certainly implied.²⁵⁷

The GIP 12 paragraphs on OCSDPO do not explicitly discuss the types of situations that could amount to OCSDPO or list factual indicators that would evidence the existence of OCSDPO, having done so in the paragraphs on Article I(2). However, the paragraphs on Conclusion III(3) explicitly note that “a declaration of a state of emergency should not be seen as a prerequisite for the existence of a circumstance seriously disturbing public order, even though it would ordinarily be indicative of such a situation.”²⁵⁸ This explanation is provided because the IACrtHR has defined circumstances seriously disturbing public order by reference in part to the acts of States derogating from their human rights obligations in cases where a state of emergency has been declared.²⁵⁹

(c) Relationship between the other Enumerated Circumstances and OCSDPO

²⁵³ UNHCR, GIP 12, n. 61, paragraph 78; See also UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 24.

²⁵⁴ For Fortín’s discussion of this notion, see n. 193, p. 279;

²⁵⁵ UNHCR, GIP 12, n. 61, paragraph 56 and 78, respectively.

²⁵⁶ *Ibid.*, paragraph 78. See also UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 24.

²⁵⁷ *Ibid.*, paragraphs 56-59.

²⁵⁸ *Ibid.*, paragraph 79; See also UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 25.

²⁵⁹ *Ibid.*

Moreover, GIP 12 does not elaborate on the relationship between each of the enumerated circumstances, aside from explaining that the “other” in OCSDPO “allows states to grant protection in circumstances beyond those related to the four situations referred to in the Cartagena refugee definition.”²⁶⁰ In the discussion of Article I(2), situations of “generalized violence”, are encompassed within ESDPO, whereas “generalized violence” constitutes a specific enumerated circumstance under Conclusion III(3).²⁶¹ Similarly, in the discussion of ESDPO, GIP 12 indicates that situations of non-international armed conflict (NIAC) within the meaning of International Humanitarian Law (IHL) would constitute ESDPO, whereas “internal conflicts” are another specifically enumerated circumstance under the Cartagena refugee definition.²⁶² This arguably implies that OCSDPO, which delineate the outer boundaries of the situations that could support a claim for refugee status in the region, may overlap with the other four enumerated circumstances, and even subsume some of them (such as generalized violence and internal conflicts). Such an interpretation may also have implications for how ESDPO is interpreted.

The Montevideo Summary Conclusions indicate that some experts considered the “inclusion of the language of ‘other’ could reflect an intention to provide states with some flexibility to grant protection in circumstances that either *do not meet the threshold of violence* of the other four situations reflected in the Cartagena refugee definition, or which *do not match the character* of the other situations.”²⁶³ Fortín’s very brief discussion of this aspect also states that:

The notion of ‘public order’ relates to the peace and security of society. Public order may be seriously disturbed if the mechanisms that society has for the prevention, investigation and punishment of crimes becomes so ineffective that individuals are left defenceless. A situation like this may arise in the context of strife, riots or internal upheavals that the authorities are unable to control. The effect of this clause would, therefore, *be to expand the protection net, by covering people fleeing situations in which the level and/or extent of violence are below the threshold that would be required to be categorized as ‘generalized violence’*.²⁶⁴

But equally, and adding credence to the argument that some enumerated events may be subsumed by OCSDPO, at the Montevideo meeting, one expert had suggested that “for the Cartagena refugee definition to be activated/triggered, it would only be necessary to

²⁶⁰ UNHCR, GIP 12, n. 61, paragraph 80.

²⁶¹ *Ibid.*, paragraph 58.

²⁶² *Ibid.*, paragraphs 56.

²⁶³ Montevideo Summary Conclusions, n. 210, paragraph 26. Emphasis added.

²⁶⁴ Fortín, n. 193, p. 279. Emphasis added. Corcuera’s discussion of this notion draws directly from the CIREFCA Principles and Criteria.

meet the threshold set in the [OCSDPO] element of the definition (taking into account that the other four situational events presuppose/imply the alteration of public order.”²⁶⁵ In their paper, Cantor and Trimiño Mora discuss the same argument.

[S]ince the words ‘other circumstances’ clearly suggest that this element functions as a general minimum threshold that renders precise definition of the preceding elements largely irrelevant for the purposes of qualification for refugee status. A focus on ‘circumstances seriously disturbing public order’ as the main referent for the objective situation element is therefore, appropriate, as persons fleeing the situations described by other elements will also fall into this more general one.²⁶⁶

Participants at the Montevideo expert meeting had cautioned against such an approach, since OCSDPO is the least applied in State practice,²⁶⁷ a common interpretive understanding of OCSDPO appears limited and because such an approach could render immaterial the other four enumerated circumstances thereby, detracting from the objective of extending the reach of refugee protection.²⁶⁸ Nonetheless, the preceding discussion suggests further clarity is needed on the relationship and any overlap between the enumerated circumstances in Conclusion III(3) and on how any interpretations cohere with the interpretations of Article I(2)’s enumerated grounds.

4.4.3: Enumerated Circumstances and Link to Threats

(a) Nature of the Harm to Life, Security or Freedom

GIP 12 provides little guidance on what constitutes harm to each of life, security and/or freedom, besides stating that the *whole phrase*, “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.”²⁶⁹ Cantor and Trimiño Mora suggest that the “nature of the harm required ... has not been the subject of any great controversy.”²⁷⁰

The objective of promoting international protection pursuant to the regional refugee definition arguably warrants greater clarity since available guidance does not examine how the nature of harm to life, security or freedom differ, overlap or interact.

²⁶⁵ UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 27.

²⁶⁶ Cantor and Trimiño Mora, n. 193, pp. 216-217.

²⁶⁷ In contrast, Cantor and Trimiño Mora suggest that OCSDPO “has the advantage of being a concept which many Latin American States have experience of applying within their jurisdictions such that it is amenable to local understandings.” (Ibid., p.217)

²⁶⁸ UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 27.

²⁶⁹ UNHCR, GIP 12, n. 61, paragraph 83. See also, Fortin, n. 193; Espiell et al., n. 197; Corcuera, n. 208.

²⁷⁰ Cantor and Trimiño Mora, n. 193, p.211.

Understanding the types of harms to life, the types of harm to security, or the types of harm to freedom that would be sufficient to support a claim could be valuable. In other words, there may be merit in explaining the outer boundaries of harm necessary under the regional refugee definition.

(b) Link between Enumerated Circumstances and Threats to Life, Security or Freedom

Commentary appreciates the need to establish a link between the existence of an enumerated circumstance and a threat(s) to life, security or freedom.²⁷¹ Under Conclusion III(3), refugees are persons “who have fled their country *because* their lives, safety or freedom have been *threatened* by [an enumerated circumstances].”²⁷² GIP 12 provides that the “‘threat’ or risk element in the definition connotes the possibility of harm being inflicted on a person, a group or a whole population; it does not imply that the harm has actually materialized.”²⁷³

According to GIP 12, the focus of the enquiry is not on the personal circumstances of an individual fleeing such threats, but rather on the objective circumstances in the country of origin, since the definition is orientated towards circumstances that affect groups or whole populations.²⁷⁴ In this regard, the “link between the circumstance and the threat should not be interpreted in such a manner as to curtail or restrict unnecessarily the scope of international protection granted to persons fleeing their country, for example by requiring an individualized assessment of the risk to life, security or freedom.”²⁷⁵ Indeed, pursuant to GIP 12, “spatial/geographical proximity of the circumstance to the person”, would be sufficient to satisfy the link or nexus required under the regional definition.²⁷⁶ In other words, it seems that as long as a given enumerated situation presents the possibility of harm to life, security or freedom, as assessed on an objective basis, the inquiry at the individual level will focus on geographical/spatial proximity to the enumerated circumstance. GIP 12 does not elaborate on whether the geographical/spatial proximity must relate to a person’s habitual residence.²⁷⁷

Cantor and Trimiño Mora arrive at the same broad conclusion regarding geographical/spatial proximity in their proposal for a more dynamic, contextual and purposive approach. Having argued that the “threat” element “should be understood, in

²⁷¹ See e.g., UNHCR, GIP 12, n. 61; UNHCR, Montevideo Summary Conclusions, n. 210; Fortín, n. 193; Espiell et al., n. 197; Corcuera, n. 208.

²⁷² Emphasis added.

²⁷³ UNHCR, GIP 12, n. 61, paragraphs 81; See also, UNHCR, Montevideo Summary Conclusions, n. 210, paragraphs 28-29.

²⁷⁴ UNHCR, GIP 12, n. 61, paragraphs 81-82; See also UNHCR, Montevideo Summary Conclusions, *ibid.*

²⁷⁵ UNHCR, GIP 12, n. 61, paragraph 81.

²⁷⁶ *Ibid.* See also, UNHCR, Montevideo Summary Conclusions, n. 210, paragraphs 28.

²⁷⁷ See section 3.4.5 for discussion of habitual residence in Article I(2).

principle, at a group level as designating those sectors of the population whose fundamental interests are threatened”, since the regional definition “is primarily concerned with identifiable groups of displaced persons”, they explain that the “concept of ‘threat’ relates to objective events that occur in the context of territorial space”.²⁷⁸ Accordingly, “[i]n practice, the groups of persons protected by the Cartagena definition will thus be defined primarily by the territorial scope of the situational elements, i.e. fleeing from regions where the events disturbing public order are sufficiently serious.”²⁷⁹ They support the application of a low standard of proof for determining whether lives, security or freedom of persons or groups are threatened by a given enumerated circumstance, and support the position in GIP 12 that “the very concept of ‘threat’ clearly implies that it need not have been consummated.”²⁸⁰ The stance that the regional definition is primarily group orientated does not, in their view, prevent application through individualized approaches.²⁸¹

Earlier studies do not elucidate additional insights on the threat element or its link to the enumerated circumstances. For example, the CIREFCA Principles and Criteria frames the focus of international protection around “the need to protect the physical integrity of the person” and explains that when in a particular instant there is a threat to the right to life, security, and liberty of a person, including the right not to be subjected to arbitrary arrest or detention or to torture as defined in international law, this element is satisfied.²⁸² Corcuera and Fortín’s analyses appear to equate the threat element with that of a well-founded fear of persecution, requiring direct threats and discrimination.²⁸³ In their critique, Cantor and Trimiño Mora explain:

the more that the ‘threat’ element is treated as equivalent to the subjective discrimination required for a ‘well-founded fear of persecution’, the more the scope of the Cartagena definition begins to approximate that of the Refugee Convention. There is no requirement of discriminatory, intentional or individualised aspect to the harm against which the Cartagena definition protects and introducing such a requirement makes it largely redundant as a tool for extending the scope of international protection provided under the Refugee Convention.²⁸⁴

²⁷⁸ Cantor and Trimiño Mora, n. 193, p. 220.

²⁷⁹ Ibid.

²⁸⁰ Ibid., p. 221.

²⁸¹ More generally, see UNHCR, “Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status”, 24 June 2015, <https://www.refworld.org/docid/555c335a4.html>, accessed: July 2019. See also, In Harm’s Way, n. 15, section 2.7.

²⁸² Espiell et al., n. 197, paragraph 27.

²⁸³ Fortín, n. 193; Corcuera, n. 208.

²⁸⁴ Cantor and Trimiño Mora, n. 193, p. 212.

Reed-Hurtado's review of practice in Latin America suggests these fears have been realized with decision makers conflating the assessment of claims under the regional refugee definition and the 1951 Convention definition.²⁸⁵ The CIREFCA Principles and Criteria, which appear to have been the principal source of guidance seems to have influenced how the regional refugee definition (and domestic variations) is implemented in practice.²⁸⁶ Guidance on the threat element, the relevance of direct and indirect threats, types of harm and differences between the elements of the 1951 Convention and the regional refugee definition, *inter alia*, may merit attention, particularly in light of State requests for detailed guidance and concerns about practical implementation.

4.4.4. Internal Flight or Relocation Alternative

As with the 1969 OAU Convention's Article I(2), GIP 12 dismisses the applicability of an IFA under Conclusion III(3), except where an enumerated circumstance "is isolated to a particular part of the country or to a particular region or city, and where the state is able and willing to protect its citizens in those areas."²⁸⁷ The application of such an exception would require a careful assessment of the "likely spread of the situation and the accompanying violence and disorder into other areas ... with a forward-looking perspective."²⁸⁸ This is notwithstanding the fact that the 1984 Cartagena Declaration definition does not include similar wording to Article I(2) (i.e. in the whole or part of the country).

4.4.5. Sur Place Claims

Available commentary, including GIP 12, suggests *sur place* claims are accepted.²⁸⁹ This stance is supported by the position that the "threat" element of the definition connotes the possibility of harm being inflicted on a person, not necessarily that the harm has actually materialized, and commentary on a forward-looking assessment.

²⁸⁵ Reed-Hurtado, n. 201., e.g., pp.21-23; Reed-Hurtado states that: "[o]ne of the greatest obstacles in the development of the regional refugee definition (and its national variations) as an authoritative source of law and an autonomous basis for extending protection for persons fleeing one of the objective situations is that authorities do not interpret the definitional elements in their own terms." (p. 21)

²⁸⁶ See e.g., *ibid.*

²⁸⁷ UNHCR, GIP 12, n. 61, paragraphs 85.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*, paragraph 69; The Montevideo Summary Conclusions state that a person may qualify as a refugee under the regional refugee definition, "where there is a reasonable possibility that the harm will come to be if the person remains in the country or he or she returns to it. This is in line with the purpose of the Cartagena refugee definition of extending protection to those who are at risk of the effects of conflict and violence but who do not meet the requirements of the 1951 Convention refugee definition." (n. 210, paragraphs 36.); See also Cantor and Trimiño Mora who state that "[g]iven the Cartagena definition's *raison d'être* of extending protection to persons fleeing the effects of conflict and violence but who do not meet the requirements of the Refugee Convention, the terminology of 'have been threatened' should thus be applied in a flexible and not unduly legalistic manner." (n. 193, p. 221.); Fortín's analysis also concludes that *sur place* claims should be accepted under the regional definition. He concludes his analysis by submitting "the expression 'persons who have fled the country' should be understood as if the text read 'persons who have fled or who remain out of their country'." Internal emphasis omitted. (Fortín, n. 193, pp. 269-270.)

5. APPLICABILITY AND APPLICATION IN NEXUS SITUATIONS

Section II highlighted nexus dynamics in different countries and regions to demonstrate the diversity of interactions between conflict and/or violence and disaster and/or the adverse effects of climate change. Sections III and IV discussed the scope of the regional refugee definitions in Article I(2) of the 1969 OAU Convention and Conclusion III(3) of the 1984 Cartagena Declaration, respectively. Against this backdrop, this section turns to the applicability and application of the regional refugee definitions. It discusses:

1. The applicability of ESDPO and OCSDPO to situations of conflict or violence.
2. The applicability of ESDPO and OCSDPO to disaster situations, including those influenced by the adverse effects of climate change, as well as evidence of State practice in Africa and Latin America; and
3. The applicability of ESDPO and OCSDPO to nexus situations (i.e., where the above dynamics interact), and evidence of State practice in Africa and Latin America.

5.1. Conflict or Violence

The regional refugee definitions in the 1969 OAU Convention and the 1984 Cartagena Declaration support claims for refugee status from people fleeing situations of conflict or violence. This conclusion is unequivocal. In GIP 12, UNHCR's authoritative interpretive guidelines relating to claims for refugee status in situations of armed conflict and violence, UNHCR explains that armed conflict and violence are the major causes of contemporary refugee movements.²⁹⁰ Background and expert materials produced to inform the development of GIP 12, UNHCR's profile- and country specific Eligibility Guidelines, scholarly literature and State practice, reinforce and support these conclusions. Indeed, both of the regional refugee instruments and definitions were developed in the context of, and as a response to, movements associated with these root causes.

In addition to the other enumerated events listed in Article I(2), and other circumstances listed in Conclusion III(3), ESDPO and OCSDPO also ground claims for refugee status in

²⁹⁰ UNHCR, GIP 12, n. 61, paragraph 1. GIP 12 defines "situations of armed conflict and violence" as: "situations that are marked by a material level or spread of violence that affects the civilian population. Such situations may involve violence between state and non-state actors, including organized gangs, and violence between different groups in society. Further, such situations may include violence between two or more states, between states and non-state armed groups, or between various non-state armed groups. Any particular classification of an armed group, for example as criminal or political, is not necessary or determinative for the purpose of refugee status determination. Further, while in some circumstances situations of armed conflict and violence referred to in these Guidelines may be categorized as an international (IAC) or a non-international (NIAC) armed conflict within the meaning of international humanitarian law (IHL), such categorization is not required for the purpose of refugee status determination. Many situations of armed conflict and violence are not designated as an armed conflict for IHL purposes, yet the means employed and their consequences may be just as violent or harmful. Other labels – such as a situation of generalized or indiscriminate violence – have also been used by decision-makers to describe situations of armed conflict and violence." (paragraph 5, internal citations omitted).

situations of armed conflict or violence. The above-mentioned sources reinforce this understanding. Notwithstanding its focus on armed conflict and violence, GIP 12 provides important insights on the types of situations that could be regarded as ESDPO or OCSDPO and the types of factual indicators that may evidence the existence of each. Pursuant to GIP 12, situations that may be regarded as ESDPO or OCSDPO:²⁹¹

1. “[M]ay be categorized as an IAC [International Armed Conflict] or NIAC within the meaning of IHL, but may also include events not categorized as an armed conflict within the meaning of IHL, involving violence by or between different groups in society or between the state and non-state actors.”²⁹²
2. “[A]lso include 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 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.”²⁹³

Moreover, the substantive sections of GIP 12 which focus on the 1984 Cartagena Declaration, elaborate that “[p]eople fleeing gang violence or violence by organized criminal groups may ... fall under one or more of the circumstances mentioned in the Cartagena refugee definition.”²⁹⁴

Non-exhaustive factual indicators of ESDPO or OCSDPO, as listed in GIP 12, are:

1. A declared state of emergency;
2. Violations of IHL including war crimes;
3. Acts of terrorism;
4. A significant number of people killed, injured or displaced;
5. The closure of schools;
6. A lack of food, medical services and supplies, and other vital services such as water, electricity and sanitation;

²⁹¹ As noted in section 4.4.2(a) of this paper, UNHCR’s guidance in paragraphs 56-59 of GIP 12 appears to relate not only to ESDPO but also OCSDPO.

²⁹² UNHCR, GIP 12, n. 61, paragraph 56.

²⁹³ *Ibid.*, paragraph 58.

²⁹⁴ *Ibid.*, paragraph 84; More generally see UNHCR, “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs”, March 2010, <https://www.refworld.org/docid/4bb21fa02.html>, accessed: July 2019 (Guidance Note on Gangs); Boulton, “Living in a World of Violence: An Introduction to the Gang Phenomenon”, July 2011, UNHCR, <https://www.unhcr.org/protection/globalconsult/4e3269629/23-living-world-violence-introduction-gang-phenomenon-michael-boulton-july.html>, accessed: July 2019.

7. A change in, or collapse of, government institutions and services, political systems or the police and justice system; and
8. The imposition of parallel or informal justice and administrative systems; and/or non-state actors controlling state territory.²⁹⁵

Further insights on situations that UNHCR has deemed to amount to ESDPO or OCSDPO can be gleaned from UNHCR's profile- or country-specific Eligibility Guidelines, which provide advice to support decision-makers to assess claims under the regional refugee definitions.²⁹⁶

The preceding discussion demonstrates that in situations of conflict and/or violence, those who cross borders have the potential to be recognized as refugees pursuant to the regional refugee definitions in Africa or Latin America due to ESDPO or OCSDPO, respectively. State practice reinforces the foregoing conclusions.

In Africa, of the four enumerated events, Sharpe explains the significance of ESDPO, noting "it is currently the cause of flight most frequently employed in the adjudication of refugee status under Article I(2)."²⁹⁷ Summary Conclusions from a UNHCR expert roundtable held in South Africa in support of the development of GIP 12 elaborate that ESDPO "is the most commonly used ground, including to persons fleeing armed conflict, serious internal disturbances, gross violations of human rights, or other similar situations."²⁹⁸ By contrast, GIP 12 and other commentary indicate that in Latin America, OCSDPO appears to be the least frequently applied by national adjudication bodies in the determination of refugee claims pursuant to the regional refugee definition.²⁹⁹ Although, Cantor and Trimiño Mora note that OCSDPO "has the advantage of being a concept which many Latin American States have experience of applying within their jurisdictions such that it is amenable to local understandings," suggesting that even if it is the least applied circumstance, it is nonetheless, used in practice.³⁰⁰

In this respect, the mere existence of conflict or violence in a given nexus situation should be sufficient to trigger an assessment of international protection claims in accordance

²⁹⁵ UNHCR, GIP 12, n. 61, paragraph 59.

²⁹⁶ UNHCR Eligibility Guidelines are available on UNHCR's Refworld website and as noted earlier, since about 2013, UNHCR has included guidance on assessing claims pursuant to the regional refugee definitions.

²⁹⁷ Sharpe, n. 48, p. 47; See also UNHCR, GIP 12, n. 61, paragraph 56; Wood, n. 55, Chapter 7.

²⁹⁸ UNHCR, "Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence", 20 December 2012, <https://www.refworld.org/pdfid/50d32e5e2.pdf>, accessed: July 2019 (South Africa Summary Conclusions), paragraph 30.

²⁹⁹ UNHCR, GIP 12, n. 61, paragraph 78, UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 24; See also Reed-Hurtado, n. 201. One reason for this may relate to the contemporary relevance of the other circumstances enumerated in Conclusion III(3), as compared to the other events listed in Article I(2), which are, arguably, less applicable in contemporary African contexts.

³⁰⁰ Cantor and Trimiño Mora, n. 193, p. 217.

with regional refugee criteria, where such obligations apply. This is so, notwithstanding the ways in which hazard, disaster or the adverse effects of climate change may interact with conflict or violence. The existence of ESDPO or OCSDPO is a question of fact to be determined case-by-case, on the basis of doctrinal interpretation of the terms as assessed against available objective evidence. Once the existence of such a situation is established, refugee status will turn on an individual satisfying, under group-based or individual approaches to RSD, other relevant criteria.

5.2. Disaster

If the effects or conditions created by conflict or violence is insufficient to make a determination that an ESDPO or OCSDPO exists in a given location, the key question is whether interaction with hazard, disaster or the adverse effects of climate change could support such a finding. Interactions with hazard, disaster or the adverse effects of climate change may also sustain or reinforce conditions amounting to ESDPO or OCSDPO. Considering whether disaster, including those influenced by the adverse effects of climate change, could, on its own, amount to ESDPO or OCSDPO, is a helpful first step. If the answer is yes, such a conclusion adds weight to the argument that the combined effects of conflict and/or violence and disaster and/or the adverse effects of climate change may ground more claims under the regional refugee definitions. A positive answer also means that certain disaster situations may, on their own, ground claims under the regional refugee definitions.

5.2.1. Commentary on ESDPO and Disasters in Africa

Scholarly opinion with respect to ESDPO is divided. This division stems partly from the fact that many scholars consider that ESDPO must be generated by human activity. That is, they emphasize and place importance on the *cause(s)* that trigger or underpin ESDPO, rather than *simply* whether such a situation exists as a matter of fact.

In addition, many commentators continue to use the terms “‘natural’ disaster” and “‘natural hazard” synonymously, failing to recognize the more nuanced understanding of disaster that is accepted in policy and practice. This understanding recognizes that disasters are not ‘natural’ but rather are the combined result of exposure to a natural hazard with an affected community’s adaptive capacity based on their pre-existing vulnerabilities.³⁰¹ The United Nations Office for Disaster Risk Reduction (UNDRR) defines “disaster” as:

³⁰¹ See e.g., UNHCR, “Key Concepts on Climate Change and Disaster Displacement”, n.d., <https://www.unhcr.org/protection/environment/5943aea97/key-concepts-climate-change-disaster-displacement.html>, accessed: July 2019.

A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.³⁰²

As is apparent from this definition, human-made factors, including governance and socio-political dynamics influence and are intimately connected to exposure, vulnerability and capacity and in this respect, “neat distinctions between human and ‘natural’ disturbances are rarely, if ever, borne out in practice.”³⁰³ With these concerns in mind, the following table highlights some of the division in commentary.

³⁰² United Nations Office for Disaster Risk Reduction (UNDRR), “Terminology on Disaster Risk Reduction”, <https://www.unisdr.org/we/inform/terminology>, last update February 2017, accessed: July 2019; UNDRR also provides the following annotation, “The effect of the disaster can be immediate and localized, but is often widespread and could last for a long period of time. The effect may test or exceed the capacity of a community or society to cope using its own resources, and therefore may require assistance from external sources, which could include neighbouring jurisdictions, or those at the national or international levels.” “A sudden-onset disaster is one triggered by a hazardous event that emerges quickly or unexpectedly. Sudden-onset disasters could be associated with, e.g., earthquake, volcanic eruption, flash flood,” “A slow-onset disaster is defined as one that emerges gradually over time. Slow-onset disasters could be associated with, e.g., drought, desertification, sea-level rise,” UNDRR defines the term “hazard” as a “process, phenomenon or human activity that may cause loss of life, injury or other health impacts, property damage, social and economic disruption or environmental degradation.” UNDRR explains that hazards “may be natural, anthropogenic or socionatural in origin. Natural hazards are predominantly associated with natural processes and phenomena. ... Several hazards are socionatural, in that they are associated with a combination of natural and anthropogenic factors, including environmental degradation and climate change.” Hazards include, storms (cyclones, hurricanes and typhoons), floods, droughts, heatwaves, cold spells, storm surges, landslides, wildfires, earthquakes, volcanic activity and eruptions.

³⁰³ Wood, n. 55, p. 203. Moreover, where the adverse effects of anthropogenic climate change have influenced a disaster, an argument exists to support the contention that general questions of human influence, fall away.

Table 1: Commentary on the African Regional Refugee Definition and Disasters³⁰⁴

Commentator	Brief Excerpts and Synthesis of Reasons	Position
Rwelamira (1989)	Rwelamira contends that the “phrase events seriously disturbing public order is designed to cover a variety of <i>man-made</i> conditions which do not allow people to reside safely in their countries of origin” ³⁰⁵ However, Rwelamira then claims the regional refugee definition “was more than timely, providing the necessary flexibility to include even victims of ecological changes such as famine and drought, which remain among the most challenging situations on the continent.” ³⁰⁶	Yes. Limited discussion and internal inconsistency. Not analyzed per VCLT rules.
Hathaway (1991)	Hathaway accepts that the regional refugee definition in the 1969 OAU Convention “recognizes the legitimacy of flight in circumstances of generalized danger” and also accepts that the definition “leaves open the possibility that the basis or rationale for the harm may be indeterminate.” ³⁰⁷ Nonetheless, his position is that the regional refugee definition extends “protection to all persons compelled to flee across national borders by reason of any man-made disaster”. ³⁰⁸ The definition “does not ... suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community, as a shift away from concern about the adequacy of state	No. Limited discussion. Not analyzed per VCLT rules.

³⁰⁴ In addition to the literature included in the table, see also Keane, “The Environmental Cause and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’”, *Georgetown International Environmental Law Review*, 2004, Vol. 6, Issue 2; Kolmannskog, n. 18; McCue, “Environmental Refugees: Applying International Environmental Law to Involuntary Migration”, *Georgetown International Environmental Law Review*, 1993, Vol. 6, Issue 1; Viljoen, “International Human Rights Law in Africa”, 2012, Oxford University Press.

³⁰⁵ Rwelamira, “Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa”, *International Journal of Refugee Law*, 1989, Vol. 1, Issue 4, p. 558.

³⁰⁶ *Ibid.*

³⁰⁷ Hathaway, “The Law of Refugee Status”, 1991, Lexis Nexis Canada, p. 18.

³⁰⁸ *Ibid.*, p. 16.

	protection in favour of a more generalized humanitarian commitment might have dictated.” ³⁰⁹	
Naldi (1999)	According to Naldi, “[the 1951 Convention definition] ... was not deemed applicable to mass exoduses but the OAU considered that such a narrow definition failed to take account of the particular difficulties facing Africa, such as wars of national liberation and environmental catastrophes such as drought and famine which had given rise to flight en masse and displaced whole population.” ³¹⁰	Yes. Limited discussion. Not analyzed per VCLT rules.
Rankin (2005)	Rankin begins by assessing the available literature noting that “[w]hile some take the view [ESDPO] includes all man-made disasters, others maintain that it provides ‘the necessary flexibility to include even victims of ecological changes such as famine and drought, which remain among the most challenging situations on the continent.’” ³¹¹ He notes that “[t]he legal basis for either interpretation is unclear. What does seem clear is that the clause is not infinitely variable and indicates both a quantitative and qualitative element.” ³¹² Rankin elaborates, “there has been precious little effort at articulating a legal rationale. Most explanations are rather more like statements of preference than legal arguments.” ³¹³	No, in general. Yes, if famine occurs (and perhaps also severe food insecurity) in the context of State action. Turns on meaning of public order.

³⁰⁹ Ibid., p. 18. In reaching his conclusion that Article I(2) is limited to situations stemming from human-made disasters, Hathaway draws in part from an unpublished 1980 background paper (p. 16).

³¹⁰ Naldi, *The Organization of African Unity: An Analysis of its Role*, 1999, Second Edition, Mansell, p. 79, as cited in Okoth-Obbo, n. 79, p. 87, with Okoth-Obbo’s emphasis removed. Note that this claim by Naldi, that “so-called environmental refugees [were] among the pre-occupations of the drafters of the [1969 OAU] Convention” was strongly critiqued by Okoth-Obbo, who in trying to ascertain the origins and legislative history of the Convention, notes the lack of travaux préparatoire or other publicly available information, and explains that “authors’ views and statements covering the motives behind the Convention and its features have over the years become the established mantra for the analysis of many a similar question. The dangers which lurk behind studying the Convention in this manner, that is, primarily through the eyes and interpretations of others, are easy to spot. They include attributing to the Convention purposes and intentions it never pretended to have.” (pp. 85-87. Internal citations omitted.)

³¹¹ Rankin, n. 76, p. 16.

³¹² Ibid.

³¹³ Ibid., p. 20.

	<p>Recognizing that “surely, more is needed [as] a plain reading does not immediately suggest the exclusion of natural disasters [<i>sic</i>] why an earthquake or flood does not seriously disturb public order”, he also takes the position that “natural disasters should be excluded.”³¹⁴</p> <p>“To begin, the technical meaning of ‘public order’ suggests a reference to social and political unrest caused by human activities and not by nature. [ESDPO] is a basket clause, and should arguably be read <i>ejusdem generis</i> to cover events that share some element that is similar to aggression, occupation, and foreign domination, which are all clearly manmade events.”³¹⁵ In this regard, Rankin explains in a footnote that “[i]t should be remembered that [ESDPO] was first and foremost intended to capture subversive activities. This suggests a clear intention to deal with human made threats from human activity.”³¹⁶</p> <p>“If a natural disaster can be put into legal terms, it is probably best described as <i>force majeure</i> or ‘an event or effect that can be neither anticipated nor controlled.’ Unless otherwise stated, a <i>force majeure</i> [<i>sic</i>] usually considered to be outside of the responsibility of a state and do not therefore give rise to a duty to grant asylum. More importantly, however, is the distinction in event types. Disruptions to public order are about breakdowns in human relationships and antagonisms within the community. The OAU Convention’s communitarian perspective rests on a belief that the community can become a threat to itself or to the well-being of its members. A natural disaster represents a threat to the community, but rather than coming from within, a natural disaster is an event which sees the</p>	<p>Uses maxim <i>ejusdem generis</i>.</p> <p>Reliance on mistaken understanding of disaster as one that is arguably solely based on external adversity.</p> <p>Not analyzed per VCLT rules.</p>
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³¹⁴ Ibid.

³¹⁵ Ibid. Internal citations omitted.

³¹⁶ Ibid., footnote 138.

	<p>community confront collective adversity from the outside. Still, it should be made equally clear that this does not licence a government or non-state agent to use 'natural disasters' in pursuit of its own agenda. The definition would seem to capture the effects of a famine caused by state action since this is merely using nature as a tool to a political end."³¹⁷</p> <p>In relation to famine, Rankin elaborates that "[i]n many so-called 'natural disasters' man-made factors have caused or aggravated the situation. The Ethiopian famine of the 1980s provides a good example: while the media focused on the drought as the ostensible cause of the famine, the reality was that it was a backdrop to a government supported process of forced land collectivization which was among the primary causes of the death. The great state generated famines such as occurred in the Ukraine or in China provide similar examples."³¹⁸</p>	
<p>Mandal (2005)</p>	<p>In her study on protection mechanisms outside the 1951 Convention, Mandal notes that "[a]lthough, it is possible to envisage a breakdown in public order caused by extreme mismanagement of the economy or a severe environmental disaster (whether man-made or natural), Article I(2) of the OAU Convention does not explicitly cover individuals fleeing poor economic or ecological conditions. Moreover, there is scant evidence of this refugee definition being applied in such circumstances and the inclusion of natural disasters sits uneasily with the preceding criteria that relate to man-made events such as foreign aggression. However, where a natural disaster is manipulated by the government</p>	<p>No, in general.</p> <p>Yes, if State manipulates natural disaster to detriment of population.</p> <p>Limited discussion.</p> <p>Not analyzed per VCLT rules.</p>

³¹⁷ Ibid., p. 20-21; Internal citations omitted.

³¹⁸ Ibid., footnote 142.

	or other actors to the detriment of the population this may well constitute [ESDPO].” ³¹⁹	
Edwards (2006)	<p>Edwards explains that “[d]etermining whether so-called ‘environmental refugees’ fit within the OAU Convention definition will ... depend upon the scope of understanding given to the term ‘public order’. Some commentators suggest that ‘public order’ refers to ‘social and political unrest caused by human activities and not by nature.’ An alternative approach is that ‘public order’ may be defined as the sum of rules that ensure the peaceful and effective functioning of society. As looting and general crimes often follow such events, including in some cases the complete collapse of the system of law and order, it is arguable that persons fleeing these correlative events could seek protection under the OAU Convention. ... It seems a little absurd though for an individual to receive international protection from associated civil disobedience, but not from the precipitating event. While commentators warn against expanding the definition to include persons fleeing natural disasters, one has to question why.”³²⁰</p> <p>“Although it might be possible to argue effectively that the OAU definition covers environmental disasters, whether linked to human activity or not, it is notable that this has not been openly accepted by receiving States. Even though such persons are frequently given refuge on the territory of neighbouring States ... receiving States rarely declare that they are acting pursuant to their OAU Convention obligations. Thus, while there may be some State practice to suggest that ‘environmental refugees’ merit protection under the OAU</p>	<p>Yes, arguably persons fleeing the aftermath of a disaster, which has resultant effects on law and order could be regarded as refugees under Article I(2).</p> <p>Turns on meaning of public order.</p> <p>Not analyzed per VCLT rules.</p>

³¹⁹ Mandal, “Protection Mechanisms Outside the 1951 Convention (“Complementary Protection”), June 2005, UNHCR, <https://www.refworld.org/docid/435e198d4.html>, accessed: July 2019, paragraph 34.

³²⁰ Edwards, n. 78, pp. 226, 225-227. Internal citations omitted.

	<p>Convention, it is not backed up by <i>opinio juris</i>. ... Why government pronouncements are important is relevant to whether they support or reject liberal interpretations of the OAU Convention definition. Without such statements, the arguments appear at best theoretical. ... In spite of these difficulties in relation to treaty definitions and State responses, the general practice of receiving and hosting 'environmental refugees' may be seen as contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty."³²¹</p>	
Nansen Initiative (2015)	<p>The Nansen Initiative Protection Agenda notes that it "remains unclear to what extent regional instruments such as the 1969 African Union Refugee Convention ... are applicable to cross-border disaster-displacement."³²²</p>	<p>Leaves open applicability in <i>purely</i> disaster situations.</p>
UNHCR (2016)	<p>In GIP 12, UNHCR explains that, "[t]he inclusion of the regional refugee definitions in these Guidelines concern their application to claims for refugee status related to situations of armed conflict and violence and is without prejudice to the application of these definitions to other situations."³²³</p> <p>UNHCR's Summary of Deliberations on Climate Change and Displacement also states that: "some regional refugee instruments, such as the 1969 OAU Convention ... and the 1984 Cartagena Declaration, extend the definition of a 'refugee' to persons fleeing 'events seriously disturbing public order', which may equally apply to persons fleeing sudden-onset disasters. However, this position has yet to be fully</p>	<p>Leaves open applicability in <i>purely</i> disaster situations.</p>

³²¹ Ibid., p. 227.

³²² The Nansen Initiative, The Nansen Initiative Protection Agenda, n. 19, Vol. I, p. 28.

³²³ UNHCR, GIP 12, n. 61, paragraph 3.

	<p>tested. Nonetheless, it has become common practice or custom in some regions to offer temporary protection to persons who cross an international border to escape the effects of natural disasters.”³²⁴</p>	
<p>Sharpe (2018)</p>	<p>Sharpe also concludes that “construing article I(2) as affording refugee protection to individuals in flight from major environmental events is in line with the ordinary meaning of [ESDPO] and is supported somewhat by other regional law, and arguments that might mitigate this expansive interpretation are ultimately, unpersuasive.”³²⁵</p> <p>For Sharpe, “the view of article I(2) as capable of protecting individuals displaced by environmental events does not depend on an evolutive interpretation. Rather, the 1969 Convention will protect individuals in flight from an environmental event if such event is sufficiently severe that it seriously disturbs public order. In other words, the interpretation is based on ordinary meaning, rather than on any evolutive approach.”³²⁶</p> <p>To support her position, Sharpe also discusses the African Charter on the Rights and Welfare of the Child and in particular, Article 25, which covers family unity. In paragraph 2(b) of that article, which focuses on separation from parents during displacement, Sharpe explains that the “provision mentions ‘separation ... caused by internal and external displacement arising from armed conflict or natural disasters’. While this provision does not describe children externally displaced by natural disasters as ‘refugees’, it does mention natural disasters alongside armed conflict, which clearly does produce refugees. Article 25(2)(b) ... therefore</p>	<p>Yes.</p> <p>Based on ordinary meaning.</p>

³²⁴ UNHCR, Summary Deliberations on Climate Change, n. 24, paragraph 9.

³²⁵ Sharpe, n. 48, pp. 51-52.

³²⁶ Ibid., p. 51.

	<p>lends a measure of support to the inclusion of natural disasters within the meaning of [ESDPO].”³²⁷</p> <p>In addition, Sharpe states that “divergence between environmental refugees under article IA(2) [of the 1951 Convention] and such refugees under article I(2) is permissible because the 1969 Convention addresses refugee issues particular to Africa; this is precisely the sense in which it is the 1951 Convention’s ‘regional complement’.”³²⁸</p>	
<p>Wood (2018)</p>	<p>Wood’s conclusion is that her principled interpretation does not support the exclusion of certain types of events from the definition, whether environmental, economic or otherwise. “Both the ordinary meaning of [ESDPO], and the protection-orientated object and purpose of the 1969 Convention ... emphasise the <i>effect</i> of a disturbance, rather than its origins. Moreover, excluding particular events due to their cause would also be inconsistent with a contextual reading of [ESDPO] ... – in particular, its relationship to the other three enumerated events. For example, though some have argued that the ‘man-made’ character of the first three enumerated events ... means that [ESDPO] ought also to be limited to disturbances with a human cause, these events also share <i>other</i> characteristics – for example, all denote ‘a serious disruption to society that threatens the lives and freedoms of human beings’.”³²⁹</p> <p>“In essence, a determination of [ESDPO] remains the same, irrespective of the source of the disturbance. Distinguishing between potential disturbances according to their ‘human’ or ‘natural’ causes is both contrary to a principled interpretation of the</p>	<p>Yes.</p> <p>Based on ordinary meaning and object and purpose.</p> <p>What is important for the purposes of determining the existence of ESDPO is the <i>effect</i> of a disturbance not its origin or source.</p>

³²⁷ Ibid.

³²⁸ Ibid. Internal citations omitted.

³²⁹ Wood, n. 55, p. 205. Internal citations omitted.

	<p>definition's terms and an inaccurate representation of how such disturbances occur in reality. This does not mean that all environmental ... disasters will amount to [ESDPO]. For example, moderate flooding followed by an effective government response, in which law and order is fully maintained, would be unlikely to qualify. However, where such events disrupt government, police, security and judicial mechanisms, and where that disruption is sufficiently serious, they will constitute [ESDPO]."³³⁰</p>	
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As apparent from the above synthesis, few commentators engage with the Article I(2) definition in depth. Similarly, very few examine the issue in light of the interpretive rules of the VCLT. As Wood also helpfully states:

some of the reasons provided to support the exclusion of non-conflict related events from the definition do not withstand scrutiny under the VCLT's principles of interpretation. For example, Edwards points to the lack of *opinio juris* among African states to support the inclusion of 'natural' disasters, an argument that has been taken up by other authors on the topic as well. However, established principles of treaty interpretation neither require, not admit, *opinio juris* as a means of treaty interpretation. While there *is* a role for state practice in interpretation, the limited examples of state practice in this regard are neither consistent in their approach to the issue, nor sufficient to qualify as 'state practice' under the VCLT.³³¹

5.2.2. State Practice on ESDPO and Disasters in Africa

This subsection offers a brief discussion of available State practice, which is limited, and in many respects, also ambiguous. Relevant examples that reference or implicate ESDPO are summarized below and are drawn directly and solely from literature that quotes State officials or discusses laws, policy or practice.

Table 2: State Practice on Disaster Situations in Africa

Country	Practice	Possible Position

³³⁰ Wood, *ibid.*, pp. 205-206.

³³¹ Wood, *ibid.*, pp. 204-205. Internal citations omitted.

Angola	<p>“In Angola, the authorities can grant ‘refugee status’ to large-scale flows of persons who, ‘in a group’, leave countries bordering on Angola ‘as a result of serious armed conflicts, occupation or foreign domination of its national territory or <i>natural disasters</i>’. Although the law sometimes also designates the measure as a form of ‘temporary protection’, the phrasing strongly suggests that this merely describes the temporal dimension of such ‘refugee status’.”³³²</p>	Yes.
Ethiopia	<p>“We in Ethiopia, based on regional and international conventions governing refugees, including those who are forced to leave their countries due to natural disasters, mainly climate related calamities such as droughts, have welcomed them with an open-hand and have provided shelter in accordance with the protection standards contained in the Kampala Convention [sic]. We are of the view that, as outlined in the Agenda for Protection, the broader definition of refugees adopted by the OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa to include persons who are compelled, due to <i>natural disasters</i>, to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality, has enabled African countries, including Ethiopia to open their borders.”³³³</p>	Yes.
South Africa	<p>A “1998 South African Refugee White Paper, prepared during the drafting of the South African Refugees Act, states: ‘The government... does not agree that it is appropriate to consider</p>	No. However, note the reference to “solely for reasons of ... environmental

³³² Cantor and Chikwanha, n. 54, p. 52. Emphasis added. Internal citations omitted.

³³³ Nansen Initiative, “The Nansen Initiative Global Consultation: Conference Report”, October 2015, <https://www.nanseninitiative.org/global-consultations/>, accessed: July 2019 (Global Consultation Report), p. 107. Emphasis added.

	as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships.” ³³⁴	hardship”, which may leave open applicability in nexus situations.
Uganda	Wood states that “in 2002, the government of Uganda took the view that people fleeing the eruption of Mount Nyiragongo in nearby Goma, DRC, were not refugees, even under the expanded refugee definition, though it still afforded them temporary refuge within its borders.” ³³⁵ Wood’s characterization is drawn from how representatives of the Government of Uganda reported the matter during the Nansen Initiative Horn of Africa Regional Consultation.	No. However, while Uganda took this view regarding people fleeing the specific situation in DRC in 2002, it does not necessary follow that Uganda would reject application in all disaster situations.

5.2.3. Commentary on OCSDPO and Disasters in Latin America

Commentary considering the applicability of OCSDPO in disaster situations is even more limited than for its counterpart in Africa. The Montevideo Summary Conclusions state that some considered “the inclusion of the language of ‘other’ could reflect an intention to provide states with some flexibility to grant protection in circumstances that either do not meet the threshold of violence of the other four situations reflected in the Cartagena refugee definition, or which *do not match the character* of the other situations.”³³⁶ Notwithstanding this latter view (i.e., OCSDPO need not match the character of the other enumerated circumstances), the Montevideo Summary Conclusions explain that:

the Cartagena refugee definition is not 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. While States *may choose to apply the Cartagena refugee definition to persons compelled to leave because of natural or ecological disasters, they are not strictly speaking protected pursuant to the Cartagena refugee definition.*³³⁷

³³⁴ Wood, Nansen Initiative Paper, n. 18, p. 25. See also, Rankin, n. 76.
³³⁵ Wood, *ibid.*; See also, Edwards, n. 78.
³³⁶ UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 26. Emphasis added.
³³⁷ *Ibid.*, paragraph 10. Emphasis added.

The document adds that, “[w]hile it is *open to states to adopt an interpretation that the Cartagena refugee definition can provide protection to persons fleeing natural disasters*, for example, it was accepted that such an approach is not proscribed.”³³⁸ This position of permitting States to recognize international protection claims from persons fleeing ‘natural’ disasters contrasts with the CIREFCA Principles and Criteria, which stated that OCSDPO “must be man-made and cannot constitute natural disasters.”³³⁹ UNHCR’s Summary of Deliberations on Climate Change and Displacement also recognized that the 1984 Cartagena Declaration’s OCSDPO ground “may equally apply to persons fleeing sudden-onset disasters” while acknowledging that the position is yet to be fully tested.³⁴⁰ In GIP 12, UNHCR leaves open applicability in purely disaster situations.³⁴¹

Cantor and Trimiño Mora explain “States adopting the Cartagena Declaration were [not] concerned equally with all forms of serious public order disturbances ... the focus was upon armed conflict and the generalized violence with which it is often associated.”³⁴² Drawing on background material prepared in the context of the Cartagena colloquium, they suggest that “[o]ne possible implication [from this background context] is that public order disturbances that lack ‘a political or institutional origin’ will fall outside the scope of even [OCSDPO] and thus, ultimately the Cartagena refugee definition as a whole.”³⁴³ Cantor and Trimiño Mora seem to endorse this stance by reference to the CIREFCA Principles and Criteria’s position that the OCSDPO must be man-made and cannot constitute natural disaster. Accordingly, although they stress a principled and flexible interpretation of OCSDPO to achieve the “ultimate purpose of protecting persons fleeing the effects of armed conflict and other serious disturbances to public order” and assert that their approach supports the use of the regional definition to respond to new and changing dynamics of refugee flows, they nonetheless appear to conclude that circumstances which lack a political or institutional origin fall outside OCSDPO in the 1984 Cartagena Declaration.³⁴⁴

As with much of the commentary on ESDPO in Africa, Cantor and Trimiño Mora also emphasize the underlying *causes* that may create a serious disruption to public order, rather than whether such an objective situation exists, in fact. By contrast, UNHCR’s commentary leaves open the possibility that a disaster may create a disruption to public order, and does not explicitly articulate a political or institutional prerequisite.

³³⁸ Ibid., paragraph 26, Emphasis added. In this regard, see also footnotes 26 and 5.

³³⁹ Espiell et al., n. 197, paragraph 33.

³⁴⁰ UNHCR, Summary Deliberations on Climate Change, n. 24, paragraph 9.

³⁴¹ UNHCR, GIP 12, n. 61, paragraph 3.

³⁴² Cantor and Trimiño Mora, n. 193, p. 217

³⁴³ Ibid.

³⁴⁴ Ibid., p. 223.

The position in the Montevideo Summary Conclusions that “persons compelled to leave because of *natural* or ecological disasters ... are not *strictly speaking* protected pursuant to Cartagena refugee definition”³⁴⁵ would benefit from further explanation. For example, what is “strictly speaking” intended to capture? Is the suggestion that the critical enquiry should be on whether a serious disruption to public order exists in fact? More generally, reference to “natural” disasters also suggests that experts at the Montevideo meeting may not have considered adequately the governance and socio-political dynamics that influence and contribute to the occurrence of a disaster through effects on human exposure, vulnerability and capacity. This enquiry will also be tempered by how the term “public order” is interpreted in the region, and whether it does include notions beyond law and order, to capture rights and essential freedoms.

5.2.4. State Practice on OCSDDPO and Disasters in Latin America

As with Africa, there are few illuminating examples of State practice on the use of OCSDDPO as a basis for granting refugee status in the context of disasters.³⁴⁶ Relevant examples that reference or implicate OCSDDPO are drawn directly and solely from literature, which quotes State officials, or discusses laws, policy or practice.³⁴⁷

Table 3: State Practice on Disaster Situations in Latin America

Country	Practice	Possible Position
Mexico	Article 4(XI) of Mexico’s regulations which supplement its domestic law related to refugees defines OCSDDPO as “[s]ituations that seriously alter the public peace in the country of origin or habitual residence of the applicant and that are the result of acts attributable to man.” ³⁴⁸	No, unless can argue the alteration to public peace is attributable to man.

³⁴⁵ UNHCR, Montevideo Summary Conclusions, n. 210, paragraph 10. Emphasis added.

³⁴⁶ See e.g., The Nansen Initiative, “Protection for Persons Moving Across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries”, November 2016, <https://disasterdisplacement.org/wp-content/uploads/2016/11/PROTECTION-FOR-PERSONS-MOVING-IN-THE-CONTEXT-OF-DISASTERS.pdf>, accessed: July 2019 (RCM Guide), which states that “the use in RCM Member States of refugee designation ... has been limited with respect to persons affected by disasters”. (p. 20.)

³⁴⁷ See also Cantor, n. 201, where he discusses the use of the refugee designation to grant protection for persons fleeing disasters, although these examples do not relate to OCSDDPO.

³⁴⁸ Weerasinghe, n. 15, p. 196.

5.3. Nexus Situations

5.3.1. *Commentary on Nexus Situations in Africa and Latin America*

Commentary on the applicability of ESDPO and OCSDPO to nexus-related cross-border movements stem from the same sources. In GIP 12, UNHCR does not rule out applicability in nexus situations.³⁴⁹ On the contrary, GIP 12 discusses application in situations of armed conflict and violence, and regardless of other interacting factors.

UNHCR's Legal Considerations on Conflict and Famine explain how environmental factors may interact with human factors, and outlines the applicability of the 1951 Convention and regional refugee criteria. The document begins by acknowledging "[h]umanitarian crises are unfolding that are linked to a mix of conflict, the effects of climate change and drought, creating internal and cross-border displacement" and that "[f]ood insecurity and famine are both consequences of these crises and are further exacerbating their impacts."³⁵⁰ It states that "[a]cute food insecurity, including famine, can often be seen as a manifestation of fragile governance structures and institutional weaknesses. i.e. the inability of the state to ensure equitable access to affordable food."³⁵¹ Following a brief explanation of how pertinent eligibility criteria in the 1951 Convention may be satisfied in such conditions, the document also explains that when "famine is the result of armed conflict, violence or other state conduct", such a situation may constitute ESDPO as reflected in Article I(2).³⁵² It concludes by noting that:

People displaced by the humanitarian crises linked to a mix of the consequences of conflict, public disorder, the effects of climate change, and drought are in need of international protection. Based on the manner in which these crises are unfolding, they qualify as refugees within the meaning of the 1951 Convention or the 1969 OAU Convention...³⁵³

A 1992 UNHCR Working Group document also explicitly references nexus dynamics and indicates that nexus situations could support a finding of serious disruption to public order.

³⁴⁹ UNHCR, GIP 12, n. 61, paragraph 3.

³⁵⁰ UNHCR, Legal Considerations on Conflict and Famine, n. 64.

³⁵¹ Ibid. It continues: "Conflict and violence can impede physical and economic access to food, particularly through the disruption of livelihoods and markets. Political systems and choices influence access to affordable food, and consequently the development and extent of famine conditions. Particularly in conflict-affected and other polarized societies, political ideologies and social and ethnic divides can determine—and impede—access to food."

³⁵² Ibid.

³⁵³ Ibid. Arguably, the regional definition in Latin America should have also been referenced in the list of refugee instruments, even though famine and food insecurity are not as common in that region.

The OAU Convention does not refer to people who are forced to leave their respective countries of origin due to economic deprivation or chronic poverty but this cause is assuming increasing significance in Africa. So also is the category of people who are forced to leave by a *combination of factors*. This includes victims of *man-made disasters who are at the same time victims of natural disasters*. This cause or category of people is not explicit in the OAU Convention, but reference in the Convention to "events seriously disturbing public order in either part or the whole of his country of origin or nationality", can be construed to cover this category.³⁵⁴

While the Nansen Initiative Protection Agenda leaves open the question of applicability in purely disaster situations, it recognizes that refugee law applies in nexus situations.

[T]he effects of a disaster may create international protection concerns by generating violence and persecution, such as when a collapse of governmental authority triggered by the disaster leads to violence and unrest Thus, it is still necessary for competent authorities to carefully scrutinize cases from a disaster-affected country with a view to assessing refugee status[.]³⁵⁵

Similar language is reflected in the *Guide to Effective Practices for RCM Member Countries*, drafted by the Nansen Initiative (**RCM Guide**).³⁵⁶ In a section entitled "Protection for Foreigners Arriving From Disaster Affected Countries", under a subsection elaborating effective practices, the RCM Guide explains that:

Even if a disaster does not in itself constitute a ground for refugee status, its effects may create international protection needs if they generate violence ..., including events seriously disturbing public order as recognized by some countries that have adopted the Cartagena Declaration in their national legislation. Competent authorities should therefore carefully scrutinize cases from an affected country with a view to assessing if refugee status is merited as a result of the negative consequences of the disaster.³⁵⁷

An analogous discussion is evident in the *Regional Guidelines on the Protection and Assistance of Persons Displaced Across Borders and Migrants in Countries Affected by 'Natural' Disasters* prepared within the framework of the South American Conference on Migration

³⁵⁴ UNHCR, n. 224, paragraph 7. Emphasis added.

³⁵⁵ Nansen Initiative, Nansen Initiative Protection Agenda, n. 19, Vol. I, p. 27.

³⁵⁶ Nansen Initiative, RCM Guide, n. 346, p. 12.

³⁵⁷ *Ibid.*, pp. 20-21. Internal citations omitted.

and adopted in November 2018 (**South American Guidelines**).³⁵⁸ The document discusses refugee law, including regional refugee instruments to ground international protection claims in situations where the impacts of natural phenomena are interlinked with hunger, armed conflicts or violence. The Guidelines recommend:

States use refugee law, *inter alia*, to provide international protection when the effects of a disaster generate international protection concerns. For example, when there are disturbances, conflicts and violence following the collapse of government authorities due to a disaster, and the situation represents an imminent risk to the life or integrity of the affected persons if they return to their country.³⁵⁹

As noted earlier, in a technical paper that informed the Nansen Initiative Protection Agenda, Wood was an early advocate on the potential of regional refugee criteria for supporting claims in the context of nexus dynamics. Wood identified the potential of the regional refugee definition in Africa “to extend protection to persons displaced in the context of disaster, at least in situations where the disaster is accompanied by conflict, widespread violence and/or breakdown of national government systems.”³⁶⁰

This is significant for the Horn of Africa, which has been marred by considerable violence in recent decades, and where conflict and lack of effective governance have been significant determinants, first, of whether the effects of a natural hazard amount to a disaster, and second, whether persons affected by disaster are compelled to cross an international border in search of safety. The capacity of the 1969 Convention to encompass disaster-related displacement in the absence of these additional factors is less clear, though ... this question warrants further attention.³⁶¹

Wood’s deeper analysis in her monograph contends that the 1969 OAU Convention emphasizes the *effect* of a given situation, that is, whether ESDPO exists in fact, rather than the origins of the disturbance. Her argument is that the determination of ESDPO remains the same, irrespective of the source of the disturbance. As such, whether a situation manifests nexus dynamics is arguably less relevant, although a nexus situation may have greater potential to satisfy a finding of ESDPO.³⁶²

³⁵⁸ South American Conference on Migration, “Regional Guidelines on the Protection and Assistance of Persons Displaced Across Borders and Migrants in Countries Affected by ‘Natural’ Disasters”, 2018, <https://disasterdisplacement.org/portfolio-item/csm-lineamientos>, accessed: November 2019.

³⁵⁹ *Ibid.*, pp. 34-35. Unofficial translation.

³⁶⁰ Wood, Nansen Initiative Paper, n. 18, p. 23.

³⁶¹ *Ibid.*

³⁶² Wood, n. 55, Chapter 7.1.3.6.

While Cantor has concluded that circumstances which lack a political or institutional origin fall outside the scope of OCSDPO in the 1984 Cartagena Declaration,³⁶³ and noted in a 2018 study that “States have tended to apply [the OCSDPO] element as requiring a direct link to governmental or political circumstances”,³⁶⁴ he also recognizes that nexus situations may result in OCSDPO. In the 2018 study *Cross-Border Displacement, Climate Change and Disasters: Latin America and the Caribbean*, conducted in response to a direct request in the Brazil Declaration and Plan of Action, on behalf of UNHCR and the Platform on Disaster Displacement (PDD), Cantor (drawing on the Nansen Initiative Protection Agenda) emphasizes that:

the occurrence of a disaster may generate wider and longer-lasting conditions that do provide a need for international protection under refugee ... law. In particular, where a disaster linked to a natural hazard and/or climate change unleashes violence or persecution, triggers a collapse of governmental authority or is used as a pretext by the government to persecute opponents, then the dangers inherent in those wider conditions can provide a basis for protection under international refugee ... law.³⁶⁵

Other commentators have also made pertinent points on nexus situations and regional refugee definitions.³⁶⁶

More generally, commentators and States may misdiagnose the nature of the inquiry by failing to recognize the complexity of conditions at origin. Rather than recognizing cross-border movements in the context of nexus dynamics (with an appreciation of the complex interactions between conflict and/or violence and disaster and/or the adverse effects of climate change), some characterizations surmise such movements as driven *solely* by disaster and/or the adverse effects of climate change, or fail to recognize the relevance of underlying conflict and/or violence to the question of international protection. The cross-border movement of Somalis in 2011 is one pertinent example. At the Global Consultation on the Nansen Initiative Protection Agenda, the Kenyan Commissioner for Refugee Affairs made the following statement:

As you may recall, in 2010–2012, Kenya received over two hundred thousand Somali citizens who were fleeing the severest *drought/famine* in the Horn of Africa in sixty years. These people crossed from Somalia to Kenya towards the Dadaab refugee camp to escape imminent death. Although we received and registered

³⁶³ See section 5.2.3 of this paper.

³⁶⁴ Cantor, n. 201, p. 20.

³⁶⁵ *Ibid.*, p. 25.

³⁶⁶ See e.g., literature mentioned in section 5.2.1 and 5.2.3 of this paper.

them as refugees they did not meet the definition of refugees' [sic] *per se* as defined by the 1951 Geneva Convention on refugees. Despite this, the government of Kenya recognized them as refugees on humanitarian grounds.³⁶⁷

Sharpe has also stated that:

Kenya recognized Somalis fleeing the 2011 *drought* *prima facie*, under article I(2). By contrast, Uganda was of the view that people fleeing the 2002 eruption of Mount Nyiragongo in the DRC were not refugees, and offered them only temporary protection.³⁶⁸

Appreciating that Somali flight in 2011 occurred in the context of nexus dynamics shifts the lens, and, given the prevalence of conflict in the country at the time, automatically brings into the fore the imperative to examine refugee law and to assess claims for international protection in accordance with States' refugee law obligations.

5.3.2. State Practice on ESDPO and OCSDPO and Nexus Situations in Africa and Latin America

There is some evidence of State practice granting refugee status based on ESDPO or OCSDPO following nexus-related cross-border movements. Relevant examples that reference or implicate ESDPO or OCSDPO are summarized below and are drawn directly and solely from literature, which quotes State officials, or discusses laws, policy or practice.

Table 4: State Practice on Nexus Situations in Africa and Latin America

Country	Practice	Possible Position
Ethiopia	Somalis fleeing to Ethiopian camps in 2011 and 2012 were recognized on the basis of regional refugee criteria. ³⁶⁹	Yes. Under ESDPO which had been incorporated into domestic law.
Kenya	Somalis fleeing in 2011 and 2012 to Dadaab camps were recognized on the basis of broader refugee criteria.	Unclear. Practice demonstrates application in nexus situation, but views suggested only some

³⁶⁷ Nansen Initiative, Global Consultation Report, n. 333, pp. 134-135.

³⁶⁸ Sharpe, n. 48, p. 50. Internal citations omitted. Emphasis added.

³⁶⁹ See e.g., Weerasinghe, n. 15.

	UNHCR was responsible for RSD, which it undertook, pursuant to its mandate. ³⁷⁰	actors recognized the prevalence of nexus dynamics including violence and conflict and considered a serious disruption to public order existed.
Mexico	Mexico recognized some asylum claims from Haitians fleeing zones affected by the 2010 Haitian earthquake based on regional refugee criteria. ³⁷¹	Yes. Arguably the consequences of a disaster can create conditions, including violence and insecurity, that amount to OCSDPO.
Djibouti	Somalis fleeing to Djibouti in 2011 and 2012 were recognized on the basis of regional refugee criteria. Even though Djibouti had only signed the 1969 OAU Convention, in practice, Djibouti applied regional refugee criteria. ³⁷²	Yes. Practice arguably demonstrates application with references to general insecurity, disturbance to public order, drought and famine as relevant considerations, but requires further research.
Uganda	Somalis fleeing to Uganda in 2011 and 2012 were recognized on the basis of regional refugee criteria. ³⁷³	Yes. Practice arguably demonstrates application with references to violence and insecurity, but does not disaggregate by reasons for recognition. Would require further research.
South Africa	A “1998 South African Refugee White Paper, prepared during the drafting of the South African Refugees Act, states:	Unclear. Reference to “solely for reasons of ... environmental hardship” may leave open the

³⁷⁰ See e.g., *ibid.*

³⁷¹ See e.g., *ibid.*

³⁷² See e.g., *ibid.*

³⁷³ See e.g., *ibid.*

	<p>“The government... does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships.”³⁷⁴</p>	<p>possibility of application in nexus situations.</p>
Burundi	<p>The Nansen Initiative Protection Agenda indicates “in 2004, prolonged drought in Kirundo, Burundi prompted an unknown number of people to cross into neighbouring Rwanda, where they shared ethnic and linguistic heritage with the people. One researcher found that in light of the post-conflict situation in Burundi and concerns about upcoming elections, UNHCR reportedly ‘made efforts to consider them within a political context,’ and provided assistance to such persons from Burundi as refugees under UNHCR’s mandate, although most people gave both political and disaster related reasons for seeking asylum.”³⁷⁵</p>	<p>Arguably, yes, application in nexus situation, although requires further research.</p>

6. 1951 CONVENTION AND NEXUS SITUATIONS

6.1. Introduction

Having discussed the regional refugee definitions in the preceding sections, this penultimate section of the paper turns to the 1951 Convention, which defines a refugee in Article 1A(2) as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside

³⁷⁴ Wood, Nansen Initiative Paper, n. 18, p. 25. See also, Rankin, n. 76.

³⁷⁵ Nansen Initiative, Nansen Initiative Protection Agenda, n. 19, Vol. II, p. 11.

the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.³⁷⁶

UNHCR has elaborated detailed guidance on interpreting elements of the 1951 Convention definition and on assessing claims under its criteria. UNHCR's 1951 Convention Handbook (including 13 Guidelines on International Protection), Eligibility Guidelines, Legal Considerations, Protection Considerations and Guidance Notes are among the reference documents that provide interpretive and procedural guidance on the scope and applicability of the 1951 Convention definition.

This guidance has extended to address situations that embody nexus dynamics. As previously noted, UNHCR's Legal Considerations on Conflict and Famine make the most direct references to nexus dynamics, articulating the relevance of the 1951 Convention for providing international protection where nexus-related cross-border movements occur. In addition, UNHCR's GIP 12 elaborates legal interpretive guidance on the applicability of the 1951 Convention in situations of armed conflict and violence, which captures one of the two dimensions embodying nexus dynamics as defined in this paper. Similarly, UNHCR 2010 *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (Guidance Note on Gangs)*, which concerns asylum claims in the context of gang-related violence in communities and societies, is also applicable since such violence can and does occur in parallel with, or in locations affected by, hazards or disasters, including those influenced by the adverse effects of climate change.³⁷⁷

In contrast, specific UNHCR guidance on the applicability of the 1951 Convention definition in the context of the other dimension of nexus dynamics – that is, situations of hazard, disaster or environmental degradation (including as they are influenced by climate change) – has not been issued to date. While scholarly commentary elaborating on the applicability of the 1951 Convention has acknowledged “there are some circumstances in which [the Convention] will be applicable”, scholars have opined that it might be “by and large, an inappropriate normative framework”.³⁷⁸ In general, jurisprudence, including high judicial authority aligns with these conclusions. Nevertheless, more recently, New Zealand jurisprudence from 2013 proffered that

³⁷⁶ Convention relating to the Status of Refugees, n. 29 and Protocol relating to the Status of Refugees, n. 30.

³⁷⁷ UNHCR, *Guidance Note on Gangs*, n. 294

³⁷⁸ See e.g., McAdam, “Climate Change, Forced Migration and International Law”, 2012, Oxford University Press, p. 39.

“generalised assumptions about environmental change and natural disasters and the applicability of the Refugee Convention can be overstated.”³⁷⁹

Drawing on the above-mentioned materials, this section engages in a general discussion of the 1951 Convention definition’s applicability to nexus situations. It begins with a discussion of UNHCR’s legal interpretive guidance on the 1951 Convention definition’s applicability in situations of conflict or violence. The second subsection discusses applicability in situations of hazard, disaster or environmental degradation, and also offers considerations that may support the establishment of specific elements of the definition. The final subsection discusses applicability in the context of nexus-related cross-border movements.

6.2. Applicability in the Context of Armed Conflict or Violence

Section II of this paper highlighted that nexus dynamics are a contemporary reality. The diversity in nexus dynamics and associated cross-border movements suggests that in certain contexts, their combined consequences may be necessary to establish some or all elements of the 1951 Convention definition. Accordingly, assessing pathways to protection under the 1951 Convention definition may require fine-grained country of origin information, and detailed situation- and profile-specific guidance on how ‘problematic’ elements of the definition could be established.

Yet, this is not necessarily the case where a given *nexus* situation can also be characterized as embodying armed conflict and violence. In such situations, as a result of UNHCR’s GIP 12, the task is arguably less demanding. Moreover, the availability of such guidance means that it is the most pertinent and appropriate starting point.

UNHCR’s GIP 12 dedicates much of its legal interpretive guidance to a substantive analysis of Article 1A(2) in “situations of armed conflict and violence”. GIP 12 defines the phrase as encompassing “situations that are marked by a material level or spread of violence that affects the civilian population.”³⁸⁰ GIP 12 explains how situations of armed conflict and violence and their consequences may establish specific elements of the inclusion criteria. Building on an extensive body of material, including jurisprudence, State practice, scholarly research and UNHCR’s ExCom and other commentary, UNHCR unequivocally instructs that the 1951 Convention is applicable to civilians displaced by armed conflict and violence, as the “majority of these situations engender political,

³⁷⁹ *AF (Kiribati)* [2013] NZIPT 800413, paragraph 64. The paragraph adds that: “While in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case.”

³⁸⁰ UNHCR, GIP 12, n. 61, paragraph 5. See footnote 290 of this paper for the full definition.

religious, ethnic, social, or gender persecution.”³⁸¹ Notably, GIP 12 recognizes that, in the contemporary landscape, “[s]ituations of armed conflict and violence are ... the major causes of *refugee* movements”.³⁸²

Similarly, UNHCR’s Guidance Note on Gangs explains that “[g]ang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak.”³⁸³ UNHCR recognizes that gang violence is a feature of everyday life in some countries, where communities are at times dominated by gangs and gang culture, with effects on all segments of a society, especially children and young people.³⁸⁴ The document addresses whether victims of criminal gangs or activities associated with such groups may be considered in need of international protection under the 1951 Convention, and under what circumstances.

GIP 12 and the Guidance Note on Gangs may be salient for assessing claims in diverse nexus situations, including those highlighted in section II. This means that in any nexus situation which can be regarded as embodying armed conflict and violence as defined in GIP 12 – and regardless of how such a situation is affected by hazard, disaster or the adverse effects of climate change – claims for refugee status should be assessed in line with the legal interpretive guidance in GIP 12. This is because, as research has shown, the majority of situations of armed conflict and violence engender persecution based on a Convention reason.³⁸⁵ Similarly, in the context of claims associated with organized gangs – and regardless of how origin conditions have been affected by hazard, disaster or the adverse effects of climate change – refugee claims should be assessed pursuant to the Guidance Note on Gangs.

6.3. Applicability in the Context of Hazard, Disaster or Environmental Degradation

In contrast to situations of conflict or violence, salient UNHCR guidance specifically on situations of hazard, disaster or environmental degradation (including as they are influenced by climate change) does not exist.³⁸⁶ Scholars and courts have largely considered the 1951 Convention framework inapplicable to claims based solely on such

³⁸¹ UNHCR, GIP 12, n. 61, paragraph 1.

³⁸² *Ibid.* Emphasis added.

³⁸³ UNHCR, Guidance Note on Gangs, n. 294, paragraph 10.

³⁸⁴ *Ibid.*, Introduction and paragraphs 1-3.

³⁸⁵ See e.g., resources listed in UNHCR, GIP 12, n. 61, including, Farrell and Schmitt, “The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010”, April 2012, UNHCR, <https://www.refworld.org/docid/4f8c3fcc2.html>, accessed: July 2019; See also UNHCR’s more recent Eligibility Guidelines and Protection Considerations.

³⁸⁶ See however, UNHCR, Summary Deliberations on Climate Change, n. 24.

events or processes.³⁸⁷ Reasoning advanced on the limitations of the 1951 Convention pertains to multiple elements of the definition, including:

- Concerns related to the threshold of harm and whether it amounts to persecution;
- Difficulties in identifying discriminatory acts or omissions and demonstrating the requisite nexus to a Convention ground;
- Complexities associated with identifying the so-called “agent of persecution” and concerns that the agent may be industrialized States, the very actors from whom international protection is sought;
- Recognition that governments may be willing and/or able to provide protection;
- Conceptions of disasters as “natural” existential events arising from forces of nature;
- Conceptions of hazards, disasters and the adverse effects of climate change as inflicting indiscriminate rather than discriminate harm.³⁸⁸

Notwithstanding the above-mentioned impediments, it appears that individuals are advancing “hundreds” of claims for international protection, which reference “floods, cyclones, earthquakes, droughts and other natural hazard events and processes.”³⁸⁹ Many of these references have largely been peripheral, however.³⁹⁰ Indeed, based on the information available to date for the purposes of this analysis, judicial or administrative bodies are yet to grant refugee status on the basis of a domestic refugee definition drawn from the 1951 Convention to any person who has claimed international protection for harm caused directly and solely by a hazard, disaster or environmental degradation.³⁹¹

This is not to say that refugee status pursuant to the 1951 Convention definition is, or is considered by judicial and administrative entities to be, wholly inapplicable to

³⁸⁷ See e.g., McAdam, n. 378, particularly Chapter 2; Scott, “Refugee Status Determination in the Context of ‘Natural’ Disasters and Climate Change: A Human Rights-Based Approach”, 2018, Lund University, Doctoral Dissertation (Refugee Status Determination); and Scott, “Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change”, *Refugee Survey Quarterly*, 2016, Vol. 35, Issue 4 (Finding Agency in Adversity). Scott discusses in detail scholarly arguments and jurisprudence and provides a synthesis of *obiter dicta* from the Australian High Court, the UK House of Lords and the Canadian Supreme Court, *inter alia*. He explains that high-level courts have excluded people displaced in the context of “natural” disasters from the scope of the 1951 Convention.

³⁸⁸ See e.g., *ibid.* See also, Kälin and Schrepfer, “Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Solutions”, February 2012, UNHCR, <https://www.refworld.org/docid/4f38a9422.html>, accessed: July 2019; Kälin, “Conceptualizing Climate-Induced Displacement”, in McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, 2010, Hart Publishing.

³⁸⁹ Scott, *Finding Agency in Adversity*, n. 387, p. 27; Scott highlights cases in the context of: the 2004 tsunami in Sri Lanka; a typhoon in China; a hurricane in Honduras; the natural and technological disaster in Fukushima, Japan; and a cyclone in Myanmar; See also McAdam, “The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement”, *Migration Studies*, 2015, Vol. 3, No. 1 (Emerging New Zealand Jurisprudence), which notes that Australia and New Zealand have examined claims relating to these factors since at least 1995 (p. 132); See also, McAdam, n. 378, p. 47

³⁹⁰ Scott, *ibid.*

³⁹¹ However, courts have recognized refugee status in cases where disaster formed the backdrop to more familiar patterns of direct and intentional infliction of harm for a Convention reason. See e.g., Scott, n. 387.

international protection claims from those fleeing such situations. Recent jurisprudence from New Zealand pronounced that:

While in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case.³⁹²

New Zealand jurisprudence, including a series of cases concerning Mr. Teitiota, a man from Kiribati, elaborates the most pertinent analysis and commentary on the scope of the 1951 Convention to support claims in the context of hazards, disasters and environmental degradation.³⁹³ The case concerned harms stemming from changes to the environment caused by sea-level rise associated with climate change.³⁹⁴ In dismissing Mr. Teitiota's final appeal in 2015, New Zealand's Supreme Court left open the possibility of an appropriate case supporting a claim for refugee status pursuant to the 1951 Convention definition.³⁹⁵ Although Mr. Teitiota's claim was dismissed because "while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face 'serious harm' and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can", the Supreme Court articulated the following position.³⁹⁶

That said, we note that both the Tribunal and the High Court, emphasised their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention Our decision in this case should not be taken as ruling out that possibility in an appropriate case.³⁹⁷

³⁹² *AF (Kiribati)*, n. 379, paragraph 64.

³⁹³ *AF (Kiribati)*, n. 379; See also *AC (Tuvalu)* [2014] NZIPT 800517-520 and *BG (Fiji)* [2012] NZIPT 800091, which while not necessarily presenting nexus dynamics on the facts, provides valuable insights; See more generally, Scott, n. 387; McAdam, *Emerging New Zealand Jurisprudence*, n. 389.

³⁹⁴ *AF (Kiribati)*, n. 379, paragraph 2.

³⁹⁵ *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107; Preceding decisions are discussed in paragraph 6 of the judgement and include a negative decision by a Refugee and Protection Officer, dismissal of the appeal by the New Zealand Immigration and Protection Tribunal (*AF (Kiribati)* [2013] NZIPT 800413), refusal of leave to appeal by New Zealand's High Court (*Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125), and refusal of leave to appeal by New Zealand's Court of Appeal (*Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*) [2014] NZCA 173.

³⁹⁶ *Ibid.*, paragraph 12

³⁹⁷ *Ibid.*, paragraph 13. Internal citations omitted. In these citations the Supreme Court referred to *AF (Kiribati)* (n. 379) at paragraphs 55-59 and 64-64, and *Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (n. 395) at paragraph 27.

Jurisprudence and scholarship have identified some situations or factual circumstances in which the inclusion criteria in the 1951 Convention definition may, or have been, established. Examples include situations in which:

1. A government withholds or obstructs protection or assistance, including disaster relief, for a Convention- reason and exposes disaster victims to persecution;³⁹⁸
2. Post-disaster provision of humanitarian relief becomes politicized such that activities associated with relief efforts are perceived as political;³⁹⁹
3. A government refuses to accept aid from other States when it is in need, such as in the aftermath of a disaster;⁴⁰⁰
4. A government destroys the environment to persecute particular groups of persons; or in other words a government uses environmental degradation as a 'weapon' of oppression against a particular group;⁴⁰¹
5. A climate-related impact meets the threshold of persecution because it is the consequence of a respective governmental policy with a discriminate impact on a specific group of persons possessing Convention attributes;⁴⁰²
6. A government does not establish appropriate measures for prevention of disaster.⁴⁰³

In *Refugee Status Determination in the Context of 'Natural' Disasters and Climate Change*, Matthew Scott provides a helpful taxonomy of the types of circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in

³⁹⁸ See e.g., UNHCR, Summary Deliberations on Climate Change, n. 24, paragraph 8. This paragraph add that "[t]hese actions may take place during armed conflicts, situations of generalized violence, public disorder or political instability, or even peacetime; McAdam, n. 378, p. 47; See also Hathaway and Foster, "The Law of Refugee Status", 2014, Cambridge University Press, Second Edition, where they state that: "By way of example, the victims of a flood or earthquake are not *per se* Convention refugees, even if they have fled to a neighboring state because their own government was unable or unwilling to provide them with relief assistance. If, on the other hand, the government of the home state chose to limit its relief efforts to those victims who were members of the majority race, forcing a minority group to flee to another country in order to avoid starvation or exposure, a claim to refugee status should succeed because the harm feared is serious, bespeaks a failure of state protection, and the requisite linkage to civil or political status [i.e., an enumerated ground] is present." (p. 176); See also Kälin, n. 388, p. 88; Kälin and Schrepfer, n. 388, p. 33.

³⁹⁹ *AF (Kiribati)*, n. 379, paragraphs 58 and 69, noting that such circumstances occurred in the wake of so-called cyclone "Nargis" in Myanmar in May 2008 and refugee status was granted to a person who assisted in such relief work on the basis that such activity would be perceived as the expression of an anti-regime political opinion. The case was *Refugee Appeal No. 76374 RSAA* (28 October 2009); See also Kälin and Schrepfer, n. 388, p. 33, discussing the case.

⁴⁰⁰ McAdam, n. 378, p. 48. Drawn directly from McAdam who explains a persecutory element for a Convention reason would need to be shown.

⁴⁰¹ See e.g., *AF (Kiribati)*, n. 379, paragraphs 59 and Kälin and Schrepfer, n. 388, p. 32-33, referring to the Marsh Arabs in Iraq, who suffered persecution during Saddam Hussein's regime though the international draining and dessication of the Tigris-Euphrates marshlands in Southern Iraq; See also McAdam, n. 378, p.47, discussing situations in which governments induce famine by destroying crops or poisoning water, or contributing to environmental destruction by polluting land and/or water.

⁴⁰² Kälin and Schrepfer, n. 388, p. 32; See also McAdam, "Review Essay: From Economic Refugees to Climate Refugees: Review of International Refugee Law and Socio-Economic Rights: Refuge from Deprivation by Michelle Foster (Cambridge University Press), *Melbourne Journal of International Law*, 2009, Vol. 10, Issue 1.

⁴⁰³ McAdam, n. 378, p. 48. Drawn directly from McAdam who explains a persecutory element for a Convention reason would need to be shown. More generally, see also Kälin and Schrepfer, n. 388, discussing possible claims under the Convention related to prohibitions to live in specific areas based on Convention reasons, where forced relocation occurs resulting in human rights violations related to Convention grounds or relocated persons are left without assistance and protection for Convention reasons and associated harm rises to the level of persecution.

the context of ‘natural’ disasters and climate change. He elaborates the types of circumstances that have been argued and categorizes these based on whether refugee status has been recognized on the facts of the case; recognized in principle; or suggested in doctrine or asserted in a claim for recognition of refugee status.⁴⁰⁴

As demonstrated by the above examples, scholarly commentary and jurisprudence on the applicability of the 1951 Convention has largely centered on: (1) State action or inaction in the context, or aftermath, of a disaster (i.e. where the disaster forms the backdrop); or (2) the intentional destruction of the environment as a form of oppression against specific groups of people. Such commentary has not necessarily engaged in a discussion of: (3) how ex-ante action or inaction on the part of a government, including historical discrimination related to a Convention ground, combined with harm stemming from a hazard, disaster, or adverse effects of climate change may support a claim for refugee status.⁴⁰⁵ This third category is the focus of the ensuing discussion because it is in situations where human agency is not readily apparent that the more complex doctrinal and epistemological challenges arise.

In this context, some scholars have begun to argue for a more careful examination of the applicability of the 1951 Convention.⁴⁰⁶ Scott in particular has argued for conceptual shifts, including a lens that would permit consideration of discriminatory action predating disaster-related harm. Drawing on Scott’s work, other scholarly commentary and *obiter dictum* from New Zealand, this subsection highlights three possible entry-points that may enliven deeper consideration of the applicability of the 1951 Convention in extending protection to persons fleeing in the context of hazard, disaster, and environmental degradation. These entry-points may not overcome all hurdles to establishing a claim under the 1951 Convention definition. However, in reviewing the discussion below, it should be borne in mind that the entry-points are also relevant for claims in the context of nexus dynamics, and specifically claims which cannot be established purely on the strength of available evidence on armed conflict or violence.

6.3.1. *The Predicament Approach*

To satisfy the criteria in Article 1A(2) of the 1951 Convention, a person’s well-founded fear of being persecuted must be “for reasons of” race, religion, nationality, membership

⁴⁰⁴ Scott, *Refugee Status Determination*, n. 387, Chapter 9.5. See also, Hathaway, “Food Deprivation: A Basis for Refugee Status?”, *Social Research: An International Quarterly*, 2014, Vol. 81. No. 2.

⁴⁰⁵ Points 5 and 6 arguably allude to ex-ante action. In *Refugee Status Determination*, n. 387, Scott explains his typology of circumstances, parsing situations of direct and intentional infliction of harm, where the disaster forms the backdrop; situations where there is intentional discriminatory denial or omissions; and situations of ex-ante failure of protection and its connection to exposure and vulnerability.

⁴⁰⁶ See e.g., Scott, 387; See also, Nishimura, “Climate Change and International Law: A Predicament Approach”, November 2018, Blog post, <http://www.reflaw.org/climate-change-and-international-refugee-law/>, accessed: July 2019.

of a particular social group, or political opinion. In essence, a causal link between a risk of being persecuted and one of the enumerated grounds in the 1951 Convention is required.⁴⁰⁷ Or, as Hathaway and Foster helpfully state, “refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of being persecuted in her home state.”⁴⁰⁸ However, a Convention ground need only account in part for or be a contributing factor in creating the risk of being persecuted; it need not be a sole or even dominant cause.⁴⁰⁹ In elaborating the *nature* of the causal link, Hathaway and Foster put forth three compelling arguments for adopting the so-called “predicament approach” to understanding the 1951 Convention’s nexus requirement and conclude that:⁴¹⁰

while it is still widely and frequently assumed that evidence of intention is the only method of satisfying the ‘for reasons of’ clause in refugee law, there is an emerging ‘*predicament approach*’ that more closely comports with the text, object, and purpose of the Convention and hence is to be preferred. Accordingly, the more principled approach to interpreting the Refugee Convention’s nexus clause is to acknowledge that the causal element may be satisfied where the intention either of the persecutor or of the state in withholding protection is linked to a Convention ground, *or where the Convention ground explains why the applicant is at risk of being persecuted*.⁴¹¹

Hathaway and Foster explain that the predicament approach focuses attention “more broadly on the *reason for exposure to the risk*.”⁴¹² Drawing on New Zealand’s jurisprudence, their first argument is textual: “the Convention requirement is not that *persecution* be linked to a Convention ground, but rather that the condition of ‘*being persecuted*’ – the predicament of the applicant – be ‘for reasons of’ a Convention ground.”⁴¹³ Their second argument contends “consideration of the object and purpose of the Convention argues strongly against any intention requirement.”⁴¹⁴ Their third argument asserts “the intention requirement cannot be reconciled to the Convention’s fundamental concern with socio-political disenfranchisement anchored in non-discrimination norms, since the international understanding of non-discrimination law is that discrimination may be established on the basis of intent *or effect*.”⁴¹⁵

⁴⁰⁷ See e.g., Hathaway and Foster, n. 398, Chapter 5.

⁴⁰⁸ *Ibid.*, p. 362.

⁴⁰⁹ *Ibid.*, Chapter 5. See also UNHCR, 1951 Convention Handbook, n. 60.

⁴¹⁰ *Ibid.*, Chapter 5.2.3 and Chapter 5 more generally.

⁴¹¹ *Ibid.*, p. 382. Emphasis added.

⁴¹² *Ibid.*, p. 378. Emphasis added.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*, p. 389.

The predicament approach is well established in New Zealand jurisprudence,⁴¹⁶ and indeed in *AF (Kiribati)*, the case concerning Mr. Teitiota, New Zealand’s Immigration and Protection Tribunal (NZIPT) explicitly affirmed the approach in the context of claims related to “natural disasters and environmental degradation”.

While there is no presumption of non-applicability, no special rules exist either. It is indubitably correct that natural disasters and environmental degradation can involve significant human rights issues. Nevertheless, like any other case, in cases where such issues form the backdrop to the claim, the claimant must still establish that they meet the legal criteria set out in Article 1A(2) of the Refugee Convention This involves an assessment not simply of whether there has been breach of a human right in the past, but the assessment of a future risk of being persecuted. In the New Zealand context, the claimant’s *predicament* must establish a real chance of a sustained or systemic violation of a core human right demonstrative of a failure of state protection which has sufficient nexus to a Convention ground.⁴¹⁷

UNHCR’s recent Guidelines on International Protection reflect a shift to embody the predicament approach. In *Claims to Refugee Status based on Sexual Orientation and/or Gender Identity (GIP 9)*, for example, under its commentary on the causal link (i.e., the “for reasons of” element), UNHCR explains that “[t]he focus is on the *reasons for the applicant’s feared predicament* within the overall context of the case, and *how he or she would experience the harm* rather than on the mind-set of the perpetrator.⁴¹⁸ And in GIP 12, UNHCR reaffirms that:

The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a 1951 Convention ground. However, the intent or motive of the persecutor is not necessary or decisive, not least because it is often difficult to establish, in particular in situations of armed conflict and violence. A causal link may also be established by the strategies, tactics or means and methods of warfare of the persecutor, by the inability or 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: *do the reasons for the person’s feared predicament, within the overall context of the country, relate to a Convention ground?*⁴¹⁹

⁴¹⁶ See e.g., *Ibid.*, pp. 380 and 378.

⁴¹⁷ *AF (Kiribati)*, n. 379, paragraph 65.

⁴¹⁸ 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”, October 2012, <https://www.refworld.org/docid/50348afc2.html>, accessed: July 2019, paragraph 39. Emphasis added.

⁴¹⁹ UNHCR, GIP 12, n. 61, paragraph 32. Emphasis added.

The same reasoning and position would apply in the context of hazard, disaster or environmental degradation. Consequently, the question to guide decision makers is or includes: do the reasons for the person's feared predicament, within the overall context of the country, including in light of hazards, disasters and/or environmental degradation, relate to a Convention ground? Addressing this question entails an enquiry into the social context in which differential vulnerability and exposure to serious harm arises. This point is explored below.

6.3.2. *Indiscriminate or Discriminate Risks and Harm*

A shift towards examining the *feared predicament* of a putative refugee, and whether his or her risk of harm in the face of hazard, disaster or environmental degradation relates to a Convention ground necessitates a deeper understanding of hazards, disasters and environmental degradation (including as they are influenced by the adverse effects of climate change) and their effects on individuals.⁴²⁰ In general, jurisprudence and refugee scholarship has tended to assimilate the notion of *natural* hazards and disasters and regards such 'events' as presenting *indiscriminate threats and harm* to people. Such indiscriminate threats and harm are viewed as stemming from external factors or forces of nature and are generally deemed unrelated to human-agency.⁴²¹

Scott's scholarship provides a detailed discussion of the limitations on how courts (and scholars) have examined and discussed these themes in the context of assessing claims for international protection. Through an extensive review of cases, and drawing on literature in the fields of disaster law and disaster risk reduction (DRR), Scott persuasively argues for an understanding of the notion of disaster that aligns with how it is conceptualized in the DRR field.⁴²² In essence, for the purpose of assessing eligibility for refugee status, Scott recommends a paradigm shift that recognizes "disasters as social phenomena within which existing patterns of discrimination contribute to differential impacts".⁴²³ A number of salient points raised by Scott to substantiate his conclusion are elaborated here to facilitate understanding.

At the outset, based on a review of high judicial authority from a number of English-speaking jurisdictions, Scott explains that "[t]hese opinions reveal the clear view that,

⁴²⁰ On the human rights implications of the adverse effects of climate change, see e.g., McAdam et al., "International Law and Sea-Level Rise: Forced Migration and Human Rights", 2016, Fridtjof Nansen Institute, <https://www.fn.no/publications/international-law-and-sea-level-rise-forced-migration-and-human-rights-article893-290.html>, accessed: July 2019; Human Rights Council (HRC), "The Slow-onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants", A/HRC/37/CRP.4, 22 March 2018, <https://reliefweb.int/report/world/slow-onset-effects-climate-change-and-human-rights-protection-cross-border-migrants>, accessed: July 2019.

⁴²¹ See e.g., discussion in Scott, n. 387.

⁴²² Ibid.

⁴²³ Scott, Finding Agency in Adversity, n. 387, p. 26.

unlike in genuine refugee-producing contexts, displacement in the context of disasters is not connected to discriminatory conduct on the part of the State.”⁴²⁴ Discussing the case of *Ward*, and highlighting La Forest J’s opinion, Scott emphasizes that it “reveals the underlying assumption that the breakdown in the relationship between the individual and the State that is considered central to the notion of being persecuted is not perceived to exist in the context of disasters.”⁴²⁵ What these *obiter dicta* on the applicability of the 1951 Convention reveal are certain assumptions about the nature of “natural” disasters.⁴²⁶

[T]hey reflect a conception of people fearing exposure to disaster related harm as being victims of the storms, droughts, and floods whose indiscriminate impact causes adversity, which is the unfortunate consequence of the forces of nature, *rather than emerging within the context of existing patterns of discrimination and marginalisation generating unsafe conditions where individuals are exposed and vulnerable to natural hazard events*. ‘Natural’ disasters, according to this view engender adversity. The role of human agents is entirely absent from the frame – hence the non-applicability of international refugee law.⁴²⁷

According to Scott, such perspectives accord “with the centuries’ old ‘hazard’ paradigm.”⁴²⁸ This paradigm views “people who face adversity in the context of disasters ... as unfortunate victims of ‘natural’ disasters”, deserving of humanitarian assistance, but distinguished from refugees who are persecuted due to a Convention ground.⁴²⁹ Given the centrality of human agency for the establishment of a claim under the 1951 Convention definition, “a paradigm that casts ‘natural’ disasters as resulting exclusively from the forces of nature (or even anthropogenic climate change), presents clear problems for people seeking refugee status in that connection.”⁴³⁰

Hathaway and Foster, in punctuating their point that many involuntarily displaced persons, including those fleeing “natural disasters” generally do not fall within the ambit of the 1951 Convention, also focus on the *indiscriminate* nature of risks and harm.⁴³¹ They draw on the statement of the Israel representative during the 1951 Convention’s drafting for support:

⁴²⁴ Ibid., p. 31.

⁴²⁵ Ibid.

⁴²⁶ Ibid., p. 28.

⁴²⁷ Ibid., p. 32. Emphasis added.

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Ibid., pp. 32-33.

⁴³¹ Hathaway and Foster, n. 398, p. 362.

As recognized by the drafters, '[t]he text ... obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, flood, earthquakes or volcanic eruptions, for instance, *differentiated* between their victims on the grounds of race, religion, or political opinion. Nor did the text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by Article 1 of the Convention.'"⁴³²

In a separate passage, they also explain that:

While it is true that those whose *predicament* is simply the result of *natural disasters* or widespread turmoil do not ordinarily qualify as Convention refugees, this is not because the adverse impact falls on large numbers of persons, but rather because of the *non-discriminatory* nature of such risks. Because refugee law is concerned only with protection from persecution tied to a claimant's race, religion, nationality, membership of a particular social group, or political opinion, those impacted by *natural calamities*, weak economies, civil unrest, and even generalized failure to adhere to basic standards of human rights *are not by that fact alone* entitled to refugee status. ... If the harm is both sufficiently serious and impacts persons by reason of their civil or political status [i.e., a Convention ground], then a claim to Convention refugee status is made out, however many people are similarly affected.⁴³³

Indeed, notwithstanding *obiter dicta* and the opinions of refugee-law experts who appear to understand natural hazards as synonymous with 'natural' disasters triggered by natural hazards, in the field of DRR an alternative paradigm, which recognizes disasters as social phenomena produced (at least partially) by society, dominates discourse.⁴³⁴ This epistemology of disaster is recognized in the definition of disaster used foremost by policy makers and practitioners and endorsed by UNDRR. As discussed in section 5.2.1, UNDRR defines a "disaster" as:

A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and

⁴³² Ibid. Emphasis added.

⁴³³ Ibid., pp. 175-176. Internal citations omitted. Emphasis added. In this regard, they add: "By way of example, the victims of a flood or earthquake are not per se Convention refugees, even if they have fled to a neighboring state because their own government was unable or unwilling to provide them with relief assistance. If, on the hand, the government of the home state chose to limit its relief efforts to those victims who were members of the majority race, forcing a minority group to flee to another country in order to avoid starvation or exposure, a claim to refugee status should succeed because the harm feared is serious, bespeaks a failure of state protection, and the requisite linkage to a civil or political status is present."

⁴³⁴ See e.g. Scott, n. 387.

capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.⁴³⁵

Notably, this definition recognizes that human *vulnerability*, human *capacity* and human *exposure* are inherently connected with the ways in which people experience and are impacted by hazards (including those which may be influenced by the adverse effects of climate change) and which may ultimately result in a disaster.

As early as the 1970s, experts had highlighted the need to focus on social vulnerability, “a vulnerability that is induced by socio-economic conditions that can be modified by man, and is not just an act of god”.⁴³⁶ In *At Risk: Natural Hazards, People’s Vulnerability and Disasters*, which is often cited as a seminal work in the area, the authors explain that “[i]n evaluating disaster risk, the social production of vulnerability needs to be considered with at least the same degree of importance that is devoted to understanding and addressing natural hazards.”⁴³⁷ Explaining *disaster risk* as a function of a hazard and its relationship to vulnerability (i.e., disaster risk = hazard * vulnerability), the authors highlight two models for demonstrating how disasters occur when natural hazards affect vulnerable people.⁴³⁸

Through the so-called “Pressure and Release model (**PAR model**)”, the authors explain that a “disaster is the intersection of two opposing forces: those processes generating vulnerability on one side, and the natural hazard event (or sometimes slow unfolding natural process) on the other.”⁴³⁹ Increasing pressure on people can arise from both: the impact and severity of the hazard, or the extent of vulnerability, which “is rooted in social processes and underlying causes which may *ultimately be quite remote from the disaster event itself*.”⁴⁴⁰ For the purposes of the analysis, the authors define vulnerability as “the characteristics of a person or group and their situation that influence their capacity to anticipate, cope with, resist and recover from the impact of a natural hazard (an extreme natural event or process).”⁴⁴¹

Using the PAR model, *At Risk* shows how certain groups within society can be particularly vulnerable to disasters. The progression of vulnerability is explained as a

⁴³⁵ UNDRR, n. 302; See same footnote for related commentary and definitions from UNDRR. See also Scott, Finding Agency in Adversity, n. 387, p. 33, where he discusses how this confused use of terminology draws much-needed attention away from understanding and reducing human and social vulnerability.

⁴³⁶ Scott, *ibid.*, p. 33, quoting O’Keefe et al., “Taking the Naturalness out of Natural Disasters”, *Nature*, 1976, Vol. 260.

⁴³⁷ Wisner et al., “At Risk: Natural Hazards, People’s Vulnerability and Disasters”, 2004, Routledge, Second Edition, p. 49.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*, p. 50.

⁴⁴⁰ *Ibid.* Emphasis added. In order “to relieve the pressure, vulnerability has to be reduced.”

⁴⁴¹ *Ibid.*, p. 11.

function of root causes, dynamic pressures and unsafe conditions.⁴⁴² They explain that “[r]oot causes reflect the exercise and distribution of power in a society.”⁴⁴³

The most important root causes that give rise to vulnerability (and which reproduce vulnerability over time) are economic, demographic and political processes. These affect the allocation and distribution of resources, among different groups of people. They are a function of economic, social, and political structures, and also legal definitions and enforcement of rights, gender relations and other elements of ideological order.⁴⁴⁴

Dynamic pressures are explained as “processes and activities that ‘translate’ the effects of root causes both temporally and spatially into unsafe conditions.”⁴⁴⁵ Unsafe conditions are explained as “the specific forms in which the vulnerability of a population is expressed in time and space in conjunction with a hazard.”⁴⁴⁶ These can include living in hazardous locations, being unable to afford safe buildings, lacking effective protection by the state (i.e. effective building codes), having to engage in dangerous livelihoods, having minimal food entitlements or entitlements that are prone to rapid and severe disruption.⁴⁴⁷

A second model, referred to as the “Access model” provides “a more magnified analysis of how vulnerability is initially generated by economic, social and political processes, and what then happens as a disaster unfolds.”⁴⁴⁸ It “focuses on precise detail of what happens at the pressure point between the natural event and longer-term social processes” to help explain “differential vulnerability to, and the impacts of, a disaster”, for particular groups such as women, children, the poor and those defined by ethnicity, class, occupation, location of work or domicile.⁴⁴⁹

⁴⁴² Ibid., p. 51.

⁴⁴³ Ibid., p. 53.

⁴⁴⁴ Ibid., p. 52. Scott explains that “[u]nderstanding the *root causes* of vulnerability can entail an exploration of centuries of social history but in more practical terms invites an appreciation of the structural underpinnings of a society People do not simply end up living in places where they are exposed and vulnerable to natural and other hazards. There is a story to be uncovered.” (Finding Agency in Adversity, n. 387, p. 34. Internal citations omitted.)

⁴⁴⁵ Wisner et al., p. 53, but see more generally pp. 53-55; Scott explains that these “include such factors as government policies, for example relating to land distribution, education, and international trade, as well as levels of corruption, the presence or absence of social unrest and/or armed conflict, and so forth.” (Finding Agency in Adversity, n. 387, pp. 34-35.)

⁴⁴⁶ Wisner et al., n. 437, p. 55.

⁴⁴⁷ Ibid. In this regard, Scott helpfully asks: “Why do certain people live in a particular place, and what are the factors that conspire to make that place one that is exposed to natural hazards? Additionally, what makes this individual or community vulnerable, in terms of protecting against hazards and rebuilding their lives and livelihoods in the aftermath?” (Finding Agency in Adversity, n. 387, p. 35.)

⁴⁴⁸ Ibid., p. 50, but also see more generally Chapter 3.

⁴⁴⁹ Ibid., 87.

Accepting the conceptualizations of disaster, disaster risk and vulnerability in the DRR sphere in assessments of international protection claims, compels cognizance that risks and harms stemming from a hazard and/or environmental degradation can impact people *differentially* based on their vulnerability. In other words, while a hazard or environmental degradation may strike or unfold in an indiscriminate manner, the impacts (or harm) may be felt differentially as a function of vulnerability. The differential impacts (or harm) experienced, or the differential risks of harm, may have the potential rise to the level of persecution, based on individual vulnerability.

From here, appreciating that vulnerability (and therefore experiences or risks of harm arising in the context of hazard, disaster and/or environmental degradation) is affected by multiple factors, which may include historical or pre-existing *discriminatory human agency*, does not require an onerous leap. The discriminatory action need not occur post-hazard, disaster or environmental degradation, but may have occurred in the *past* through root causes such as those identified in the PAR model,⁴⁵⁰ and it is certainly plausible that past discriminatory human agency may have occurred due to Convention grounds.

In this context, and as Scott helpfully synthesizes, when it comes to assessing claims for refugee status:

[T]he perception of disasters as being synonymous with the natural hazard events that often trigger them must be replaced with an awareness of the deeply social nature of disasters, within which existing patterns of discrimination and marginalization are exacerbated. The latter approach invites a more context-specific examination of *individual* claims for international protection.⁴⁵¹

A context specific examination of individual claims for international protection need not however, depend simply on the existence of a disaster or on recognition of the deeply social nature of *disaster per se* (as Scott seems to limit), since that term is defined by

⁴⁵⁰ See also Burson, "Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition", in Afifi and Jäger (eds.), *Environment, Forced Migration and Social Vulnerability*, 2010, Springer-Verlag, where he explains "environmental degradation may be the result of policy choices that form part of a wider pattern of state-sanction repression." (p. 9) "The reality is that environmental degradation does not occur in a vacuum, isolated from anthropogenic influence. Environmental degradation is intimately bound up with long-term issues of development, population growth, and economic and social policy choices. This is particularly true in relation to climate change. This historical context, when mixed with activity of a discriminatory nature, can in principle produce environmentally displaced persons who meet the Convention's definition. While in such cases the presence of these other discriminatory practices is essential for Convention-based recognition, this does not mean that the underlying environmental issue ceases to have all relevance. Historical policy choices, particularly development and infrastructure-related policy choices, may evidence a pattern of official discrimination – a relevant consideration for the Convention inquiry. Furthermore, that the impacts of environmental degradation may not be transient in nature may assist in establishing that there is no real chance that things will improve – a key factor in establishing Convention recognition." (p. 7. Internal citations omitted.)

⁴⁵¹ Scott, *Finding Agency in Adversity*, n. 387, p. 27.

reference to the community or societal scale. If it is accepted that differential harm can be experienced by virtue of a person's vulnerability (which is influenced by pre-existing discrimination on the basis of a Convention reason), then a disaster need not occur for particularly vulnerable individuals to experience, or be at risk of, serious harm. Hazards and environmental degradation (including as influenced by the adverse effects of climate change) may affect vulnerable individuals in a manner that creates experiences or risks of serious harm that rise to the level of persecution.

6.3.3. Socio-Economic Harms

Often, experiences and risks of harm in the context of hazard, disaster or environmental degradation relate to socio-economic conditions and rights.⁴⁵² In such situations, lack of availability and access to food, drinking water, and health care, *inter alia*, can constitute serious threats to life and health. Hathaway and Foster explain that:

threats to core-socio-economic entitlements will frequently give rise to a risk to the internationally guaranteed right 'to an adequate standard of living.' While neither the existence of financial grievances nor even poverty per se infringes this standard, there will be cases in which either an accumulation of risks, or – especially in relation to such core entitlements as the rights to food and shelter – the risk to a single core interest standing alone, will infringe this fundamental human right. Where the essentials of life are threatened in these ways, refugee law appropriately recognizes the risk to be of sufficient gravity to be persecutory.⁴⁵³

Indeed, the harms feared by Mr. Teitiota on account of sea-level rise, *inter alia*, related to socio-economic rights and New Zealand jurisprudence has affirmed that breaches of socio-economic rights in disasters and environmental degradation are relevant to the refugee inquiry.⁴⁵⁴

While claims based on economic and social deprivation present challenges to key conceptual assumptions regarding the nature of persecution, and consensus may be

⁴⁵² See e.g., McAdam et al., n. 420; HRC, n. 420.

⁴⁵³ Hathaway and Foster, n. 398., p. 235.

⁴⁵⁴ *AF (Kiribati)*, n. 379, paragraph 70 referring to *BG (Fiji)* (n. 393) paragraphs 90-93. Scott helpfully summarises these points: "Firstly, breaches of economic and social rights can amount to persecution under the Refugee Convention where the minimum core of the right is denied. Secondly, the immediate obligation under Article 2(2) ICESCR [the International Covenant on Economic, Social and Cultural Rights] requiring States to address economic and social rights without discrimination is also relevant to determining the failure of state protection element. Thirdly, the 'cumulative effect of individual breaches which, in themselves, would not amount to being persecuted' needs to be considered. Finally, the Tribunal is very clear that persecution can arise even where States are doing their best in difficult circumstances." (Scott, Finding Agency in Adversity, n. 387, p. 40. Internal citations omitted.)

elusive, jurisprudence does encompass a wide range of claims relating to economic and social rights.⁴⁵⁵ As Foster explains:

courts are now uniform in considering the full range of harm feared by an applicant for refugee status, thus making assessments of whether a person is at risk of 'being persecuted' on the basis of an accumulation of all harm feared, even if some elements of harm would not individually be considered sufficiently serious to amount of [*sic*] persecution.⁴⁵⁶

As the New Zealand RSAA [Refugee Status Appeals Authority] has explained: 'It is recognised that various threats to human rights, in their cumulative effect can deny human dignity in key ways and should properly be recognized as persecution for the purposes of the Convention. The need to recognise the cumulative effect of threats to human rights is particularly important in the context of refugee claims based on discrimination.'⁴⁵⁷

In this regard, Foster's analysis also highlights developments in the use of the *predicament* approach noting two key ways in which claims have been successful based on an effective predicament analysis. On the first, she explains, "courts and tribunals have focused on the question of which groups in society are primarily the victims of the particular type of harm faced by the applicant."⁴⁵⁸

In such decisions, the adjudicator has not engaged in an inquiry or consideration as to what the individual motives or thoughts of the persecutor (or future persecutor) may have been, or even as to whether the state had the requisite intent; the fact that one group is significantly over-represented amongst victims is deemed sufficient to establish nexus.⁴⁵⁹

A predicament approach thus allows for a more realistic assessment of the wider context of a person's fear of being persecuted, admitting of the possibility that, where the predicament is the result of widespread discrimination against a group on a ground protected by the Refugee Convention, refugee status will be established.⁴⁶⁰

The second way in which the approach has been implemented in practice:

⁴⁵⁵ Foster, "International Refugee Law and Socio-Economic Rights", 2007, Cambridge University Press, Chapter 3.

⁴⁵⁶ *Ibid.*, p. 93.

⁴⁵⁷ *Ibid.*, p. 94, quoting *Refugee Appeal No. 71427/99*, RSAA, 16 August 2000, paragraph 53(a).

⁴⁵⁸ *Ibid.*, p. 281.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*, p. 283. See also Hathaway, n. 404.

is displayed in cases in which decision-makers focus on the *factors that led to or contributed to the person's vulnerability to the relevant harm feared*, concluding that if those factors can be related to a Convention ground (most commonly membership of a particular social group) then nexus is established. In such cases, as in those described above, the focus is not on the intention of the persecutor or even the state (although the state protection issue is relevant); rather the decision-maker simply asks, 'why is the person in this predicament?'⁴⁶¹

Accordingly, where a person faces serious denials of economic and social rights in the context of hazard, disaster or environmental degradation, decisions makers should consider if a claim to refugee status under the 1951 Convention could be established.

6.3.4 Summary

As McAdam admits, "[t]here is nothing implicit in the Refugee Convention that would preclude recognition of environmental harms amounting to persecution provided that the requisite elements of Article 1A(2) could be established."⁴⁶² In cases where human agency is readily apparent, such as where discriminatory State action or inaction occurs in the context or aftermath of a disaster or the environment is degraded as a form of oppression against specific groups, establishing the elements of the 1951 Convention definition may follow familiar patterns.

By contrast, when human agency is not readily apparent more complex doctrinal and epistemological challenges arise. In jurisdictions that employ a predicament approach, the preceding discussion suggests that in the context of a hazard, disaster or environmental degradation, there may be possible pathways to refugee status pursuant to the 1951 Convention. For example, it is conceivable that a focus on a claimant's predicament, underpinned by a deep and historical understanding of discriminatory actions and omissions that influenced vulnerability and associated experiences and risks of harm, including on account of individual or cumulative socio-economic consequences, may support a claim under the 1951 Convention.⁴⁶³

In this respect, it is worth quoting the 2013 NZIPT decision regarding Mr. Teitiota:

[B]road generalisations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental

⁴⁶¹ Ibid. Emphasis added.

⁴⁶² McAdam, n. 378, p. 44.

⁴⁶³ See e.g., Scott, Finding Agency in Adversity, n. 387, discussing Somali ethnicities affected by the conditions in Somalia in 2011.

degradation, and *human vulnerability to those disasters and degradation* is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including Convention-based recognition.⁴⁶⁴

The three interrelated entry points highlighted in this section do not necessarily influence or engage all of the limitations raised in scholarship and jurisprudence on the applicability of the 1951 Convention definition. While past discrimination may create differential vulnerability and in turn, differential risks and experiences of harm, States may be willing to provide protection in the context, or aftermath, of hazards, disasters or environmental degradation. Past experiences of differential harm relating to hazards, disasters or environmental degradation may not establish a “well-founded” fear of persecution. Risks of differential harm stemming from hazards, disasters or environmental degradation may not rise to the level of persecution or may not be regarded as “well-founded”. In such contexts, examining the combined consequences and interactions of nexus dynamics and their effects at the individual level may illuminate evidence to support refugee claims.⁴⁶⁵

6.4. Applicability in Nexus Situations

In nexus situations that can be characterized by armed conflict and violence as defined in GIP 12, UNHCR has provided detailed interpretive guidance on how the 1951 Convention definition may apply. Similarly, for nexus situations in which gang violence is a feature, UNHCR’s Guidance Note on Gangs is applicable. Further, many of UNHCR’s profile- or country-specific Eligibility Guidelines relate to situations in which armed conflict and violence or gang-related violence feature, and UNHCR has elaborated detailed explanations to support assessment of claims for refugee status under the 1951 Convention definition.

However, for some individuals whose claims cannot be established solely on an assessment of conditions of armed conflict and violence or gang-related violence, the predicament stemming from their interaction with hazards, disasters or environmental degradation may be necessary to establish all elements of the 1951 Convention definition. As is widely acknowledged, human mobility including displacement across borders is multi-causal and complex, and the combined consequences of these key drivers of human movement – conflict, violence, disaster and environmental degradation (as encapsulated

⁴⁶⁴ *AF (Kiribati)*, n. 379, paragraph 57. Emphasis added. As a preliminary matter, it is worth noting that section 129(1) of New Zealand’s 2009 Immigration Act provides that: “a person must be recognized as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.” The Tribunal explains that the “the principal issues are: (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality? (b) If the answer is yes, is there a Convention reason for that persecution?” (Paragraphs 42 and 44.)

⁴⁶⁵ See *amore generally*, Scott, *Refugee Status Determination*, n. 387, and his proposed methodology.

within the notion of nexus dynamics) – may have the potential to support a broader array of refugee claims.

In this regard, UNHCR’s Legal Considerations on Conflict and Famine recognizes the influence of conflict and environmental changes for refugee movements. UNHCR notes that environmental factors contribute to the development of famine conditions, and that food insecurity and famine are both consequences of the mix of conflict and environmental changes (i.e., drought and climate change) and also exacerbate their impacts. Where famine is linked to situations of armed conflict, UNHCR explains that claims on the basis of the 1951 Convention definition may be made out.⁴⁶⁶

Beyond these Legal Considerations, UNHCR has not elaborated guidance on the applicability of the 1951 Convention to other situations that may comprise nexus dynamics. To develop detailed additional guidance, further analysis and understanding is critical. Key questions that are relevant to this inquiry include:

1. How historical discriminatory practices based on Convention grounds have affected or affect the vulnerability of people to the consequences of nexus dynamics;
2. How vulnerability to the combined consequences of nexus dynamics can create differential experiences and risks of harm;
3. How the combined consequences of nexus dynamics may affect socio-economic rights and satisfy the threshold of persecution;
4. How the combined consequences of nexus dynamics may support the establishment of a well-founded prospective risk of being persecuted;
5. How situations of indiscriminate violence, when combined with historical discrimination and the consequences of hazards, disaster or environmental degradation, could support claims for refugee status.

More generally, nexus situations do not detract from the fact that more ‘traditional’ claims for refugee status, including claims from specific profiles of individuals that were recognized previously, may continue to be supported by conditions at origin that are unrelated to nexus dynamics. For such purposes, UNHCR’s earlier Guidelines on International Protection, including on gender, membership of a particular social group, religion, victims of trafficking, child asylum seekers, and sexual orientation and gender identity, as well as UNHCR Eligibility Guidelines will continue to be relevant.

7. SUMMARY AND CONCLUSIONS

⁴⁶⁶ UNHCR, Conflict and Famine Legal Considerations, n. 64. See also Hathaway, n. 404.

This paper discusses the applicability of refugee law when international protection claims arise in the context of nexus-related cross-border movements. In doing so, it also offers insights on the applicability of refugee law when people flee across international borders in the context of disaster and adverse effects of climate change.

- a. The research is framed by an overview of influential and contemporary policy instruments and dialogues, including the New York Declaration, the GCR and UNHCR's Strategic Directions 2017-2021. These frameworks acknowledge the contemporary reality of nexus-related cross border movements and include commitments to ensure people who qualify as refugees under law are duly recognized. Decisions of the UNFCCC COP, expert meetings and research on State practice identify the need for clarity and guidance on the applicability of refugee law.
- b. Section II highlights some of the variation in nexus dynamics and nexus-related cross-border movements, demonstrating that nexus situations are prevalent in Africa and Latin America, and also in other regions of the world. Understanding how nexus dynamics vary; undermine governance, institutions and public order; affect individual and group vulnerability, risks and experiences of harm; and influence cross-border movements, are areas for further research.
- c. Section III discusses the regional refugee definition in Africa, which is referenced in the domestic laws of 37 States in Africa. The section draws on salient scholarly literature and UNHCR guidance to provide an analysis of key terms of the definition, including "events seriously disturbing public order". It highlights the dearth in research analyzing the regional refugee definition in accordance with the rules of treaty interpretation articulated in the VCLT and the lack of authoritative guidance on interpreting the criteria in Article I(2) of the 1969 OAU Convention.
- d. Section IV discusses key terms of the regional refugee definition in Latin America, drawing on salient English-language literature, UNHCR guidance and summary conclusions, as well as instruments adopted at decennial commemoration events celebrating the 1984 Cartagena Declaration. The section explains that the domestic laws of 15 States incorporate regional refugee criteria drawn from Conclusion III(3) of the Declaration, albeit with a large degree of variation. Authoritative guidance on interpreting the regional refugee criteria is unavailable, and yet States have specifically requested such a document. The non-binding nature of the Declaration means that its regional refugee definition need not be interpreted pursuant to the rules under the VCLT. This raises questions regarding the meaning of "other circumstances which have seriously disturbed public order" and its correlation with "events seriously disturbing public order" in Article I(2) of the 1969 OAU Convention.

- e. Section V reviews selected literature discussing the applicability and application of the regional refugee definitions in Africa and Latin America in situations of conflict, disaster and nexus dynamics. It highlights misconceptions, including regarding the conception of disaster, which underpin analyses of the applicability of the regional refugee criteria. The section also excerpts example situations and factual indicators of serious disruptions to public order as offered by UNHCR.
- f. Section VI provides an overview of concerns raised by scholars and courts regarding the 1951 Convention definition's applicability to situations of disaster and climate change and synthesizes elements of the definition that present challenges for claimants. It highlights conditions under which refugee claims based on the Convention definition may be successful. Spurred by New Zealand jurisprudence, it also offers three avenues to enliven deeper engagement on the applicability of the 1951 Convention definition in the context of disaster or nexus situations.

Overall, this paper seeks to raise awareness and support knowledge production through a working analysis on the applicability of refugee law in a time of climate change, disaster and conflict, and thereby, to promote the robust and rigorous implementation of refugee law in practice. These goals align with efforts to promote responsibility sharing and with the commitments and affirmations States have made under the New York Declaration for Refugees and Migrants and the Global Compact on Refugees.

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