

## Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters<sup>1</sup>

### Introduction

1. Climate change and disasters are impacting the lives of millions of people across the globe, and forcing many people to leave their homes,<sup>2</sup> including in some cases to cross international borders. Their adverse effects will often expose the limited ability of an affected community to adapt, reflecting its pre-existing vulnerabilities. Such effects may emerge suddenly, or gradually over time, triggering human, material, economic or environmental losses.

2. The relationship between climate change and human rights is increasingly recognized in law, including in the UN Human Rights Committee's decision in the *Teitiota* case.<sup>3</sup> The adverse effects of climate change and disasters have diverse consequences for States and societies, as well as the well-being and enjoyment of rights by individuals, as recognized in judgments and decisions in various jurisdictions.<sup>4</sup> Such consequences may include the growing

<sup>1</sup> UNHCR issues these legal considerations pursuant to its mandate included in the Statute of the Office of the United Nations High Commissioner for Refugees (paragraph 8(a)), in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees, Article II of its 1967 Protocol, Article VIII of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and Commitment II(e) of the 1984 Cartagena Declaration on Refugees.

<sup>2</sup> In Africa region the Kampala Convention provides legal protection for individuals internally displaced as a result of effects of climate change and disasters. See: Articles 1, 4, 5, 11 and 12, African Union Convention on the Protection of and Assistance to Internally Displaced Persons, 22 October 2009, [www.unhcr.org/refworld/docid/4ae825fb2.html](http://www.unhcr.org/refworld/docid/4ae825fb2.html).

<sup>3</sup> *Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, [www.refworld.org/cases/HRC.5e26f7134.html](http://www.refworld.org/cases/HRC.5e26f7134.html). See also Article 5, International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters*, 2016, [www.refworld.org/docid/5f64dbd54.html](http://www.refworld.org/docid/5f64dbd54.html).

<sup>4</sup> *AC (Tuvalu)*, [2014] NZIPT 800517-520, New Zealand: Immigration and Protection Tribunal, 4 June 2014, [www.refworld.org/cases/NZ\\_IPT.585151694.html](http://www.refworld.org/cases/NZ_IPT.585151694.html), para. 59. *Advisory Opinion OC-23/17 Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACrTHR), 15 November 2017, [www.refworld.org/cases/IACRTHR.5e67c7744.html](http://www.refworld.org/cases/IACRTHR.5e67c7744.html), para. 47. *Kawas-Fernández v. Honduras* (3 April 2009) Inter-American Court of Human Rights, [www.corteidh.or.cr/docs/casos/articulos/seriec\\_196\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_196_ing.pdf), para. 148. UN Human Rights Committee, *General Comment No. 36, Article 6: Right to Life*, 3 September 2019, [www.refworld.org/docid/5e5e75e04.html](http://www.refworld.org/docid/5e5e75e04.html), para. 62. *Teitiota v. New Zealand*, note 3 above, paras. 9.4 to 9.14. African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right To Life (Article 4)* (November 2015), [www.refworld.org/docid/5e67c9cb4.html](http://www.refworld.org/docid/5e67c9cb4.html), para. 3. *Cordella and Others v. Italy* (24 January 2019), European Court of Human Rights, Appl. nos. 54414/13 and 54264/15, [www.refworld.org/cases/ECHR.5e67caf54.html](http://www.refworld.org/cases/ECHR.5e67caf54.html), para. 157. *Özel and others v. Turkey* (17 November 2015), European Court of Human Rights Appl nos. 14350/05, 15245/05 and 16051/05, [www.refworld.org/cases/ECHR.5e67cb9f4.html](http://www.refworld.org/cases/ECHR.5e67cb9f4.html), para. 171. UN General Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights: Climate Change and Poverty*, UN A/HRC/41/39, 17 July 2019, [www.undocs.org/A/HRC/41/39](http://www.undocs.org/A/HRC/41/39). Council of Europe: Parliamentary Assembly, *A Legal Status for "Climate Refugees"*, Resolution 2307 (2019), 3 October 2019, [www.refworld.org/docid/5da07db64.html](http://www.refworld.org/docid/5da07db64.html). See also e.g., Sanjula Weerasinghe, *In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change*, UNHCR 2018, [www.refworld.org/docid/5c2f54fe4.html](http://www.refworld.org/docid/5c2f54fe4.html), including discussions on Somalia and Haiti. IDMC, *Global Report on Internal Displacement*, 2019, [www.internal-displacement.org/global-report/grid2019/](http://www.internal-displacement.org/global-report/grid2019/) (GRID 2019) and in particular discussions on Afghanistan, Somalia and Nigeria; and Overseas Development Institute (ODI), *When Disasters and Conflict Collide: Facts and Figures*, 2016, [www.odi.org/sites/odi.org.uk/files/resource-documents/10537.pdf](http://www.odi.org/sites/odi.org.uk/files/resource-documents/10537.pdf), including statistics on disaster-affected populations and disaster-related deaths in fragile States affected by conflict or violence.

prevalence, spread and severity of new and re-emerging diseases;<sup>5</sup> food insecurity and famine; increasingly scarce habitual land and potable water; exposure to exploitation and trafficking; as well as to human, material, economic or environmental losses, including lost incomes, homes, livelihoods and even lives.<sup>6</sup> The adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socio-economic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection.

3. This document sets out key legal considerations concerning the applicability of international and regional refugee and human rights law when cross-border displacement occurs in the context of the adverse effects of climate change and disasters.<sup>7</sup> To this end, the document takes into account the 1951 Convention relating to the Status of Refugees<sup>8</sup> and its 1967 Protocol<sup>9</sup> (together the 1951 Convention), as well as the regional refugee criteria in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention)<sup>10</sup> and Conclusion III(3) of the 1984 Cartagena Declaration on Refugees.<sup>11</sup> Reference is also made to the applicability of complementary forms of protection under international human rights law and temporary protection or stay arrangements. This document does not address issues of cessation or exclusion from refugee status, which are explained in other relevant UNHCR guidance.<sup>12</sup>

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<sup>5</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, CEDAW/C/GC/37, 13 March 2018, [www.undocs.org/CEDAW/C/GC/37](http://www.undocs.org/CEDAW/C/GC/37).

<sup>6</sup> For example, the conditions in Somalia in 2011 arguably manifested these dynamics, albeit in a context where the effects of climate change interacted with conflict and violence in Somalia, see: In Harm's Way, note 4 above, section 3.1.1. See also, Special Rapporteur on Extreme Poverty and Human Rights (2019), note 4 above. *Teitiota v. New Zealand*, note 3 above.

<sup>7</sup> Disasters are not "natural", rather the combined result of exposure to a natural hazard with an affected community's adaptive capacity based on their pre-existing vulnerabilities. A disaster is "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..". See: UNDRR, *online glossary*, [www.undrr.org/terminology/disaster](http://www.undrr.org/terminology/disaster) (UNDRR Terminology). Disasters can be linked to sudden or slow onset natural hazards, including but not limited to those related to climate change impacts. See: UNHCR, *Key Concepts on Climate Change and Disaster Displacement*, [www.unhcr.org/protection/environment/5943aea97/key-concepts-climate-change-disaster-displacement.html](http://www.unhcr.org/protection/environment/5943aea97/key-concepts-climate-change-disaster-displacement.html).

<sup>8</sup> Convention relating to the Status of Refugees (28 July 1951), 189 UNTS 137, [www.refworld.org/docid/3be01b964.html](http://www.refworld.org/docid/3be01b964.html).

<sup>9</sup> Protocol relating to the Status of Refugees (31 January 1967), 606 UNTS 267, [www.refworld.org/docid/3ae6b3ae4.html](http://www.refworld.org/docid/3ae6b3ae4.html).

<sup>10</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969), 1001 UNTS 45, [www.refworld.org/docid/3ae6b36018.html](http://www.refworld.org/docid/3ae6b36018.html).

<sup>11</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, [www.refworld.org/docid/3ae6b36ec.html](http://www.refworld.org/docid/3ae6b36ec.html). The 2014 Brazil Declaration (*Brazil Declaration and Plan of Action*, 3 December 2014, [www.refworld.org/docid/5487065b4.html](http://www.refworld.org/docid/5487065b4.html)), preambular paragraph 32, recognizes the challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause. See also, D J Cantor, *Cross-Border Displacement, Climate Change and Disasters: Latin America and the Caribbean. Study prepared for UNHCR and PDD at request of Governments participating in the 2014 Brazil Declaration and Plan of Action* (July 2018) [www.unhcr.org/protection/environment/5d4a7b737/cross-border-displacement-climate-change-disasters-latin-america-caribbean.html](http://www.unhcr.org/protection/environment/5d4a7b737/cross-border-displacement-climate-change-disasters-latin-america-caribbean.html).

<sup>12</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, [www.refworld.org/docid/5cb474b27.html](http://www.refworld.org/docid/5cb474b27.html).

4. While this document addresses the applicability of the international protection regime in the context of cross-border climate change and disaster displacement, not all people displaced in such context will be refugees. These legal considerations are intended to provide guidance for governments, legal practitioners, administrative and judicial decision-makers and UNHCR staff in applying international refugee and human rights law to claims for international protection made in the context of the adverse effects of climate change and disasters. These legal considerations are relevant for individual and group-based approaches to refugee status determination (RSD).

5. The assessment of claims for international protection made in the context of the adverse effects of climate change and disasters should not focus narrowly on the climate change event or disaster as solely or primarily natural hazards. Such a narrow focus might fail to recognize the social and political characteristics of the effects of climate change or the impacts of disasters or their interaction with other drivers of displacement. More broadly, climate change and disasters may have significant adverse effects on State and societal structures and individual well-being and the enjoyment of human rights.<sup>13</sup> If a narrow view is taken of the effects of climate change and disasters, there is a risk that decision-makers may decide that refugee law is inapplicable and deny access to refugee status determination (RSD).<sup>14</sup> Challenges in assessing claims for international protection in this context arise from a limited understanding of the effects of climate change and disasters and from complexities in applying refugee definitions, be it Article 1A(2) of the 1951 Convention or the regional refugee criteria included in Article I(2) of the 1969 OAU Convention and Conclusion III(3) of the 1984 Cartagena Declaration.

#### **The 1951 Convention relating to the Status of Refugees**

6. People fleeing in the context of the adverse effects of climate change and disasters may have valid claims for refugee status under the 1951 Convention.<sup>15</sup> No special rules exist for determining refugee claims made in this context. Like any other claim, one made in the context of climate change or a disaster must show that the claimant meets the criteria set out in Article 1A(2) of the 1951 Convention.<sup>16</sup> In accordance with the ordinary meaning to be given to the terms of Article 1A(2) in their context, as well as the object and purpose of the 1951

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<sup>13</sup> The relevance of international refugee law because of the linkages between disasters and the respect for and protection of human rights is acknowledged by the International Law Commission, International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries*, 2016, ILC Commentary to Article 5 at para. 8, [www.refworld.org/docid/5f64dc3c4.html](http://www.refworld.org/docid/5f64dc3c4.html).

<sup>14</sup> *AF (Kiribati)* [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal, 25 June 2013, para. 64, [www.refworld.org/cases/NZ\\_IPT\\_5dad6b754.html](http://www.refworld.org/cases/NZ_IPT_5dad6b754.html). *Teitiota v. New Zealand*, note 3 above. Nansen Initiative Protection Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, 2015, [nanseninitiative.org/wpcontent/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf](http://nanseninitiative.org/wpcontent/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf), paras. 55 and 56, which is endorsed by 109 States.

<sup>15</sup> *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, New Zealand: Supreme Court, 20 July 2015, [www.refworld.org/cases/NZL\\_SC\\_55c8675d4.html](http://www.refworld.org/cases/NZL_SC_55c8675d4.html), see obiter dicta at para. 13, with references to earlier decisions, underscoring the possibility of establishing a claim for international protection pursuant to the 1951 Convention definition in the context of climate change resulting in environmental degradation and disasters.

<sup>16</sup> *AF (Kiribati)*, note 14 above, para. 65.

Convention,<sup>17</sup> the refugee definition requires a well-founded fear of being persecuted for one or more grounds, from which the authorities of the country of origin are unable or unwilling to provide protection. In paragraphs 7 to 12 below the constituent elements of the 1951 Convention refugee definition are addressed separately in the context of the adverse effects of climate change and disasters. Nevertheless, their application should be taken together as the refugee definition comprises only one holistic test.<sup>18</sup>

### *Well-founded fear of being persecuted*

7. Climate change and disasters may affect the enjoyment of human rights because of human exposure and vulnerability to their impacts, as well as State capacity, ability and willingness to provide protection.<sup>19</sup> Climate change and disasters may limit access to and control over land, natural resources, livelihoods, individual rights, freedoms and lives, which may threaten, among others, the enjoyment of the right to life; physical integrity; an adequate standard of living; health, water and sanitation; and self-determination and development.<sup>20</sup> Populations may be gradually or immediately affected or suffer longer-term diminutions in their enjoyment of human rights. Both in the short and longer-term, affected populations may be exposed to a risk of human rights violations that amount to persecution within the meaning of the 1951 Convention.<sup>21</sup>

8. Climate change and disasters will often impact entire communities. The fact that many or all members of a community are impacted does not undermine the validity of any individual member's claim. An individual claiming refugee status is not required to establish a risk of persecution over and above that of others similarly situated.<sup>22</sup> The test is whether an individual's fear of being persecuted is well-founded.<sup>23</sup> In some cases, the adverse effects of climate change and disasters on an entire community may strengthen rather than weaken the evidence that justifies the fear of an individual being persecuted.<sup>24</sup>

9. A decision as to whether a person has a well-founded fear of being persecuted requires a forward-looking assessment of all relevant facts and circumstances of each case. When

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<sup>17</sup> Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, [www.refworld.org/docid/3ae6b3a10.html](http://www.refworld.org/docid/3ae6b3a10.html), Article 31(1).

<sup>18</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, [www.refworld.org/docid/3b20a3914.html](http://www.refworld.org/docid/3b20a3914.html), para. 7.

<sup>19</sup> Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches* (February 2012), PPLA/2012/01, [www.refworld.org/docid/4f38a9422.html](http://www.refworld.org/docid/4f38a9422.html), p. 64. *AC (Tuvalu)*, note 4 above, para. 59. *Advisory Opinion OC-23/17*, note 4 above, para. 47. *Kawas-Fernández v. Honduras*, note 4 above, para. 148.

<sup>20</sup> Special Rapporteur on Extreme Poverty and Human Rights, note 4 above. HRC Gen.Com.36, note 4 above, para. 62. *Teitiota v. New Zealand*, note 3 above, paras. 9.4 to 9.14. AfrComHPR, note 4 above, para. 3. *Cordella and Others v. Italy*, note 4 above, para. 157. *Özel and others v. Turkey*, note 4 above, para. 171. See also, M. Foster, *International Refugee Law and Socio-Economic Rights*, CUP 2007, outlining that "persecution" within the meaning of Article 1A(2) of the 1951 Convention encompasses a wide range of claims related to economic and social rights.

<sup>21</sup> UNHCR Handbook, note 12 above, paras. 51-55.

<sup>22</sup> UNHCR, *Interpreting Article*, note 18 above, para. 21. See also, 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*, 2 December 2016, HCR/GIP/16/12, para. 17, [www.refworld.org/docid/583595ff4.html](http://www.refworld.org/docid/583595ff4.html).

<sup>23</sup> *AF (Kiribati)*, note 14 above, para. 65.

<sup>24</sup> UNHCR Guidelines on International Protection No. 12, note 22 above, para. 17.

assessing the risk of being persecuted in the context of climate change or disasters, it is important to understand that impacts may emerge suddenly or gradually; overlap temporally and geographically; vary in intensity, magnitude and frequency; and persist over time.<sup>25</sup> At the same time, positive impacts of disaster risk reduction as well as national and international efforts to mitigate the adverse effects of climate change and disasters and operational responses in the country of origin, or improvements or innovations in the adaptive capacity of the country and its communities, need to be taken into account.<sup>26</sup> Taken together, all these circumstances will determine how the enjoyment of human rights are affected and whether a reasonable possibility of being persecuted in the country of origin exists.<sup>27</sup>

*“For reasons of” (causal link)*

10. In the context of the adverse effects of climate change and disasters, a well-founded fear of being persecuted may arise especially for people who are already marginalized or vulnerable.<sup>28</sup> Depending on local political, religious and socio-economic circumstances, women,<sup>29</sup> children, elderly people and people with disabilities, who have inherent vulnerabilities, minority groups, indigenous peoples, and persons living in rural areas relying on natural resources for their livelihoods, will be especially at risk.<sup>30</sup> A well-founded fear of being persecuted may also arise for environmental defenders, activists or journalists, who are targeted for defending, conserving and reporting on ecosystems and resources.<sup>31</sup> The adverse effects of climate change, for example environmental degradation, may give rise to social, economic or political pressures. Further, in the risk reduction/preparedness phase, before a disaster occurs, or in the aftermath of a disaster, particular populations may be left out, leading to some being disproportionately affected or even targeted. As a result, members of such populations may have a well-founded fear of being persecuted, for example, as resources may diminish and access may be denied in a discriminatory manner, amounting to persecution for one or more Convention grounds.<sup>32</sup> The willingness or ability of a State to prevent the adverse

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<sup>25</sup> In this regard, it is instructive to consider assessments by the Intergovernmental Panel on Climate Change (IPCC) of the likelihood of future climate change risks which could affect displacement, see: Adrienne Anderson, Michelle Foster, H el ene Lambert and Jane McAdam, ‘Imminence in refugee and human rights law: a misplaced notion for international protection’ ICLQ (2019), pp. 133-135. IPCC assessment reports are available at: [www.ipcc.ch](http://www.ipcc.ch).

<sup>26</sup> *AC (Tuvalu)*, note 4 above, para. 69. *AF (Kiribati)*, note 14 above, para. 88. *Teitiota v. New Zealand*, note 3 above, para. 9.11, referring to the need to take “robust national and international efforts”.

<sup>27</sup> *AC (Tuvalu)*, note 4 above, para. 58. UNHCR Interpreting Article 1, note 18 above, para. 10(2), outlining that according to UNHCR “[i]t is generally agreed that persecution must be proved to be “reasonably possible” in order to be wellfounded”.

<sup>28</sup> Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, *Joint Statement on “Human Rights and Climate Change”*, 16 September 2019, [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E#\\_edn1](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E#_edn1).

<sup>29</sup> IUCN, *Gender-based violence and Environment linkages: the violence of inequality* (2020), <https://doi.org/10.2305/IUCN.CH.2020.03.en>.

<sup>30</sup> CEDAW General Recommendation No. 37 note 5 above.

<sup>31</sup> IUCN Gender-based violence and Environment linkages, note 29 above, chapter 5.

<sup>32</sup> *AF (Kiribati)*, note 14 above, para. 58, referring to studies conducted in the aftermath of famine and other disasters providing evidence of a political weighting of State response in which the recovery needs of marginalized groups are sometimes not met, and para. 65, referring to the need for a claimant to meet all criteria set out in Article 1A(2) of the 1951 Convention, including that 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. See also, M. Scott, “Finding Agency in Adversity: Applying the Refugee Convention in the

effects of climate change and disasters, as well as to respond adequately to them if they occur, may vary for particular groups, reflecting differences in race, ethnicity, religion, politics, gender or social groups. This may include situations where social pressures result in violence against - or trafficking of - persons with specific needs or in situations of pre-existing vulnerabilities, especially women.<sup>33</sup> It could also include situations in which a government withholds, or de-prioritizes protection by denying relief aid to specific populations;<sup>34</sup> where post-disaster relief is politicized;<sup>35</sup> or where the environment, its natural resources or ancestral lands are deliberately destroyed to persecute particular populations, i.e. promoting or deliberately failing to prevent environmental degradation as a weapon of oppression.<sup>36</sup> Also relevant are situations where a government does not establish appropriate measures for preventing disasters whereby a particular population is disproportionately affected.<sup>37</sup>

#### *Interaction with conflict and/or violence*

11. People may also have a valid claim for refugee status where the adverse effects of climate change or disasters interact with conflict and violence.<sup>38</sup> These adverse effects may exacerbate violence, or vice versa, and render the State incapable of protecting the victims of such violence, resulting in a well-founded fear of being persecuted for reasons of one or more Convention grounds.<sup>39</sup> Further, where government structures and institutions are weak, the interaction of drought, or other adverse effects of climate change, with conflict can lead to famine. Where the State is unwilling to ensure non-discriminatory access to affordable food, a well-founded fear of persecution for particular populations may arise under the 1951 Convention.<sup>40</sup> Such situations may also impede physical and economic access to food and, more broadly, to livelihoods for populations that rely on natural resources for their livelihoods

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Context of Disasters and Climate Change" (2016) 35, *Refugee Survey Quarterly*, pp. 26-57 (Scott RSQ, Finding Agency in Adversity), advancing the argument that the 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.

<sup>33</sup> IUCN Gender-based violence and Environment linkages, note 29 above, chapter 5. Nellemann, C., Verma, R., and Hislop, L. (eds), *Women at the frontline of climate change: Gender risks and hopes. A Rapid Response Assessment* (2011) United Nations Environment Programme.

<sup>34</sup> UNHCR, *Summary of Deliberations on Climate Change and Displacement*, April 2011, para. 8, [www.refworld.org/docid/4d9f22b32.html](http://www.refworld.org/docid/4d9f22b32.html). J. C. Hathaway and M. Foster, *The Law of Refugee Status*, CUP 2014, p. 176.

<sup>35</sup> *Refugee Appeal No. 76374* [2009], New Zealand Refugee Status Appeals Authority, 28 October 2009, [www.refworld.org/cases/NZL\\_RSAA\\_4afc31da2.html](http://www.refworld.org/cases/NZL_RSAA_4afc31da2.html), granting refugee status to a person who assisted in relief work following Cyclone Nargis in Burma in May 2008 on the basis that this work would be perceived as the expression of an anti-regime political opinion. See also: *AF (Kiribati)*, note 14 above, para. 69.

<sup>36</sup> J. McAdam, *Climate Change, Forced Migration and International Law*, OUP 2012, p. 48. See also, *AF (Kiribati)*, note 14 above, para. 59, referring to the situation of Iraqi Marsh Arabs following the first Gulf War; sourcing: Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs*, January 2003, p. 4, [www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm](http://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm).

<sup>37</sup> McAdam, note 36 above, p. 48.

<sup>38</sup> For general guidance on claims for refugee status related to situations of armed conflict and violence, see: UNHCR Guidelines on International Protection No. 12, note 22 above. For general guidance on claims for refugee status related to violence by organized gangs, see: UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, [www.refworld.org/docid/4bb21fa02.html](http://www.refworld.org/docid/4bb21fa02.html).

<sup>39</sup> In Harm's Way, note 4 above, p. 90, highlighting Peru's recognition of Haitian claims under the 1951 Convention definition in the aftermath of the 2010 earthquake in Haiti based on a well-founded fear of persecution for reasons of "political opinion" or "membership of a particular social group" resulting from the lack of public order and institutional capacity enabling the State to protect victims of gangs.

<sup>40</sup> Scott, note 32 above, pp. 48-50, referring to marginalization of particular ethnic groups in Somalia affected by drought and violence.

and survival. The risk of human rights violations amounting to persecution is very real where there is food insecurity. Political or religious ideologies and social and ethnic differences can also create or exacerbate a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>41</sup>

#### *Internal flight alternative*

12. The relevance of an internal flight alternative in the context of the adverse effects of climate change and disasters needs to be carefully assessed, in line with general guidance on its application.<sup>42</sup> While the adverse effects of climate change and disasters may be felt in only a part of the country, affected people may not be able to relocate to other parts of the country. This is so particularly when the State is unwilling to provide adequate protection for populations.<sup>43</sup> In addition, slow-onset effects of climate change, for example environmental degradation, desertification or sea level rise, initially affecting only parts of a country, may progressively affect other parts, making relocation neither relevant nor reasonable.

#### **Regional refugee criteria in the 1969 OAU Convention and the 1984 Cartagena Declaration**

13. Article I(2) of the 1969 OAU Convention provides refugee protection to, inter alia, “every person who, owing to ... 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”. While not a treaty, the 1984 Cartagena Declaration is similar in that in Conclusion III(3) it recommends that refugees include “persons who have fled their country because their lives, security or freedom have been threatened by ... other circumstances which have seriously disturbed public order”.<sup>44</sup>

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<sup>41</sup> UNHCR, *Legal Considerations on Refugee Protection for People Fleeing Conflict and Famine Affected Countries*, 2017, [www.refworld.org/docid/5906e0824.html](http://www.refworld.org/docid/5906e0824.html); UNHCR Guidelines on International Protection No. 12, note 22 above.

<sup>42</sup> See for general guidance on the application of an internal flight or relocation alternative (IFA), UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, [www.refworld.org/docid/3f2791a44.html](http://www.refworld.org/docid/3f2791a44.html).

<sup>43</sup> *Ibid.*, para 31, referring to the fact that people may have been displaced internally is not in itself conclusive evidence that an internal flight is reasonable.

<sup>44</sup> The 1984 Cartagena Declaration is not a treaty within the meaning of Article 1(a) of the Vienna Convention on the Law of Treaties (note 15 above). The legal authority of the regional refugee definition, has been recognized by the General Assembly of the Organization of American States (OAS), the Inter-American Court of Human Rights and widely affirmed by countries in the Americas region, including through incorporation in national legal frameworks and application in practice, see: UNHCR Guidelines on International Protection No. 12, note 22 above, para. 63. *Advisory Opinion OC-21/14: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Inter-American Court of Human Rights, 19 August 2014, [www.refworld.org/docid/54129c854.html](http://www.refworld.org/docid/54129c854.html), para. 79. *Advisory Opinion OC-25/18: The Institution of Asylum, and its Recognition as a Human Right under 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, 30 May 2018, [www.refworld.org/docid/5c87ec454.html](http://www.refworld.org/docid/5c87ec454.html), para. 123.

14. The guidance included in this section is directed at the interpretation and application of the 1969 OAU Convention, but also applies to the 1984 Cartagena Declaration.<sup>45</sup> The 1969 OAU Convention does not define or limit the concept of “events seriously disturbing public order”. The ongoing effectiveness of the regional refugee criteria requires the adoption of an evolutionary approach to interpretation of these treaty-based criteria, reflecting the ongoing developments in international law more broadly.<sup>46</sup> This is particularly important for the interpretation of the concept of “events seriously disturbing public order” if the changing realities for people in need of international protection are to be accommodated where they are affected by the adverse effects of climate change and disasters.<sup>47</sup> In line with this approach, people displaced by the adverse effects of climate change and disasters can be refugees under regional refugee criteria.<sup>48</sup>

#### *Events seriously disturbing public order*

15. The legal concept of “events [circumstances] seriously disturbing public order” is particularly relevant for refugee claims related to the adverse effects of climate change and disasters. The UN has defined 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 capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts”.<sup>49</sup> Further, “[t]he 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”.<sup>50</sup>

16. The concept of “public order” does not have a single meaning under international law. In the context of the 1969 OAU Convention (and the 1984 Cartagena Declaration), and in light of the humanitarian and protection oriented purpose of the Convention,<sup>51</sup> it encompasses the

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<sup>45</sup> Noting that the 1984 Cartagena Declaration is not a treaty, an interpretation of the regional refugee definition included in the 1984 Cartagena Declaration is similar as for the 1969 OAU Convention because of the similar wording and the fact that the Cartagena Declaration took inspiration from the 1969 OAU Convention.

<sup>46</sup> For a brief description of the legal basis of the evolutionary approach to treaty interpretation and its application to the 1969 OAU Convention, T. Wood, “Who is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa’s Expanded Refugee Definition”, (2019) 31 *International Journal of Refugee Law*, pp. 311-313, <https://academic.oup.com/ijrl/issue/31/2> (Wood IJRL).

<sup>47</sup> UNHCR, Summary of Deliberations on Climate Change and Displacement, note 34 above, para. 9; Wood, note 46 above, pp. 311-313. Ethiopia has explicitly accepted the applicability of the regional refugee criteria under Article I(2) of the 1969 OAU Convention in the context of disasters, see statement made by Ethiopia at the Nansen Initiative Global Consultation: Nansen Initiative, *The Nansen Initiative Global Consultation: Conference Report*, October 2015, [www.nanseninitiative.org/global-consultations/](http://www.nanseninitiative.org/global-consultations/), p. 107.

<sup>48</sup> The Continental Consultative Meeting organized by the African Union marking the 50th anniversary of the 1969 OAU Convention called on the AU Commission and UNHCR to develop interpretive guidance regarding the 1969 OAU Convention’s article I(2) refugee criteria, to clarify in particular its implementation in individual refugee status determination and its meaning in relation to new causes of forced displacement, such as climate change and disasters, see: African Union, *Addis Ababa Declaration of The Continental Commemorative Meeting on The Implementation and Supervision of the 1969 OAU Refugee Convention*, 20 June 2019, [www.refworld.org/docid/5f3be7b84.html](http://www.refworld.org/docid/5f3be7b84.html).

<sup>49</sup> UNDRR Terminology, note 7 above. UNHCR Key Concepts, note 7 above.

<sup>50</sup> *Ibid.*

<sup>51</sup> UNHCR Guidelines on International Protection No. 12, note 22 above, para. 46, and, regarding the Cartagena Declaration, para. 65.

prevailing level of the administrative, social, political and moral order as assessed according to the effective functioning of the State in relation to its population and based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are protected.<sup>52</sup> A “disturbance” to public order occurs when there is a disruption to the effective, normal and stable functioning of this order. The “serious” threshold may embrace quantitative and qualitative dimensions and must be assessed on a case-by-case basis, taking account of the nature and duration of the disruption and its consequences for the security and stability of the State and society.<sup>53</sup> Whether a disturbance to public order stems from human or other causes is not determinative for concluding a serious disturbance of public order;<sup>54</sup> the central concern is the *effect* of a given situation. Accordingly, the principal inquiry at the time of assessing a claim for refugee status is whether a serious disturbance to public order *exists* as *a matter of fact*, based on an assessment of available evidence.<sup>55</sup>

#### *Compelled to leave and seek protection abroad*

17. To be a refugee in accordance with Article I(2) of the 1969 OAU Convention a person must have been “compelled to leave [their] place of habitual residence in order to seek refuge in another place outside [their] country of origin” because of, inter alia, events seriously disturbing public order. Similarly, the Cartagena refugee definition requires “persons to have fled their country because their lives, security or freedom have been threatened by ... circumstances which have seriously disturbed public order”.<sup>56</sup> As such, climate change or a disaster must have an effect or impact on the person’s place of habitual residence and compel or force the person to leave their country, i.e. it must have put the person at risk of serious harm. Whether the effects of climate change or disasters are severe enough to compel a person to leave and seek protection in another country - namely, whether a risk of serious harm is established - depends on how the disaster unfolds and develops; the geographical proximity of the disaster to the person’s place of habitual residence; how it affects their life, physical integrity, liberty and enjoyment of other human rights; and how the State responds.<sup>57</sup> As such, while a disaster may by definition seriously disrupt public order, it will only warrant refugee status when the State, including with international assistance, is unable or unwilling to address

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<sup>52</sup> UNHCR Guidelines on International Protection No. 12, note 22 above, paras 56 and 78; A. Edwards, “Refugee Status Determination in Africa”, *African Journal of International and Comparative Law* (2006) 14, pp. 204-233, at p. 220; M. Sharpe, *The Regional Law of Refugee Protection in Africa*, OUP 2018, p. 49. The French language version of Article I(2) of the 1969 OAU Convention refers to “ordre public”. UN Economic and Social Council, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, [www.refworld.org/docid/4672bc122.html](http://www.refworld.org/docid/4672bc122.html), para. 22. See also, for example, UNHCR, *International Protection Considerations with Regard to People Fleeing the Republic of Iraq*, May 2019, p. 114, [www.refworld.org/docid/5cc9b20c4.html](http://www.refworld.org/docid/5cc9b20c4.html).

<sup>53</sup> UNHCR Guidelines on International Protection No. 12, note 22 above, para. 56, with para. 59 including several factual indicators such as a declared state of emergency, the closure of schools, and a lack of food and vital services.

<sup>54</sup> Wood, note 46 above, p. 307.

<sup>55</sup> UNHCR Guidelines on International Protection No. 12, note 22 above, para. 59 lists a number of factual indicators for events seriously disturbing public order.

<sup>56</sup> Article I(2) of the 1969 OAU Convention does not ignore 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. Conclusion III(3) of the 1984 Cartagena Declaration is more explicit, requiring the existence of a threat to life, security or freedom.

<sup>57</sup> Article I(2) of the 1969 OAU Convention does not require a personalized or discriminatory threat or risk of harm, see UNHCR Guidelines on International Protection No. 12, note 22 above, para. 51.

its impacts on the State and its societal order and population. In this context, following a disaster, the State must be able to demonstrate its willingness to address the impact of the disaster and to mobilize aid and assistance to stabilize the situation as soon as possible.

#### *Internal flight or relocation alternative*

18. Consideration of possible internal flight or relocation alternatives is not relevant in this context for refugees coming under the purview of Article I(2) of the 1969 OAU Convention. Similarly, it is inapplicable in relation to refugees under Conclusion III(3) of the 1984 Cartagena Declaration.<sup>58</sup> This is because the definition of a refugee under Article I(2) of the 1969 OAU Convention includes persons who flee both situations that affect either “part” or “the whole” of the territory of their country of origin. Adverse effects of climate change and disasters which are sufficiently serious as to compel people to move, are likely to impact severely on conditions and State capacity throughout the State’s territory. As the focus of Article I(2) is on situations that seriously disrupt State and societal structures, people cannot be required to relocate to other parts of the country, even when the adverse effects of climate change and disasters are confined to a particular part of the country.

#### **Complementary forms of international protection**

19. The principle of non-refoulement and international human rights law may also apply to people seeking international protection in countries where regional refugee definitions are not applicable. A person who is outside the AU (former OAU) and Cartagena regions may, for example, have been displaced by the adverse effects of climate change or disasters. If there is a real risk of being subjected to serious harm, that person may be protected from return in accordance with prohibitions on refoulement, including the right to be protected from irreparable harm by Articles 6 (right to life) and 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment) of the International Covenant on Civil and Political Rights.<sup>59</sup> The adverse effects of climate change and disasters can pose a serious threat to the enjoyment of the right to life, for example, because of increased scarcity of habitable land, limited access to potable water and the lack of alternatives to subsistence livelihoods.<sup>60</sup>

#### **Temporary protection mechanisms**

20. Without prejudice to the applicability of international and regional refugee and human rights law to claims for international protection made in the context of the adverse effects of climate change and disasters, a pragmatic way to provide protection for those displaced in the context of climate change or disasters are temporary protection or stay arrangements that are

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<sup>58</sup> UNHCR Guidelines on International Protection No. 4, note 42 above, para. 5. UNHCR Guidelines on International Protection No. 12, note 22 above, para. 60.

<sup>59</sup> *Teitiota v. New Zealand*, note 3 above, para. 9.3.

<sup>60</sup> *Ibid.*, paras. 9.7 to 9.9. Advisory Opinion OC-21/14, note 44 above, paras. 238 to 240.

time limited and include minimum human rights standards of treatment.<sup>61</sup> Such temporary protection can be particularly useful where the situation in the country of origin is fluid or unclear. For example, in the immediate aftermath of a sudden-onset disaster when that country is mobilizing resources, including international assistance, a host country may provide temporary protection. Temporary protection may also be used where the host country is experiencing a large-scale influx following a disaster and RSD is either not applicable or feasible.<sup>62</sup> By contrast, temporary protection may not necessarily be effective if the country of origin of the displaced person is unwilling or unable to stabilize the situation or adapt to climate change. In these longer-term situations or where a solution is delayed, a displaced person should be able to apply for and receive international protection, including where warranted, refugee status, from the host country.

## Conclusion

21. People seeking international protection in the context of the adverse effects of climate change or disasters may have valid claims for refugee status. They may have a well-founded fear of persecution under Article 1A(2) of the 1951 Convention, or be compelled to seek protection outside their own country owing to events seriously disturbing public order under Article I(2) of the 1969 OAU Convention and Conclusion III(3) of the 1984 Cartagena Declaration. In addition, there may be grounds for international protection under general international human rights law, i.e. non-refoulement obligations, including the right to life. This is particularly relevant in regions where the 1969 OAU Convention and the 1984 Cartagena Declaration do not apply. Whether such a claim for protection arises from sudden or slow-onset effects of climate change or disasters, States are bound to ensure access to a fair and efficient RSD procedures under which the need for international protection is assessed.<sup>63</sup>

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<sup>61</sup> UNHCR, Guidelines on Temporary Protection or Stay Arrangements, February 2014, [www.refworld.org/docid/52fba2404.html](http://www.refworld.org/docid/52fba2404.html), paras. 16.

<sup>62</sup> *Ibid.* See also, UN General Assembly, *Report of the United Nations High Commissioner for Refugees. Part II Global Compact on Refugees*, A/73/12 (Part II), para. 63, [https://undocs.org/pdf?symbol=en/A/73/12\(PARTII\)](https://undocs.org/pdf?symbol=en/A/73/12(PARTII)).

<sup>63</sup> *AF (Kiribati)*, note 14 above, para. 64, emphasizing that "generalised assumptions about environmental change and natural disasters and the applicability of the Refugee Convention can be overstated. 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."