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**LEGAL AND PROTECTION POLICY  
RESEARCH SERIES**

**In Harm's Way**

**International protection in the context of nexus  
dynamics between conflict or violence and disaster or  
climate change**

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## OVERVIEW

### Introduction

Recent history bears witness to cross-border movements in the context of conflict and/or violence *and* disaster and/or the adverse effects of climate change (nexus dynamics). Countries and regions affected range from South Sudan to Syria, the Lake Chad basin and Horn of Africa, to Central America and Haiti. Despite this reality, the recognition that multiple factors underlie human movements and the enduring relevance of refugee law for providing international protection, research examining State practice on refugee law-based international protection in the specific context of nexus dynamics is limited. The present study begins to address our knowledge gap.

This overview sets out recommendations, based on the present study, to strengthen implementation of refugee law-based international protection when cross-border movements occur in the context of nexus dynamics. The recommendations are framed to advance reflection and discussion on legal, policy and practical solutions, against the backdrop of commitments in the United Nations High Commissioner for Refugees (UNHCR) Strategic Directions 2017–2021, the New York Declaration on Refugees and Migrants, and the Global Compact on Refugees, as well as priorities outlined in the Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.

The report describes *international* protection that is: (1) based on *refugee law* frameworks; (2) provided by *destination* States; (3) to people who have *crossed international borders* in the context of *nexus dynamics* in their origin country. It does so by examining four case studies, which concern:

1. Kenya and Ethiopia's responses, primarily during 2011–2012, to the cross-border movement of *Somalis* in the context of drought, food insecurity and famine, when conflict and violence also prevailed in southern and central Somalia; and
2. Brazil and Mexico's responses, primarily during 2010–2012, to the cross-border movement of *Haitians* in the aftermath of the 2010 earthquake in Haiti, when insecurity, violence and human rights violations also prevailed in Haiti.

While not the only examples of nexus dynamics, Somalia and Haiti were selected as origin situations partly because some destination States applied refugee law

frameworks to respond to cross-border movements and because regional refugee instruments were applicable. As the emphasis is on destination State responses, the report does not describe the nexus dynamics in Somalia or Haiti in detail. Each situation does represent distinct nexus dynamics. Arguably, Somalia can be characterized, in reductionist, imperfect terms, as a situation in which pre-existing conflict, and responses related to it, exacerbated the impacts of disaster and adverse effects of climate change. By contrast, Haiti can be characterized in reductionist and imperfect terms as a situation in which a disaster exacerbated pre-existing State fragility. Admittedly, the ensuing conditions in each country would have supported different scales and types of claims for refugee status.

The research was undertaken through 4- to 6-day field visits to Kenya, Ethiopia, Brazil and Mexico between February and April 2018, informant and expert interviews, questionnaires to field operations, email correspondence and desk review of grey and academic literature, UNHCR documents and data. In addition, the country case studies were shared with government informants and the overall report benefited from review and comments from UNHCR staff and other experts.

The overarching purpose of the study is to provide recommendations to UNHCR, States and others on strengthening the implementation of refugee law when cross-border movements occur in the context of nexus dynamics. Therefore, although State responses are discussed, the aim is not to explain, compare or draw causal inferences. Rather, the report describes how refugee law frameworks featured in destination State responses in order to robustly inform recommendations to strengthen responses at national, regional and international levels.

This overview first highlights the responses of the four destination States: Kenya, Ethiopia, Brazil and Mexico. Next, it identifies pertinent observations and their potential implications. In conclusion, it presents 12 recommendations for UNHCR, States and others on strengthening the implementation of refugee law-based international protection in the context of nexus dynamics.

### **Destination State Responses in Brief**

As it has done historically, *Kenya* continued to grant refugee status to Somalis who arrived in 2011–2012, maintained territorial access and permitted Somalis to reside in the country, predominantly in camps in the Dadaab region. At the time, UNHCR was responsible for refugee status determination (RSD), which it undertook pursuant to its mandate. Most Somalis were recognized under broader refugee criteria through a group-based approach, with registration as the primary modality by which status was

recognized. Informant views on the reasons for recognition reflected two schools of thought. It appears that some saw the influx as driven by drought and its consequences for livelihoods and food security, and characterized the response as humanitarian, in the sense that Somalis were registered as ‘refugees’ for humanitarian reasons rather than on the basis that they qualified for refugee status under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (together the Refugee Convention). Another group considered that Somalis who arrived in the context of drought and food insecurity were refugees: the Somalis fled underlying conflict, generalized insecurity or disruption to public order that brought them within the broader refugee criteria under the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).

In July 2014, Kenya assumed authority for taking RSD decisions. However, UNHCR remained engaged, including during an extended transition process. Registration in the Dadaab camps was suspended in October 2011, although intermittent opportunities for registration continued until coming to a stop in mid-2015. This change in policy has meant more recent Somali asylum-seekers (close to 10,000 at mid-year 2018), including those who have arrived in the context of nexus dynamics, are unable to access procedures that would determine their claim to refugee status. Consequently, they have limited access to the humanitarian assistance available to recognized refugees. Since April 2016, the processing approach for Somali asylum-seekers has also changed: they are no longer eligible for status determination through a group-based approach. In what can be characterized as a circumscribed protection environment, close to 80,000 Somalis have repatriated within the framework of a voluntary repatriation agreement signed in late 2013.

*Ethiopia* also maintained its historical stance, with territorial access, refugee status and encampment in the Dollo Ado camps for Somalis who arrived in 2011–2012. The declaration of famine in parts of Somalia in July and August 2011 does not appear to have been a key marker for recognition of refugee status. Through a tiered process, the Administration for Refugee and Returnee Affairs (ARRA) and UNHCR conducted RSD through a group-based approach. Somalis were recognized within the framework of Ethiopia’s domestic refugee law, predominantly pursuant to broader refugee criteria. Since that time, the *status quo* has remained unchanged and more recent Somali asylum-seekers have continued to be recognized on the same basis, with ongoing efforts by ARRA and UNHCR to stay abreast of developments in Somalia.

Informants rarely considered Somalis who arrived in 2011 and 2012 as anything other than refugees. Informants discussed the applicability of the “events seriously disturbing



public order” ground in the OAU Convention to the situation in Somalia in 2011. They suggested that Somalis were fleeing areas affected by regular conflict or insecurity or that these aspects contributed to their fear of return. In general, informants appeared to recognize that multiple root causes prompted Somali flight. The discussions highlighted the complexity of identifying a sole or dominant cause. Ethiopia may view the impacts of serious ‘natural’ disasters, even in the absence of nexus dynamics, as potentially giving rise to claims that could satisfy the broader refugee criteria under the OAU Convention.

*Brazil’s* response to the movement of Haitians into its territory in the aftermath of the 2010 earthquake in Haiti was based on an *ad hoc* administrative mechanism, which by mid-2018 had benefited at least 100,000 Haitians. The domestic refugee law featured in Brazil’s response to the extent that it permitted Brazil to regularize the status of Haitians who had entered irregularly, pending a resolution under the administrative mechanism. Between 2010 and 2015, however, not a single Haitian was recognized as a refugee, even though tens of thousands applied, raising questions regarding effective access to RSD procedures.

Refugee status was considered as an option to respond to Haitian arrivals. However, it appears there was a general perception that refugee status was unsuitable or inapplicable, as Haitians did not face a well-founded fear of persecution on Refugee Convention grounds. Recognition of the mixed nature of Haitian movements seems to have been limited, even though there was some recognition of evolving conditions in Haiti. Broader refugee criteria as reflected in the 1984 Cartagena Declaration (Cartagena Declaration), which had been incorporated into domestic law in a circumscribed manner, was also dismissed, although domestic litigation, which ultimately failed, sought to argue its applicability.

*Mexico* also implemented *ad hoc* measures within the architecture of its migration framework to exceptionally permit certain categories of Haitians to enter and stay on a temporary and humanitarian basis. Access to RSD procedures was also maintained. However, informants raised concerns regarding the availability and accuracy of information on such procedures. Research indicates that in Mexico, some Haitians affected by the 2010 earthquake were recognized under broader refugee criteria on the ground of disruptions to public order.

In the aftermath of the 2010 earthquake in Haiti, it appears that Mexico’s refugee authority had discussions on how to assess Haitian claims under refugee law, including on how to apply broader refugee criteria. Informants indicated that assessing claims under the Refugee Convention was difficult because Haitians were suffering from

serious psychosocial harms and struggling to articulate coherent claims. Some informants opined that while a 'natural' disaster *per se* could not ground claims in refugee status, in principle, the impacts and consequences of a disaster may do so, including, and perhaps particularly, based on broader refugee criteria.

## Observations by Destination State

OBSERVATION	KENYA	ETHIOPIA	BRAZIL	MEXICO
<b>Use of refugee law frameworks</b>	Key framework used for international protection.	Key framework used for international protection.	Refugee law framework used only to regularize status of irregular entrants.	Refugee law framework available but secondary to use of other mechanisms.
<b>Access to refugee status determination (RSD) procedures</b>	Yes. Limited from October 2011. Stopped in Dadaab camps in mid-2015.	Yes.	Questions raised regarding effective access to RSD procedures.	Yes. However, questions raised regarding availability and accuracy of information on RSD procedures.
<b>Group or individual process</b>	Largely group-based approach to recognition of refugee status.	Largely group-based approach to recognition of refugee status.	Intervention favoured a group mechanism with low administrative burdens.	Intervention focused on particular 'categories'.
<b>Recognition under the Refugee Convention's criteria</b>	Yes. Very limited relative to use of broader refugee criteria.	Yes. Very limited relative to use of broader refugee criteria.	No. None were recognized as refugees between 2010 and 2015.	Unclear. Information could not be obtained.
<b>Recognition under broader refugee criteria in regional refugee instruments</b>	Yes. Main basis for recognition.	Yes. Main basis for recognition.	No. Limited domestic incorporation of broader refugee criteria.	Yes. Due to the consequences of the earthquake/disaster.

OBSERVATION	KENYA	ETHIOPIA	BRAZIL	MEXICO
<b>Views on relevance of refugee law frameworks</b>	Yes. Mixed. References particularly to relevance of broader refugee criteria.	Yes. References particularly to relevance of broader refugee criteria.	Limited recognition of relevance of Refugee Convention or broader refugee criteria.	Yes. Broader refugee criteria potentially applicable due to the consequences of the hazard/disaster (cf. hazard/disaster <i>per se</i> ).
<b>Rights and benefits</b>	Encampment architecture.	Encampment architecture.	Refugees entitled to <i>non-refoulement</i> and protection from extradition. Facilitation of family reunification and travel doc., but travel restrictions.	Refugees offered greater certainty through a path to naturalization with certain requirements waived. Family reunification facilitated.
<b>UNHCR engagement</b>	Mandate RSD. Recognition of refugee status predominantly through registration.	Recognition of refugee status predominantly through registration by UNHCR and government.	Engaged in collective RSD process with right to voice opinions but not vote.	Engaged in collective RSD process until 2011. Limited engagement afterwards.
<b>UNHCR guidance relevant to Somalis/Haitians</b>	2010 Eligibility Guidelines but limited references to nexus dynamics.	2010 Eligibility Guidelines but limited references to nexus dynamics.	UNHCR/OHCHR letters in 2010 and 2011, primarily requesting suspension of returns and temporary protection on humanitarian grounds.	UNHCR/OHCHR letters in 2010 and 2011, primarily requesting suspension of returns and temporary protection on humanitarian grounds.
<b>Changes in landscape including legal reform</b>	Somalis subject to individual approach to RSD beginning April 2016.	New draft refugee proclamation addressing gaps in extant law under consideration.	New 2017 migration law permits humanitarian visas and residencies and contains broader <i>non-refoulement</i> protection.	Reformed migration law permits visitor cards for humanitarian reasons.

## Observations and Implications

The following ten observations, drawn from the responses of destination States to cross-border movements in the context of nexus dynamics, raise a number of implications.

### **>> Refugee law frameworks played primary or secondary roles in international protection.**

#### *Implications:*

The other legal and policy options available to States may be relevant to how and when refugee frameworks are used in response to cross-border movements in the context of nexus dynamics.

Refugee law frameworks may form part of a 'toolbox' of options, when multiple frameworks are available to provide international protection.

When only one framework (refugee, migration, other) is operational, the potential to tailor appropriate and differentiated international protection responses is constrained.

In regions with pre-existing conflict and histories of refugee influxes, destination States may have normative and institutional frameworks and established practices for admitting and recognizing refugees. In this context, mischaracterization or misunderstanding of root causes and human factors underpinning flight may be a particular challenge.

In other destination States, such frameworks and practice may be limited. In this context, barriers to effective access to RSD procedures and refugee protection may be a challenge.

### **>> Access to, and availability of, RSD procedures, varied.**

#### *Implications:*

When refugee law frameworks are secondary to other interventions used to support admission and stay in the context of nexus dynamics, directed efforts may be needed to promote effective access to RSD procedures. If timely, targeted

and accurate information on RSD procedures is unavailable, the priority accorded to other interventions may become entrenched such that refugees cannot effectively access international protection based in refugee law. Administrative interventions may become necessary to minimize barriers to access and to promote the potential to recognize refugees.

Guidance on procedures for handling claims for refugee status may be important, particularly when refugee claims are not examined or finally determined, but are resolved through migration or other frameworks.

**>> States favoured use of mechanisms that permitted group- or category-based interventions.**

*Implications:*

When cross-border movements in the context of nexus dynamics are large scale, or are relatively so compared to historical practice, States may favour mechanisms that facilitate the timely and efficient grant of international protection, with minimal administrative burdens.

For States to consider refugee law frameworks within efforts to fashion appropriate responses to large-scale movements in the context of nexus dynamics, functional, group-based approaches for undertaking RSD may be necessary. The absence of such mechanisms may incline States towards other frameworks when political will exists to accommodate admission and stay.

Understanding why States choose to pursue other frameworks to support admission and stay (including how the viability of extant refugee law frameworks and RSD procedures are considered) may provide insights on necessary policy and operational reforms.

**>> A small number of claims were recognized under the Refugee Convention.**

*Implications:*

The Refugee Convention will continue to be relevant for responses to cross-border movements in the context of nexus dynamics, but its relevance may vary based on the particular characteristics of the nexus dynamics.

The occurrence of a disaster does not detract from the possibility that pre-existing conditions in the country of origin, including conditions that relate to conflict or violence, may continue to underpin claims pursuant to the Refugee Convention. Marginalized groups who were persecuted prior to a disaster may continue to face pre-existing forms of persecution. Some individuals or groups may be differentially treated in the aftermath of a disaster. Indeed, the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention

Guidance on the types of claims that may satisfy the Refugee Convention's criteria may facilitate recognition of refugees on this basis. Guidance may be especially important in situations where the most prominent or proximate trigger prompting flight is a disaster. In situations where pre-existing conflict exacerbates the impacts of disasters or adverse effects of climate change (as was arguably the case in Somalia), it may be important to explain human factors and root causes. It may be necessary to also explain how the consequences of a disaster or adverse effects of climate change are linked to conflict or violence and could potentially underpin refugee claims. In the absence of conflict, when disasters exacerbate pre-existing State fragility (as was arguably the case in Haiti), again, it may be important to identify the human dimensions that may support claims under the Refugee Convention. Explanation of disproportionate impacts on marginalized groups may also be important.

**>> When refugee law frameworks were used and regional refugee definitions were applicable, status was recognized largely pursuant to broader refugee criteria.**

*Implications:*

Where regional refugee definitions are applicable at the domestic level, they may facilitate recognition of refugee status in the context of nexus dynamics.

Guidance on the applicability of broader refugee criteria and their relevance to claims in the context of nexus dynamics may be necessary to enhance understanding and robust, regionally-coherent implementation of regional refugee instruments. In situations where pre-existing conflict exacerbates the impacts of disaster, which become a prominent or proximate trigger for flight, it may be important to counter any perceptions that claimants are *solely* victims of disaster. This imperative is also relevant when, in the absence of conflict, disaster exacerbates pre-existing State fragility, and is the most prominent or proximate

trigger for flight. In both types of nexus situations, identifying how the combined consequences of conflict and/or violence and disaster and/or adverse effects of climate change support claims under broader refugee criteria, particularly on the basis of disruptions to public order, may be valuable.

**>> Various stakeholders recognized the relevance and applicability of refugee law frameworks for providing international protection in the context of nexus-related movements, even when the most prominent/proximate triggers were disaster, food insecurity or famine.**

*Implications:*

Informants from governments, UNHCR and civil society recognized that refugee law frameworks, and in particular broader refugee criteria, are relevant for providing international protection in the context of nexus dynamics.

Sometimes, popular perceptions and narratives on the 'causes' prompting flight may lead to the disregard of refugee law frameworks. This may be more likely when prominent or proximate triggers relate to root causes, which are not regarded as traditional causes of refugee flight. In this context, ensuring refugee law frameworks remain within a 'toolbox' of responses to address cross-border movement in the context of nexus dynamics may be a key policy challenge.

Guidance to enhance understanding of the pertinent inquiry and evidentiary burdens in determining claims for refugee status under broader refugee criteria may be useful to mitigate preoccupation with prominent factors for flight that may prejudice the decision-making process.

In certain nexus contexts, the relevance of refugee law frameworks may become apparent only as time passes and as conditions in countries of origin evolve.

**>> International protection pursuant to refugee law frameworks offered different and unique entitlements, but also certain limitations in comparison to protection through other channels.**

*Implications:*

When multiple frameworks (e.g. refugee or other) are available to support international protection in the context of nexus-related movements, entitlements and limitations under each applicable framework may need to be communicated



effectively so claimants can make informed decisions about whether to lodge or continue with refugee claims.

**>> Although UNHCR's engagement and access varied, in each domestic context UNHCR had scope to inform, advise, support and in some cases, recognize refugee status.**

*Implications:*

When UNHCR has presence, it has scope to inform, advise and assist decision makers to understand how individuals or groups may satisfy the definitions in the Refugee Convention or regional refugee instruments. Where UNHCR is integrally involved in RSD procedures, UNHCR's potential to inform and advise States on the relevance and application of refugee law and to support the grant of refugee status is much greater. When UNHCR is able to observe and advise, UNHCR's guidance, technical support and training may be crucial to building the proficiency and capacity of decision makers on the relevance and application of refugee law frameworks and thereby fostering the robust grant of refugee status in the context of nexus-related movements.

**>> Targeted UNHCR guidance on the application of refugee law frameworks to persons seeking international protection in the context of nexus dynamics in Somalia and Haiti was unavailable at the relevant time periods.**

*Implications:*

Decision makers and practitioners may hold UNHCR guidance, including its legal interpretive guidance and its country- or profile-specific eligibility guidance, in high regard. Documents that fall into the latter suite may need to be updated regularly to account for prevailing conditions and evolving nexus dynamics to enhance their utility and promote reliance.

UNHCR advisory letters issued in the aftermath of disasters (as occurred following the 2010 earthquake in Haiti) may be taken into consideration in State decisions on responses. Such letters may need to be issued as a matter of course, whenever UNHCR learns of cross-border movements in the context of disasters, and be crafted to support the grant of international protection under refugee law frameworks.

Global- and/or regional-level UNHCR legal interpretive guidance may be necessary to promote clarity, coherence, consistency on the application of broader refugee criteria to movements in the context of nexus dynamics, especially given domestic efforts to develop commentary on the relevance of regional refugee definitions to ‘natural’ or ecological disasters.

**>> In some countries, domestic migration frameworks have been adopted and/or amended to support the provision of temporary, humanitarian forms of international protection.**

*Implications:*

A deeper analysis of domestic refugee law frameworks in destination States, as well as migration and other relevant frameworks may be necessary to understand opportunities and limitations for granting international protection in the context of nexus-related movements. Such an analysis may also be necessary to appreciate how domestic migration or other frameworks affect, support or constrain the provision of international protection on the basis of obligations pursuant to domestic, regional or international refugee law.

## **Recommendations**

Within the contemporary policy and institutional landscape, drawing on the destination State responses, observations and implications, and guided by UNHCR’s mandate, strategic priorities and activities, the following 12 recommendations are offered within four broad themes.

### *On Guidance*

1. UNHCR should develop legal interpretive guidance in the form of UNHCR Guidelines on International Protection to inform States, practitioners, decision makers and UNHCR personnel regarding the relevance and application of the Refugee Convention and regional refugee instruments to international protection in the context of nexus dynamics, and to apply them in practice.
2. In UNHCR’s country- or profile-specific Guidelines on Eligibility (and the related suite of guidance documents), UNHCR should explain explicitly 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 applicable refugee definitions. UNHCR should also provide information on the processes and timing of updates and revisions to promote reliance.

3. UNHCR should ensure other guidance issued to States, such as specific letters requesting non-return, includes reference to international protection pursuant to refugee law to ensure States are abreast of its potential applicability, even in situations where the most prominent or proximate trigger may be a disaster. UNHCR should consider the issuance of such letters systematically, and as a matter of course, when it becomes aware of cross-border movement in the context of disasters.
4. UNHCR (and States and regional actors, as appropriate) should develop tailored regional- (and subregional-) level strategies to inform and promote the interpretation and application of the Refugee Convention and broader refugee criteria to nexus-related cross-border movements.

#### *On RSD and Access*

5. In keeping with the affirmations made in the New York Declaration, States (and other stakeholders, as appropriate) should ensure effective access to domestic RSD procedures, including in the context of nexus-related movements where the most prominent or proximate trigger may be a disaster or other factors not ordinarily considered as supporting refugee claims.
6. UNHCR and other stakeholders should create or update training packages to build the proficiency of RSD decision makers, including UNHCR personnel, to apply the Refugee Convention and broader refugee criteria to movements in the context of nexus dynamics.
7. UNHCR should provide technical support to States to develop domestic refugee law frameworks with the scope and operational capacity to undertake group-based approaches to RSD, in order to foster the use of refugee law frameworks in the context of (relatively) large-scale movements.

#### *On a 'Toolbox' of International Protection Measures*

8. UNHCR, States and other stakeholders, as applicable, should analyse domestic legal frameworks, including refugee laws and policies to determine opportunities and limitations for providing international protection in the

context of nexus dynamics. When applicable, States should develop or reform—and UNHCR and other stakeholders should promote the development of or reforms to—domestic frameworks to support the grant of international protection based on refugee law.

9. In the context of nexus-related cross-border movements, UNHCR should advocate with destination States and other stakeholders to ensure refugee law frameworks are consistently considered and remain available and accessible in a ‘toolbox’ of responses to address international protection needs, even if other frameworks are used or prioritized.

### *On Data, Knowledge Gaps and Communication*

10. UNHCR and other stakeholders should build knowledge and data by documenting domestic practice at points in time when refugee law frameworks have underpinned international protection for persons fleeing in the context of nexus dynamics.
11. UNHCR and other stakeholders should conduct comparative research on multiple destination State responses to nexus-related movements from a single origin country to gather region- or subregion-specific insights on the use, opportunities and limitations of refugee law frameworks.
12. UNHCR should scrutinize the ways in which it communicates publicly about movements that relate to nexus dynamics and frame communication to avoid and negate singular inferences on the ‘causes’ prompting flight in the context of nexus dynamics (e.g. by avoiding use of terminology such as “drought displacement”

## **ACRONYMS AND ABBREVIATIONS**

**ARRA:** Administration for Refugee and Returnee Affairs (relates to Ethiopia case study)

**AU:** The African Union

**Cartagena Declaration:** 1984 Cartagena Declaration

**CNIg:** Conselho Nacional de Imigração or National Immigration Council (relates to Brazil case study)

**COMAR:** Comisión Mexicana de Ayuda a Refugiados or Mexican Commission for Aid to Refugees (relates to Mexico case study)

**CONARE:** Comitê Nacional para os Refugiados or National Committee for Refugees (relates to Brazil case study)

**CRRF:** Comprehensive Refugee Response Framework

**DRA:** Department of Refugee Affairs (relates to Kenya case study)

**ECOSOC:** United Nations Economic and Social Council

**ExCom:** Executive Committee of the United Nations High Commissioner for Refugees

**GCR:** Global Compact on Refugees

**GIP:** UNHCR Guidelines on International Protection

**INM:** Instituto Nacional de Migración or National Institute for Migration (relates to the Mexico case study)

**IOM:** International Organization for Migration

**Nansen Initiative Protection Agenda:** The Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change

**NISS:** National Intelligence and Security Service (relates to Ethiopia case study)

**OAU Convention:** OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

**OHCHR:** Office of the United Nations High Commissioner for Human Rights

**PDD:** Platform on Disaster Displacement

**RAS:** Refugee Affairs Secretariat (relates to Kenya case study)

**Refugee Convention:** The 1951 Refugee Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, together.

**RSD:** Refugee status determination

**UN:** United Nations

**UNDP:** United Nations Development Programme

**UNHCR:** United Nations High Commissioner for Refugees

**UNISDR:** United Nations Office for Disaster Risk Reduction

**WFP:** World Food Programme

## KEY TERMS

**Adverse effects of climate change:** “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.”<sup>1</sup>

**Broader refugee criteria:** see discussion in Subsections 2.3, 2.4 and 2.5 of this report.

**Climate change:** “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>2</sup>

**Conflict and/or violence:** this report uses the terms ‘conflict’ and ‘violence’ in their widest possible senses to encompass the breadth of variations in how the terms are perceived and understood. Conflict includes situations that fall within the definitions established by international humanitarian law, but is not limited to such categorization. Violence is used as an umbrella term to cover indiscriminate and generalized violence perpetrated by State and non-State actors. The purpose is to minimize a technical or narrow approach that limits the inquiry.<sup>3</sup>

**Disaster:** “[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,

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<sup>1</sup> United Nations Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 21 March 1993), 1771 UNTS 107, Article 1. Available science indicates that increases in the frequency and intensity of certain types of extreme events related to the weather and climate have been observed. Science also predicts an increased risk of more extreme events, including heat waves, droughts and floods with changes in climate. See e.g. Intergovernmental Panel on Climate Change (IPCC) Assessment Reports, including Fifth Assessment Report (2014) and Fourth Assessment Report (2007), available at: [https://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml#1](https://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1), accessed: September 2018.

<sup>2</sup> Ibid. Climate change sits under the umbrella of environmental change, which is also affected by human activity.

<sup>3</sup> For a discussion of how UNHCR considers these terms, as well as a discussion of relevant concepts in international humanitarian law, see e.g. 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”, 2016, available at: <http://www.refworld.org/docid/583595ff4.html>, accessed: September 2018 (GIP 12).

material, economic and environmental losses and impacts.”<sup>4</sup> This report 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”.<sup>5</sup> Nonetheless, at times the term “‘natural’ disaster” is used in this report, to reflect the way in which others have referenced the term.

**Group-based approach to RSD:** see discussion in Subsection 2.7 of this report. Used synonymously with a “*prima facie* approach to RSD”.

**Hazard:** “[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.”<sup>6</sup>

**Hazardous event:** “[t]he manifestation of a hazard in a particular place during a particular period of time.”<sup>7</sup>

**Individual approach to RSD:** see discussion in Subsection 2.7 of this report.

**International protection:** see discussion in Section II, particularly Subsection 2.1 of this report.

**Nexus dynamics:** situations where conflict and/or violence *and* disaster and/or adverse effects of climate change exist in a country of origin. See also the introduction to this report.

**Prima facie approach to RSD:** see discussion in Subsection 2.7 of this report. Used synonymously with a “group-based approach to RSD”.

**Refugee Convention criteria or Refugee Convention definition:** see discussion

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<sup>4</sup> United Nations Office for Disaster Risk Reduction (UNISDR), “Terminology”, 7 February 2017, available at: <https://www.unisdr.org/we/inform/terminology#letter-d>, accessed: September 2018. UNISDR 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.”

<sup>5</sup> United Nations High Commissioner for Refugees (UNHCR), “Key Concepts: On Climate Change and Disaster Displacement”, n.d., available at: <http://www.unhcr.org/protection/environment/5943aea97/key-concepts-climate-change-disaster-displacement.html>, accessed: September 2018.

<sup>6</sup> Ibid. UNISDR also provides the following annotations: “Hazards may be natural, anthropogenic or socionatural in origin. Natural hazards are predominantly associated with natural processes and phenomena.” For further discussion and explanation, see UNISDR’s terminology page.

<sup>7</sup> Ibid. UNISDR also provides the following annotation: “Severe hazardous events can lead to a disaster as a result of the combination of hazard occurrence and other risk factors.”



in Subsection 2.2 of this report.

**Regional refugee definition(s) or Regional refugee instruments:** see discussion in Subsections 2.3 and 2.4 of this report.<sup>8</sup>

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<sup>8</sup> For further discussion on how UNHCR defines other key concepts on climate change and disaster displacement see UNHCR, *supra* note 5.

## I. INTRODUCTION

This report presents research, analysis and recommendations to strengthen implementation of refugee law-based international protection in situations where cross-border movement occurs in the context of conflict and/or violence *and* disaster and/or the adverse impacts of climate change (hereinafter, nexus dynamics). The study was commissioned by the United Nations High Commissioner for Refugees (UNHCR), forms part of the work plan of the Platform on Disaster Displacement (PDD) and examines four case studies.<sup>9</sup> The recommendations are framed to advance reflection and discussion around legal, policy and practical solutions for persons displaced across borders in the context of nexus dynamics.

### 1.1. Background

UNHCR's Strategic Directions for 2017–2021 recognizes the multiple factors compelling human movement in today's complex and challenging global landscape. Conflict, serious human rights abuses, weak rule of law, non-inclusive governance, effects of climate change and 'natural' disasters are among them. The document notes that these factors often overlap and reinforce others as root causes of displacement. It further identifies five core strategic directions. On protection, UNHCR commits to:

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.<sup>10</sup>

UNHCR also commits to:

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[.]<sup>11</sup>

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<sup>9</sup> For more on the PDD, see: <https://disasterdisplacement.org/>, accessed: September 2018. For more on the PDD's predecessor, the Nansen Initiative, see: <https://www.nanseninitiative.org/>, accessed: September 2018.

<sup>10</sup> UNHCR, "UNHCR's Strategic Directions 2017–2021", 2017, available at: <http://www.unhcr.org/5894558d4.pdf>, accessed: September 2018, p. 18.

<sup>11</sup> *Ibid.*, p. 17. Aligned with these goals, UNHCR's activities (and priorities) on climate change- and disaster-related displacement include: (1) research and knowledge production to fill gaps that underpin operational and policy work,

In the 2016 New York Declaration for Refugees and Migrants, States also explicitly recognized the various factors underlying human movements.<sup>12</sup> The Declaration 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”, and acknowledged that “[m]any [people] move, indeed, for a combination of these reasons.”<sup>13</sup> Within the Declaration’s subsection on commitments for refugees, States reaffirmed that international refugee law, *inter alia*, provides the legal framework to strengthen protection for refugees; committed to ensure protection for all who need it in this context; and took note of regional refugee instruments.<sup>14</sup>

A year earlier, the outcome document of a series of political, strategic and technical efforts through the State-led Nansen Initiative—the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Nansen Initiative Protection Agenda)—had also emphasized the need to enhance the use of so-called “humanitarian protection measures”, including refugee frameworks where appropriate, to protect cross-border displaced persons.<sup>15</sup> The Nansen Initiative Protection Agenda, which was endorsed by 109 government delegations and mentioned in the New York Declaration, was focused on addressing cross-border displacement in the context of disasters and climate change, but it also recognized and referenced nexus dynamics.<sup>16</sup>

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as well as (2) legal advice, guidance and normative development at national, regional and international levels to support enhanced protection of the rights of displaced people.

<sup>12</sup> United Nations (UN) General Assembly, “New York Declaration for Refugees and Migrants”, A/RES/71/7, 3 October 2016, available at:

[http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf), accessed: September 2018. The Declaration was the negotiated outcome of the most high-profile plenary meeting on improving responses to human movements to take place at the General Assembly. While the Declaration is politically significant, it is not a legally binding document.

<sup>13</sup> *Ibid.*, paragraph 1.

<sup>14</sup> *Ibid.*, paragraph 66.

<sup>15</sup> 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, available at: <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>, respectively, accessed: September 2018. The term “international protection” was not referenced explicitly in the Nansen Initiative Protection Agenda. See discussion on international protection in Subsection 2.1. The Agenda uses the term “humanitarian protection measures” to refer to mechanisms that have the scope to provide admission and/or stay. Within 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).

<sup>16</sup> For more on the global consultation, see the Nansen Initiative, *supra* note 9. The Nansen Initiative Protection Agenda does not use the words “nexus dynamics” explicitly, but recognizes the multi-causality prompting

Despite the recognition of contemporary realities underlying human movements and the enduring relevance of refugee law for international protection, research explicitly examining *State practice on refugee law-based international protection in the specific context of nexus dynamics* is scarce.<sup>17</sup> Yet recent history bears witness to cross-border movements in the context of nexus dynamics. Countries and regions affected range from South Sudan to Syria, the Lake Chad basin and Horn of Africa, to Central America and Haiti, to name but a few.

## 1.2. Scope, Methodology and Limitations

Against this background, this report describes *international* protection that is: (1) based on *refugee law* frameworks; (2) provided by *destination* States; (3) to people who have *crossed international borders* in the context of *nexus dynamics* in their origin country. It does so by examining four case studies, which concern:

1. Kenya and Ethiopia's responses, primarily during 2011–2012, to the cross-border movement of *Somalis* into their territories in the context of drought, food insecurity and famine, when conflict and violence also prevailed in southern and central Somalia; and
2. Brazil and Mexico's responses, primarily during 2010–2012, to the cross-border movement of *Haitians* into their territory in the aftermath of the 2010 earthquake in Haiti, when insecurity, violence and human rights violations also prevailed in Haiti.

While not the only possible examples of nexus dynamics, Somalia and Haiti were selected as origin situations because some destination States applied refugee law frameworks to respond to cross-border movements and because regional refugee instruments were applicable.<sup>18</sup> As the emphasis is on destination State responses, the

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movements, referencing both conflict and violence in this context (see e.g. *ibid.*, Vol. I, pp. 6, 15) and recognizes that cross-border movements occur in situations where disasters and conflict may overlap (see e.g. *ibid.*, Vol. I, pp. 24, 27).

<sup>17</sup> This is not to say that research on refugee law-based international protection in the context of disasters and adverse effects of climate change does not exist, but rather that research examining State practice on providing international protection based in refugee law in contexts where the added elements of conflict and/or violence are also considered in depth (in other words, nexus dynamics), appears limited. On relevant, recent literature, see e.g. Scott, "Refugee Status Determination in the Context of 'Natural' Disasters and Climate Change: A Human Rights-Based Approach", Lund University, 2018, available at: <https://lup.lub.lu.se/search/publication/8a7e5a93-cc14-46fc-ad26-7f03a4c81cd4>, accessed: September 2018; Scott, "Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change", *Refugee Survey Quarterly*, Vol. 35, Issue 4, 2016, pp. 26–57. See also 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, available at: [http://www.nanseninitiative.org/wp-content/uploads/2015/03/190215\\_Technical\\_Paper\\_Tamara\\_Wood.pdf](http://www.nanseninitiative.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf), accessed: September 2018.

<sup>18</sup> Framed by a focus on the Lake Chad basin, research was also conducted on the responses of Cameroon, Chad and Niger to the cross-border movement of Nigerians.

report does not describe the nexus dynamics in Somalia or Haiti in detail. Each situation does represent distinct nexus dynamics. Arguably, Somalia can be characterized in reductionist, imperfect terms, as a situation in which pre-existing conflict, and responses related to it, exacerbated the impacts of disaster and adverse effects of climate change. By contrast, Haiti can be characterized in reductionist and imperfect terms as a situation in which a disaster exacerbated pre-existing State fragility. Admittedly, the ensuing conditions in each country would have supported different scales and types of claims for refugee status.

The descriptions in this report of the destination State responses—namely by Kenya, Ethiopia, Brazil and Mexico—are based on informant interviews, carried out during 4- to 6-day visits to one or more locations within each country between February and April 2018. Other activities included: (1) remote and in-person interviews and meetings, and email correspondence, with thematic, country or regional experts; (2) questionnaires to UNHCR field operations; and (3) desk review of grey and academic literature, UNHCR documents and data. Aside from informant interviews, the abovementioned activities also underpin the overall report. In addition, the country case studies were shared with government informants and the overall report benefited from input, review and comments from UNHCR staff and other experts.

The descriptions of destination State responses are limited to the information required to answer the research questions and do not purport to constitute a comprehensive analysis. The breadth and depth of information gathered was affected by the historical nature of the inquiry, turnover of informants, and difficulties in accessing them. The study does not compare the cases with the goal of drawing generalizable conclusions. However, examining the responses of two destination States to movements from an origin country during a specific period means some comparison is inevitable.

This study's primary purpose is to provide recommendations to UNHCR, States and others on strengthening the implementation of refugee law in the context of nexus dynamics. Therefore, although State responses are discussed, the aim is not to explain the actions or draw causal inferences, but to describe how refugee law has featured in destination State responses in order to robustly inform the recommendations, as well as further discussions and work in this area.

### **1.3. Structure**

Section II describes legal and operational structures relevant to decisions on international protection under refugee law. It begins with a discussion on the meanings of “international protection” and “refugee”. The Section also highlights refugee status

determination (RSD) processes and UNHCR’s interpretive and eligibility guidance to States and other decision makers.

Section III synthesizes the responses of Kenya, Ethiopia, Brazil and Mexico to cross-border movements in the context of nexus dynamics, emphasizing how refugee law frameworks featured in the responses. Two Subsections sharpen the focus: the first on responses to Somali cross-border movements and the second on responses to Haitian cross-border movements. Each Subsection provides a brief overview of origin context, highlights applicable UNHCR guidance and advisories, and then discusses the responses of the selected destination States. Information on the responses of a selection of other destination States is also highlighted.

Building on the content in Sections II and III, Section IV draws together a series of observations and related implications. These form the backdrop to Section V, which sets out 12 recommendations to UNHCR, as well as States and other actors, on enhancing the implementation of refugee law-based international protection in the context of nexus dynamics.

## **II. INTERNATIONAL PROTECTION BASED IN REFUGEE LAW**

This Section serves as a backdrop to the discussion of the case studies in Section III by highlighting legal and operational structures relevant to decisions on international protection under refugee law. The Section begins with UNHCR’s views on the meaning of “international protection”, discusses how the term “refugee” is defined in international and regional refugee instruments, and highlights the definitions applied by UNHCR when it assesses international protection needs pursuant to its mandate. This is followed by an explanation of individual and group approaches to RSD, entitlements applicable to refugee status, and UNHCR’s legal interpretive and eligibility guidance offered to States and others on assessing claims for refugee status and granting international protection under refugee law. International human rights law is also applicable to the grant of international protection, but is not the focus of this report.

### **2.1. International Protection**

The scope of international protection has been elaborated in various multi-lateral and domestic legal instruments, judicial decisions, State practice, United Nations (UN) General Assembly and UN Economic and Social Council (ECOSOC) resolutions, as well as Conclusions of UNHCR’s Executive Committee (ExCom). The concept of international protection is central to UNHCR’s responsibilities as outlined in its 1950

Statute.<sup>19</sup> In June 2017, UNHCR issued succinct guidance on Persons in Need of International Protection,<sup>20</sup> which explains that:

[t]he need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them.

UNHCR identifies risks that may give rise to a need for international protection to include “persecution, threats to life, freedom or physical integrity”. These risks may arise from “armed conflict, serious public disorder, or different situations of violence.” Risks also stem from, *inter alia*, “famine linked to situations of armed conflict [and] natural or man-made disasters”. UNHCR explicitly notes, “[f]requently, these elements are interlinked and are manifested in forced displacement.”

The guidance confirms that “refugees are by definition in need of international protection”, since they are “outside their country of origin because of serious threats against which the authorities of their home country cannot or will not protect them. Left unprotected, they seek protection from a country of refuge, and from the international community.” Accordingly, “[i]ndividuals who meet the refugee definition under international, regional, or domestic laws, or under UNHCR’s mandate, are entitled to international protection.” In other words, the refugee regime is the principal framework for providing international protection. Indeed, it seems General Assembly and ECOSOC resolutions first introduced the term “international protection of refugees” on UNHCR’s establishment.<sup>21</sup> In the guidance, UNHCR also recognizes that “as a result of incomplete or inconsistent application of the 1951 Refugee Convention and these other relevant legal instruments, implementation gaps have arisen.”<sup>22</sup>

The relevance and importance of “complementary protection” mechanisms and “temporary protection or stay arrangements” for providing international protection are also acknowledged in UNHCR’s guidance. These tools are mentioned as particularly

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<sup>19</sup> UN General Assembly, “Statute of the Office of the United Nations High Commissioner for Refugees”, A/RES/428(V), 14 December 1950, available at: <http://www.refworld.org/docid/3ae6b3628.html>, accessed: September 2018, see paragraphs 1, 3 and 9 in particular; See also UNHCR, “Note on the Mandate of the High Commissioner for Refugees and His Office”, 2013, available at: <http://www.refworld.org/docid/5268c9474.html>, accessed: September 2018. Each year, UNHCR submits a specific Note on International Protection to the UN General Assembly, which elaborates on the concept and practice of international protection.

<sup>20</sup> UNHCR, “Persons in Need of International Protection”, 2017, available at: <http://www.refworld.org/docid/596787734.html>, accessed: September 2018.

<sup>21</sup> UN General Assembly, “Note on International Protection”, A/AC.96/830, 7 September 1994, available at: <http://www.refworld.org/type,UNHCRNOTES,,,3f0a935f2,0.html>, accessed: September 2018, p. 7.

<sup>22</sup> UNHCR, *supra* note 20.

relevant for persons who may not qualify as refugees under international, regional or domestic refugee laws, or UNHCR's mandate, but are still in need of international protection, on a temporary or longer-term basis.<sup>23</sup> This report does not focus on international protection provided under these other mechanisms, except to the extent they are discussed within the frame of destination State responses.

## 2.2. Refugee Convention Definition

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (together the Refugee Convention), form the foundation of the international refugee regime.<sup>24</sup> Over 148 States are parties to one or both instruments.<sup>25</sup> In some of the destination States discussed in Section III, refugee status was granted on the basis of the Refugee Convention definition, which defines a refugee as any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside 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.<sup>26</sup>

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<sup>23</sup> UNHCR's ExCom Conclusions, guidance and commissioned research, *inter alia*, elaborate on international protection through complementary forms of protection. See also, McAdam, "Complementary Protection in International Refugee Law", Oxford University Press, 2007. In 2014, UNHCR issued specific guidelines on temporary protection and stay arrangements, see UNHCR, "Guidelines on Temporary Protection or Stay Arrangements", 2014, available at: <http://www.unhcr.org/protection/expert/5304b71c9/guidelines-temporary-protection-stay-arrangements.html>, accessed: September 2018. See also commitments in the Global Compact for Safe, Orderly and Regular Migration (intergovernmentally negotiated and agreed outcome as at 13 July 2018), available at: [https://refugeesmigrants.un.org/sites/default/files/180713\\_agreed\\_outcome\\_global\\_compact\\_for\\_migration.pdf](https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf), accessed: September 2018, in particular commitments 2, 5 and 21. This document is slated to be adopted at an intergovernmental conference in Morocco in December 2018.

<sup>24</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137, as amended by the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967), 606 UNTS 267. Among other things, the Protocol removed the temporal restriction in the Convention, which had limited the refugee definition to include "as a result of events occurring before 1 January 1951".

<sup>25</sup> UNHCR, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", available at: <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>, accessed: September 2018.

<sup>26</sup> Article 1A(2) of the Convention as modified by its Protocol, *supra* note 24; Convention Article 1C governs cessation of refugee status. Article 1F identifies persons excluded from protection under the Convention, although they meet the criteria in Article 1A(2).



### 2.3. Regional Refugee Definition in Africa

At the regional level, Africa was the first to adopt a binding refugee treaty to address the specific challenges faced by African countries in responding to refugee crises in the continent.<sup>27</sup> The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) has been ratified by 46 of the 55 member States of the African Union, the successor to the OAU,<sup>28</sup> and 44 States have incorporated it into domestic law.<sup>29</sup> In Article I, the OAU Convention provides two definitions of a refugee, applicable to the region. Article I(1) includes the Refugee Convention definition. Article I(2) provides that 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.<sup>30</sup>

According to UNHCR, “[a] principle purpose of the 1969 OAU Convention is to provide refugee protection in specific humanitarian situations, including large-scale arrivals of people fleeing situations or circumstances in their country of origin which fall within the OAU Convention’s Article I(2) criteria.”<sup>31</sup> Notably, the regional refugee definition in Article I(2):

steer[s] away from persecutory conduct towards more generalized or so-called ‘*objectively*’ identifiable situations. The 1969 OAU definition acknowledges that the compulsion for persons to leave their country may occur not only as a result of the conduct by state or non-state actors in the refugee’s country of origin, but also as a result of that government’s loss of authority or control due to ... [the events listed in Article I(2)]. The 1969 OAU definition focuses on *situations* that compel people to leave their countries in search of safety and sanctuary.<sup>32</sup>

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<sup>27</sup> See e.g. GIP 12, *supra* note 3.

<sup>28</sup> 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; on State parties, see [https://au.int/sites/default/files/treaties/7765-sl-oau\\_convention\\_governing\\_the\\_specific\\_aspects\\_of\\_refugee\\_problems\\_in\\_afr.pdf](https://au.int/sites/default/files/treaties/7765-sl-oau_convention_governing_the_specific_aspects_of_refugee_problems_in_afr.pdf), accessed: September 2018.

<sup>29</sup> Sharpe, “The Regional Law of Refugee Protection in Africa”, Oxford University Press, 2018, p. 101.

<sup>30</sup> Emphasis added.

<sup>31</sup> 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, 2017, available at: <http://www.refworld.org/docid/5a391d4f4.html>, accessed: September 2018, paragraph 2.

<sup>32</sup> GIP 12, *supra* note 3, paragraph 48. Internal citations omitted. For more on the OAU Convention and refugee protection in Africa, see also UNHCR, *ibid.*; Sharpe, *supra* note 29; Sharpe, “The 1969 African Refugee Convention:

As discussed in Section III, the OAU Convention's regional refugee definition and the ability to consider the objective situation in Somalia were relevant to responses to Somali movements.

#### 2.4. Regional Refugee Definition in Latin America

The OAU Convention is sometimes credited with contributing to the adoption in 1984 of the non-binding Cartagena Declaration in Latin America.<sup>33</sup> The Cartagena Declaration recommends that States in Latin America, in addition to recognizing refugees in accordance with the Refugee Convention definition, also:

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*.<sup>34</sup>

The Declaration "calls for an inclusive, evolving and flexible interpretation of the [broader] refugee definition",<sup>35</sup> since its scope is to provide "international protection to people fleeing threats resulting from 'objectively' identifiable circumstances which have seriously disturbed public order."<sup>36</sup> Fifteen States have implemented a regional refugee definition, drawn from the recommendation in the Cartagena Declaration, into their domestic law.<sup>37</sup> The incorporation by Brazil and Mexico of the regional refugee definition, and views on its application to Haitian movements following the 2010 earthquake, feature in Section III.

#### 2.5. UNHCR's Extended Mandate

Recognition of refugee status pursuant to UNHCR's mandate is also discussed in Section III, particularly in the Subsection on Kenya's response. UNHCR's mandate covers individuals who meet the criteria in the Refugee Convention, and has also been broadened through UN General Assembly and ECOSOC resolutions to situations of

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Innovations, Misconceptions and Omissions", *McGill Law Journal*, Vol. 58., No. 1, 2012, available at: <https://www.erudit.org/fr/revues/mlj/2012-v58-n1-mlj0390/1013387ar.pdf>, accessed: September 2018.

<sup>33</sup> Cartagena Declaration on Refugees, 22 November 1984, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, available at: <http://www.refworld.org/docid/3ae6b36ec.html>, accessed: September 2018; See e.g. Sharpe, *supra* note 29.

<sup>34</sup> *Ibid.*, Conclusion 3. Emphasis added.

<sup>35</sup> GIP 12, *supra* note 3, paragraph 65.

<sup>36</sup> *Ibid.*, paragraph 66.

<sup>37</sup> Cantor, "Cross-border Displacement, Climate Change and Disasters: Latin America and the Caribbean", PDD, forthcoming, p. 20; draft dated 4 July 2018, on file with author.

forced displacement resulting from indiscriminate violence or public disorder.<sup>38</sup> This has meant that:

UNHCR's competence to provide international protection to refugees extends to individuals who are outside their country of nationality or habitual residence and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from indiscriminate violence or other events seriously disturbing public order.<sup>39</sup>

## 2.6. Refugee Status Determination (RSD)

RSD refers to the process used to assess whether an individual who seeks international protection is a refugee under eligibility criteria established by international or regional refugee instruments, national legislation, or UNHCR's mandate. For States, RSD is an essential step for the implementation of their obligations under the Refugee Convention or regional refugee instruments. States bear the primary responsibility for RSD, but because it is unregulated in the Refugee Convention, States have wide latitude to establish appropriate RSD systems that reflect their political and legal landscapes.<sup>40</sup> Many countries have established State-based RSD systems. Sometimes States conduct RSD jointly or in parallel with UNHCR, where UNHCR plays varying roles within the overall process. In other countries, UNHCR conducts RSD pursuant to its mandate, so as to exercise UNHCR's core function of providing international protection, *de facto* substituting for States where they do not, or inadequately, perform this function.<sup>41</sup>

In its guidance documents (discussed below in Subsection 2.9), UNHCR often explains that the various definitions of refugees are not mutually exclusive, but promote a sequential approach, which underscores the primacy of the Refugee Convention and

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<sup>38</sup> See e.g. UNHCR, "Eligibility Guidelines for Assessing the International Protection needs of Asylum-seekers from Guatemala", 2018, available at: <http://www.refworld.org/docid/5a5e03e96.html>, accessed: September 2018, p. 55.

<sup>39</sup> Ibid. A comprehensive and authoritative UN General Assembly, ECOSOC, or ExCom articulation of UNHCR's broader mandate criteria is unavailable. Although the language of UNHCR's broader mandate criteria is drawn from the OAU Convention and the Cartagena Declaration, differences exist. On this, see e.g. 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*, Vol. 26, No. 4, 2014, pp. 555–580.

<sup>40</sup> On different frameworks established at the domestic level, see e.g. UNHCR, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status", 2011, available at: <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>, accessed: September 2018.

<sup>41</sup> This scenario is common when a State-based legal and institutional framework does not exist or is inadequate, or when a State is yet to become a party to the Refugee Convention. For more on RSD, see e.g. Executive Committee of the High Commissioner's Programme, "Refugee Status Determination", EC/67/SC/CRP.12, 31 May 2016, available at: <http://www.unhcr.org/excom/standcom/574e94ad7/refugee-status-determination-574e94ad7.html>, accessed: September 2018.

the complementary nature of regional refugee definitions.<sup>42</sup> UNHCR reinforces that the criteria in the Refugee Convention should be interpreted in a manner that permits individuals or groups of persons who meet the criteria to be duly recognized and protected under that instrument. Only when a person is found not to meet the criteria in the Refugee Convention, should the potential application of broader refugee criteria contained in regional refugee instruments and UNHCR's mandate be examined.<sup>43</sup> That said, while a sequential approach is preferred, UNHCR also acknowledges that "applying the regional definitions would be more practical and efficient in group situations or in specific regional contexts, as long as the 1951 Convention standards of treatment apply".<sup>44</sup>

## 2.7. Individual and Group Approaches to RSD

RSD can be conducted using two approaches: an individual approach or a group-based approach, with the latter sometimes used synonymously with a so-called "*prima facie* approach". Both approaches can be adopted using various case processing modalities,<sup>45</sup> but in either case, the inquiry is nonetheless at the individual level and the merits of an applicant's claim for refugee status are examined on an individual basis.

Where an individual approach is used, the modalities can vary. This may include a 'regular' assessment process, which involves an in-depth examination of the individual circumstances of an applicant's case. An individual approach may also include certain forms of simplification relating to the interview or assessment process, or both.<sup>46</sup>

A group-based or *prima facie* approach can be favoured where an individual approach is impractical, impossible or unnecessary, which may be the case in situations of large-scale movements.<sup>47</sup> In this regard, a group-based approach is often combined with a simplified case processing modality. In practice, registration is a principal means through which refugees are recognized within a group-based approach.<sup>48</sup> Registration

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<sup>42</sup> See e.g. GIP 12, *supra* note 3.

<sup>43</sup> See e.g. UNHCR, *supra* note 38.

<sup>44</sup> GIP 12, *supra* note 3, paragraph 88. Internal citations omitted.

<sup>45</sup> For more on various case processing modalities, as well as other aspects discussed in this Section, see UNHCR, "Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to RSD under UNHCR's Mandate", 2017, available at: <http://www.refworld.org/docid/5a2657e44.html>, accessed: September 2018.

<sup>46</sup> UNHCR has traditionally favoured an individual approach to RSD, but this may be changing. See e.g. Executive Committee of the High Commissioner's Programme, *supra* note 41.

<sup>47</sup> UNHCR, "Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status", 2015, available at: <http://www.refworld.org/docid/555c335a4.html>, accessed: September 2018, (GIP 11), paragraph 2. Such an approach may also be appropriate for groups of similarly situated individuals, who share a readily apparent common risk of harm, regardless of the scale of arrival (paragraph 10).

<sup>48</sup> See generally, *ibid.*

procedures seek to appropriately identify persons who should benefit from recognition pursuant to a group-based approach and to channel persons, such as those presenting exclusion triggers, to a deeper individualized examination.<sup>49</sup> A group-based approach is relevant to the discussion on responses to Somali movements as the vast majority of Somalis from southern or central Somalia were granted status using such an approach, with registration a key aspect of the case processing modality.

In 2015, UNHCR published Guidelines on International Protection No. 11 on Prima Facie Recognition of Refugee Status (GIP 11), which explains the legal basis and procedural and evidentiary aspects of applying a *prima facie* approach.<sup>50</sup> It notes that “[i]n general, *prima facie* means ‘at first appearance’, or ‘on the face of it’.”<sup>51</sup> GIP 11 defines a *prima facie* approach as:

the recognition by a State or UNHCR of refugee status on the basis of *readily apparent, objective circumstances in the country of origin* ... A *prima facie* approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition.<sup>52</sup>

Refugee status may be recognized using a *prima facie* approach pursuant to any of the applicable refugee definitions.<sup>53</sup> In this context, GIP 11 acknowledges that the:

regional refugee definitions were designed to respond, in part, to large-scale arrivals of people fleeing from objective circumstances in their countries of origin, such as ... events seriously disturbing public order, and are thus particularly suited to forms of group recognition [or in clearer words, a group-based or *prima facie* approach].<sup>54</sup>

Notably, a *prima facie* approach operates only to recognize refugee status; decisions to reject require an individual approach.<sup>55</sup> Each refugee recognized through a *prima facie* approach benefits from refugee status and is entitled to the rights contained in the

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<sup>49</sup> The type and extent of data collection through registration activities varies. In some cases, the implementation of a group-based approach may occur through so-called “merged-registration-RSD” or more exceptionally following so-called “simplified RSD”. See e.g. UNHCR, *supra* note 45.

<sup>50</sup> GIP 11, *supra* note 47. It acknowledges that recognizing refugee status using a *prima facie* approach has been a common practice of both States and UNHCR for over 60 years and the majority of the world’s refugees are recognized through a *prima facie* approach.

<sup>51</sup> *Ibid.*, paragraph 4.

<sup>52</sup> *Ibid.*, paragraph 1. Internal citations omitted. Emphasis added.

<sup>53</sup> *Ibid.*, paragraph 5.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, paragraph 6.

applicable instrument.<sup>56</sup> In accordance with domestic legal frameworks, the decision to recognize refugee status using a *prima facie* approach, and to end the use of the *prima facie* approach, rests with the relevant authority in the country of asylum, or UNHCR, when acting under its mandate.<sup>57</sup>

## 2.8. Entitlements Framework

RSD is an indispensable tool and a critical step on the path to international protection for refugees by States. Recognition of legal status as a refugee entitles beneficiaries to a range of rights that may differ, to varying extents, from the rights that may be accorded where recognition of refugee status does not occur, but international protection is afforded through other means, such as temporary and humanitarian-centred discretionary protection measures. The cardinal obligation on States relates to the prohibition against *refoulement* and the obligation to grant rights as set out in Articles 3–34 of the Refugee Convention,<sup>58</sup> some of which are more immediate, while others accrue, for example, as a function of the nature and duration of the attachment to the host State.<sup>59</sup> In general, the particular definition pursuant to which a refugee is recognized (i.e. based on the Refugee Convention definition or the definitions in regional refugee instruments) may not create material consequences in practice.<sup>60</sup> Entitlements, their availability, accessibility and enjoyment in practice are not a focus of this research,<sup>61</sup> although, freedom of movement and work rights are mentioned in some case studies.<sup>62</sup>

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<sup>56</sup> Ibid., paragraph 7.

<sup>57</sup> Ibid., paragraph 29.

<sup>58</sup> Convention relating to the Status of Refugees, supra note 24. The prohibition on *refoulement* is set out in Article 33.

<sup>59</sup> See e.g. Hathaway, “The Rights of Refugees Under International Law”, Cambridge University Press, 2005.

<sup>60</sup> GIP 12, supra note 3, paragraph 8. It also states that “[a]s far as rights are concerned, the 1951 Convention and the regional instruments each recognize a person as a refugee and provide for 1951 Convention rights to be applied.” For more on this, see also, UNHCR, supra note 31, which notes that in comparison to the Refugee Convention, the OAU Convention contains a more limited set of rights for refugees and that the OAU Convention does not incorporate the entire standards of treatment found in Articles 3–34 of the Refugee Convention. This may not, however, pose a significant problem in practice as most African Union member States are party to the Refugee Convention and the OAU Convention, and refugees recognized under Article I(1) or I(2) of the OAU Convention benefit from the Refugee Convention’s rights framework. Refugees recognized under the OAU Convention or the Refugee Convention are similarly situated, with indistinguishable status attached, regardless of the legal basis of their protection needs (paragraphs 5–6, in particular). In the 15 States in Latin America, which have incorporated broader refugee criteria into domestic law, persons recognized under such criteria are entitled to the rights and benefits accruing under the Refugee Convention. See Cantor, supra note 37, p. 20. The basis on which refugee status is recognized is, however, relevant to resettlement opportunities. See brief discussion on these aspects in the Sections on Kenya and Ethiopia’s responses.

<sup>61</sup> For commentary on these aspects, see e.g. Hathaway, supra note 59; Foster, “International Refugee Law and Socio-Economic Rights: Refuge from Deprivation”, Cambridge University Press, 2007.

<sup>62</sup> Convention relating to the Status of Refugees, supra note 24, Articles 17–19 and 26.

## 2.9. UNHCR's Legal Interpretive and Eligibility Guidance

The Refugee Convention and UNHCR's Statute confers supervisory responsibilities on UNHCR regarding the application of international conventions for the protection of refugees.<sup>63</sup> State parties are obliged to cooperate with UNHCR in the exercise of its functions, including facilitating UNHCR's duty to supervise the application of the Refugee Convention.<sup>64</sup> One of the ways UNHCR exercises this supervisory responsibility is through the issuance of *legal interpretive* and *eligibility* guidance on international protection.

UNHCR's legal interpretive guidance, such as its *Guidelines on International Protection* (GIPs) are "intended to provide legal interpretive guidance and are based on the accumulated views of UNHCR, state practice, ExCom Conclusions, judicial decisions at national and international levels and academic writing."<sup>65</sup> *Guidance Notes* are also intended to provide legal interpretive guidance on particular thematic areas through the analysis of, *inter alia*, international legal standards, jurisprudence and other relevant documents. Beyond these, there are *Legal Considerations* and other types of legal and policy documents relevant to RSD. This 'suite' of legal interpretive documents serves to provide complementary information and is intended to be read in conjunction with the others. Better clarification on any hierarchy, differences, unique purposes and interconnections among the various types of legal interpretive guidance documents issued by UNHCR may aid decision makers.

UNHCR also issues country- or profile-specific *Eligibility Guidelines for Assessing International Protection Needs* (Guidelines on Eligibility), which "are legal interpretations of the refugee criteria in respect of specific profiles on the basis of assessed social, political, economic, security, human rights and humanitarian conditions in the country or territory of origin concerned."<sup>66</sup> Other documents that fall into this 'suite' include *International Protection Considerations*, *Positions on Return*, *Return Advisories* and *Protection*

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<sup>63</sup> Convention relating to the Status of Refugees, supra note 24, preamble; UN General Assembly, supra note 19, paragraph 8(a); See more generally, Türk, "Summary of Introductory Remarks", *International Journal of Refugee Law*, Vol. 25, No. 2, pp. 394-398.

<sup>64</sup> Convention relating to the Status of Refugees, supra note 24, Article 35; Protocol relating to the Status of Refugees, supra note 24, Article II(1); Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 28, Article VIII.

<sup>65</sup> Türk, supra note 63, p. 396. As at September 2018, 13 GIPs have been issued by UNHCR. These are available at: <http://www.refworld.org/rsd.html>, accessed: September 2018. The Guidelines complement UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugees Status under the Refugee Convention, supra note 40.

<sup>66</sup> Türk, *ibid*, p. 397. Based on in-depth research, this form of guidance analyses in detail international protection needs and provides recommendations on how applications for international protection relate to relevant principles and refugee law criteria, as well as where relevant, complementary and subsidiary protection criteria.

*Guidance Notes.* It appears that such eligibility guidance documents remain in effect until they are explicitly superseded. Again, clarification on any hierarchy, differences, unique purposes and interconnections among the various types of eligibility documents issued by UNHCR may aid decision makers. In addition, it appears that UNHCR issues eligibility guidance on an *ad hoc* basis, rather than systematically or based on a defined timetable or articulated criteria. This may leave questions unanswered on the part of States or stakeholders regarding the international protection needs of certain groups at different points in time.

GIPs, Guidelines on Eligibility, and the other guidance documents that fall into the two broad categories discussed here are, in general, issued to advise, inform and assist governments, legal practitioners and decision makers, as well as UNHCR personnel, to assess the international protection needs of asylum-seekers.<sup>67</sup> As discussed in the next Section, specific Guidelines on Eligibility for Somali asylum-seekers were issued in May 2010. A similar document was not available for Haitian asylum-seekers, although in February 2010 and June 2011, UNHCR (together with the Office of the United Nations High Commissioner for Human Rights (OHCHR)) issued two *ad hoc* letters concerning the return of Haitians.

### III. CASE STUDIES

Building on the preceding background, this third Section synthesizes Kenya, Ethiopia, Brazil and Mexico's responses to cross-border movements in the context of nexus dynamics. Two Subsections sharpen the focus: the first on responses to Somali cross-border movements between 2011 and 2012 and the second on responses to Haitian cross-border movements between 2010 and 2012. Each Subsection begins with a brief overview of the situation in the countries of origin and country-specific UNHCR guidance and advisories applicable during the periods under consideration, before summarizing the responses of the selected destination States. Information on the responses of a selection of other destination States is briefly highlighted at the end of each Subsection to provide context and inform further research.

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<sup>67</sup> In the contemporary space, UNHCR also commissions *Country of Origin Information* (COI) Reports, which provide country information from different sources, but do not provide any guidance.



## 3.1 Responses to Somali Cross-Border Movements

### 3.1.1. Background Context in Somalia

Between late 2010 and early 2012, southern and central Somalis experienced severe food insecurity.<sup>68</sup> On 20 July 2011, the UN declared famine in parts of Somalia and extended the declaration to cover additional areas in August 2011.<sup>69</sup> It was the first time famine had been declared in Somalia since 1991–1992.<sup>70</sup> By February 2012, famine conditions had ended, but the humanitarian emergency continued.<sup>71</sup>

Multiple causes are identified as having played a part in the famine in Somalia.<sup>72</sup> Among them, drought conditions affected the Horn of Africa during 2010 and 2011. Within Somalia, the rains had failed two years in a row, in late 2010 and between March and June 2011, with some concluding that the later failure was influenced by climate change.<sup>73</sup> Shortage of water, crop and livestock failure, a drop in demand for labour, and an increase in local food prices combined with a global spike in food prices to disrupt livelihoods and deplete resilience.

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<sup>68</sup> Food Security and Nutrition Analysis Unit – Somalia (FSNAU), “Study Report: Mortality Among Populations of Southern and Central Somalia affected by Severe Food Insecurity and Famine During 2010-2012”, 2013, available at: <http://www.fsnau.org/in-focus/study-report-mortality-among-populations-southern-and-central-somalia-affected-severe-food->, accessed: September 2018. For more on the Integrated Food Security Phase Classification System, see e.g. <http://www.ipcinfo.org/>, accessed: September 2018.

<sup>69</sup> FSNAU, “Famine Declared in Three New Areas of Southern Somalia”, 2011, available at <http://www.fsnau.org/in-focus/famine-declared-three-new-areas-southern-somalia>, accessed: September 2018. When the famine was declared on 20 July 2011, an estimated 4 million people were affected by the crisis. See e.g. Maxwell et al., “Facing Famine: Somali Experiences in the Famine of 2011”, Feinstein International Center, 2015, available at: <http://fic.tufts.edu/assets/Facing-Famine-high-quality.pdf>, accessed: September 2018.

<sup>70</sup> Salama et al., “Famine in Somalia: Evidence for a Declaration”, *Global Food Security*, 2012, available at: [https://fews.net/sites/default/files/documents/reports/Global\\_Food\\_Security\\_Famine\\_Somalia.pdf](https://fews.net/sites/default/files/documents/reports/Global_Food_Security_Famine_Somalia.pdf), accessed: September 2018.

<sup>71</sup> FSNAU and Famine Early Warning Systems Network (FEWS NET), “Famine Ends, Yet 31% of the Population Remains in Crisis”, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report\\_532.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_532.pdf), accessed: September 2018. More than 250,000 people are estimated to have died between October 2010 and April 2012, as a result of the emergency in southern and central Somalia. See e.g. Checchi and Courtland Robinson, “Mortality Among Populations of Southern and Central Somalia Affected by Severe Food Insecurity and Famine During 2010-2012”, United Nations Food and Agriculture Organization (FAO) and FEWS NET, 2013, available at: <https://data2.unhcr.org/en/documents/details/31945>, accessed: September 2018, p. 8.

<sup>72</sup> For more on these factors, and a deep and detailed discussion of the context in Somalia, including the proceeding discussion in this Subsection, see e.g. Maxwell and Majid, “Famine in Somalia: Competing Imperatives, Collective Failures, 2011-12”, Oxford University Press, 2016; see also, Checchi and Courtland Robinson, *ibid.*

<sup>73</sup> See e.g. Lott et al., “Can the 2011 East African Drought be Attributed to Human-Induced Climate Change?”, *Geophysical Research Letters*, 2013, available at: <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/grl.50235>, accessed: September 2018; See also, Peterson et al., “Explaining Extreme Events of 2011 from a Climate Perspective”, *American Meteorological Society*, 2012, available at: <https://journals.ametsoc.org/doi/pdf/10.1175/BAMS-D-12-00021.1>, accessed: September 2018.

Adding to these dynamics were historical and ongoing political volatility, governance challenges and conflict in Somalia. During the relevant period, Al-Shabaab controlled much of southern and central Somalia. Al-Shabaab imposed aggressive taxation practices, controlled information and blocked trade, eroding social safety nets. Restrictions were also imposed on mobility, limiting access to humanitarian aid. “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”.<sup>74</sup>

The crisis conditions in Somalia were compounded by State- and donor-driven counter-terrorism policies, military offensives and Al-Shabaab’s actions towards aid agencies and humanitarian personnel. These factors also limited access to humanitarian assistance, particularly in Al-Shabaab influenced or controlled areas. In late 2009, the World Food Programme (WFP) withdrew from southern and central Somalia and was banned from returning in early 2010 by Al-Shabaab.<sup>75</sup> Access to alternative sources of assistance within Somalia was further reduced in September 2010, when seven other agencies were also banned.<sup>76</sup>

Within the conditions created by the interplay of the above factors, historically marginalized groups in southern or central Somalia were among the worst affected by the food insecurity and famine.<sup>77</sup> In 2011 and 2012, the number of Somalis who crossed international borders was enormous. Between January and April 2011, new Somali arrivals in Ethiopia averaged between 5,000 and 10,000 per month and peaked at nearly 27,000 in July 2011.<sup>78</sup> Similarly, between January and June 2011, new Somali arrivals in Kenya averaged about 9,500 per month, but jumped to 26,000 in July 2011.<sup>79</sup> During the course of the crisis, approximately 150,000 and 120,000 Somalis are thought to have arrived in Kenya and Ethiopia, respectively.<sup>80</sup> Yemen was another key destination for Somalis, and to a lesser extent, Djibouti and Uganda.<sup>81</sup>

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<sup>74</sup> Maxwell and Majid, *ibid.*, p. 60.

<sup>75</sup> *Ibid.*, p. 59.

<sup>76</sup> *Ibid.*

<sup>77</sup> See e.g. *ibid.*

<sup>78</sup> *Ibid.*, p. 70. Relates to Dollo Ado camps, which are discussed in the Subsection on Ethiopia’s response.

<sup>79</sup> *Ibid.*, p. 72. Relates to Dadaab camps, which are discussed in the Subsection on Kenya’s response.

<sup>80</sup> *Ibid.*, p. 70.

<sup>81</sup> See e.g. UNHCR, “UNHCR Population Statistics Database”, available at: [http://popstats.unhcr.org/en/persons\\_of\\_concern](http://popstats.unhcr.org/en/persons_of_concern), accessed between February and September 2018.

As has been the case historically, a number of factors, including drought and violence, overlapped more recently once again in Somalia.<sup>82</sup> Although famine was averted in early 2017, Somalia has experienced severe food insecurity and internal displacement. Some cross-border movements, including to Kenya and Ethiopia, have also occurred.<sup>83</sup>

### 3.1.2. UNHCR Guidance on Somali Asylum-seekers

In 2011, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Somalia dated 5 May 2010 (2010 Eligibility Guidelines) was in effect.<sup>84</sup> This document acknowledges that Somali displacement “due to human rights violations, conflict, *natural disasters* and economic crises have been commonplace” since the collapse of the Somali State in the early 1990s.<sup>85</sup> In setting out the general approach on eligibility for international protection, the 2010 Eligibility Guidelines state that Somalis may, depending on the circumstances surrounding flight, qualify as refugees within the meaning of the Refugee Convention definition. This is in view of the serious and widespread violations of human rights and ongoing armed conflict and insecurity in much of southern and central Somalia. In this context, the 2010 Eligibility Guidelines encourages a group-based approach.<sup>86</sup> In discussing eligibility for international protection, the Guidelines describe: the main groups at risk for the purpose of the Refugee Convention definition; agents of persecution; the availability of effective State or *de facto* protection; the internal flight or relocation alternative; and exclusion.

The 2010 Eligibility Guidelines also discuss broader refugee criteria. It explains that:

the extended/broader refugee criteria enshrined in several regional refugee instruments (the 1984 Cartagena Declaration and the 1969 OAU Convention) and

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<sup>82</sup> On more recent conditions, see e.g. Yarnell and Thomas, “On the Edge of Disaster: Somalis Forced to Flee Drought and Near-Famine Conditions”, Field Report, Refugees International, 2017, available at:

<https://www.refugeesinternational.org/reports/somaliadroughtandfaminereport>, accessed: September 2018; Amnesty International, “Not Time to Go Home: Unsustainable Returns of Refugees to Somalia, 2017, available at:

<https://www.amnesty.org/download/Documents/AFR5276092017ENGLISH.PDF>, accessed: September 2018.

<sup>83</sup> See discussion on Kenya and Ethiopia’s responses to follow in Subsections 3.1.3. and 3.1.4.

<sup>84</sup> UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Somalia”, 5 May 2010, available at: <http://www.refworld.org/docid/4be3b9142.html>, accessed: September 2018 (2010 Eligibility Guidelines). These superseded the following: UNHCR, “UNHCR Advisory on the Return of Somali Nationals to Somalia,” 2 November 2005, available at: <http://www.unhcr.org/refworld/docid/437082c04.html>, accessed: September 2018. The 2010 Eligibility Guidelines contain four sections and an Annex: (1) introduction; (2) trends in causes of Somali displacement across international borders and general trends in types of Somali asylum claims; (3) background information and developments relevant to main types of Somali claims; and (4) eligibility for international protection, which outlines the approach advised by UNHCR. Section 4 contains relevant country-of-origin information, accompanying legal analysis and conclusions, as well as UNHCR’s recommendations on international protection needs of Somalis under complementary or subsidiary protection regimes.

<sup>85</sup> 2010 Eligibility Guidelines, *ibid.*, p. 2. Emphasis added.

<sup>86</sup> *Ibid.*, p. 9.

UNHCR's mandate, are critical in responding to the international protection needs of persons who do not meet the Convention criteria and who are outside of their country of origin because of a serious threat to their life, liberty or security as a result of generalized violence or events seriously disturbing public order.<sup>87</sup>

Having set out extensive evidence demonstrating the existence of an armed conflict in southern and central Somalia, the 2010 Eligibility Guidelines state that:

UNHCR considers that the prevailing situation in southern and central Somalia with the reported high frequency of significant casualties among the civilian population represents *events seriously disturbing public order* in the meaning of the extended refugee definition of Article I(2) of the OAU Convention ... . In addition, UNHCR considers that no reliable safety zones exist in southern and central Somalia given the unpredictable evolution of the conflict, characterized by constant struggle for territorial control by parties to the conflict and outbreaks of violence in previously unaffected areas and, therefore, any individual present on the territory would be at risk of serious harm.<sup>88</sup>

In this context, the 2010 Eligibility Guidelines also acknowledge that:

Aggravating the situation of large scale population displacements due to the ongoing conflict is *food insecurity*. The suspension of food distribution by WFP to most regions of southern and central Somalia is compounded by the *drought* affecting many [internally displaced persons] camps and host communities. The conflict is also taking a toll on the logistical capacities of aid organizations to deliver much needed assistance to populations in need as the conflict affects main road arteries and due to threats against humanitarian workers.<sup>89</sup>

The quoted text captures the only places in the 54-page 2010 Eligibility Guidelines in which the terms "disaster", "drought" and "food insecurity" are explicitly mentioned. Between May 2010 and the end of 2012, UNHCR did not issue superseding or supplementary guidance.<sup>90</sup> Updated guidance, as food insecurity worsened or subsequent to the famine declaration, could have elaborated on the interactions of the drought with the actions of the parties to the conflict to explain the consequences for Somalis, including for access to humanitarian assistance, so as to highlight their bearing

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<sup>87</sup> Ibid., p. 39. Internal citations omitted.

<sup>88</sup> Ibid., p. 41. Emphasis added. Internal citations omitted.

<sup>89</sup> Ibid. Emphasis added. Internal citations omitted.

<sup>90</sup> Note, however, that an Addendum was issued in 2012, relating specifically to the city of Galkacyo.

on eligibility for refugee status. Rather, the 2010 Eligibility Guidelines remained the key source of advice and interpretive legal guidance in effect at the time of the Somali movements in 2011 and 2012.<sup>91</sup>

In April 2017, UNHCR issued *Legal Considerations on Refugee Protection for People Fleeing Conflict and Famine Affected Countries (Legal Considerations on Conflict and Famine)*, which explains how environmental factors may interact with human factors, and outlines the applicability of the Refugee Convention and the broader refugee criteria.<sup>92</sup> The document concludes by noting that:

People displaced by the [sic] 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, or, when they do not fall within the criteria for refugee status, they should be granted a complementary protection status where applicable under national law.

The *Legal Considerations on Conflict and Famine* is arguably the most pertinent UNHCR guidance on the themes discussed in this report, but it was issued well after the cross-border movements during 2011–2012.<sup>93</sup> Nonetheless, the document highlights

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<sup>91</sup> While not directly relevant to the time period examined in this study, it is worth noting an interim update issued by UNHCR in January 2014 (see UNHCR, “International Protection Considerations with Regard to People Fleeing Southern and Central Somalia”, 17 January 2014, available at: <http://www.refworld.org/docid/52d7fc5f4.html>, accessed: September 2018). The interim update is, by and large, based on information that was available to UNHCR up to 24 December 2013. It describes relevant developments, including the security situation and its impact on civilians, governance and the rule of law, the role of the clan in providing traditional forms of protection, and assessment of international protection needs of asylum-seekers from Mogadishu and other areas of southern and central Somalia, including internal flight and relocation alternative. In a subsection focused on refugee status under UNHCR’s broader mandate criteria, and centred on the situation in southern and central Somalia, the interim update identifies indicators for assessing threats to life, physical integrity or freedom resulting from generalized violence. These include: (i) reports of civilian casualties as a result of indiscriminate acts of violence, including bombings, suicide attacks and IED explosions; (ii) reports of conflict-related security incidents; and (iii) the number of people who have been forcibly displaced due to conflict. The interim update also states that: “Such considerations are not, however, limited to the direct impact of the violence. They also encompass the longer-term, more indirect consequences of conflict-related violence that, either alone or on a cumulative basis, give rise to threats to life, physical integrity or freedom. In this respect, relevant elements include the information presented [earlier] ... relating to ... (iii) the impact of violence and insecurity on the humanitarian situation as manifested by food insecurity, poverty and the destruction of livelihoods; ... (v) systematic constraints on access to education or basic health care as a result of insecurity; and (vi) systematic constraints on participation in public life, including in particular for women.”

<sup>92</sup> UNHCR, “*Legal Considerations on Refugee Protection for People Fleeing Conflict and Famine Affected Countries*”, 2017, available at: <http://www.refworld.org/docid/5906e0824.html>, accessed: September 2018.

<sup>93</sup> UNHCR issued further guidance in June 2014 and May 2016. These documents concern return and therefore, are not discussed here, as questions on the return of Somalis are not within the immediate scope of this research.

the extent to which UNHCR's recognition and explicit discussion of overlapping factors prompting flight and their potential to ground claims in refugee status has evolved since the 2010 Eligibility Guidelines. With this background, the subsequent Subsections turn to Kenya's and then Ethiopia's responses to Somali cross-border movements in 2011–2012.

### 3.1.3. Kenya's Response

In 2011, when hundreds of thousands of Somalis fled across international borders, Kenya provided territorial access and refuge. Having fled in the context of multiple root causes, including conflict, persecution, violence, drought, food insecurity and famine, Somalis were granted refugee status, permitted to reside principally in the Dadaab camps and allowed to access the protection afforded within that architecture.<sup>94</sup> This case study describes the form and processes through which Somalis who arrived in Kenya in the context of nexus dynamics in Somalia in 2011 and 2012, received international protection, and how it was characterized.<sup>95</sup>

Somalis who arrived in 2011 traversed a well-worn path. Somalis had arrived in Kenya in large-scale waves since the early 1990s and substantial numbers had remained eking out an existence in the arid, desolate and underdeveloped landscape in north-eastern Kenya. Shared ethnic, cultural and clan ties facilitated their early reception, even if encampment became the practice, and in time, a legal requirement.<sup>96</sup>

Amidst large-scale influxes in 1991, when the government's individualized approach to RSD was overwhelmed and untenable, Kenya had delegated responsibility to UNHCR

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<sup>94</sup> Many have written on the protection provided to Somalis in Kenya, including during 2011 and 2012. They include Lindley and Haslie, "Unlocking Protracted Displacement: Somali Case Study", Working Paper Series No. 79, Oxford Refugee Studies Centre, 2011, available at: <https://www.rsc.ox.ac.uk/publications/unlocking-protracted-displacement-somali-case-study>, accessed: September 2018; Lindley, "Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya", *Refugee Survey Quarterly*, Vol. 30, No. 4, pp. 14–49; Hammond, "History, Overview, Trends and Issues in major Somali Refugee Displacements in the Near Region", *New Issues in Refugee Research*, UNHCR, 2014, available at: <http://www.refworld.org/docid/53301a444.html>, accessed: September 2018; Betts, "Survival Migration: Failed Governance and the Crisis of Displacement", Cornell University Press, 2013; Horvil, "Protection for Refugees not from Refugees: Somalis in Exile and the Securitisation of Refugee Policy", International Refugee Rights Initiative, 2017, available at: <https://reliefweb.int/report/somalia/protection-refugees-not-refugees-somalis-exile-and-securitisation-refugee-policy>, accessed: September 2018; Moret et al., "The Path of Somali Refugees into Exile: A Comparative Analysis of Secondary Movements and Policy Responses", *Swiss Forum for Migration and Population Studies*, 2006, available at: <http://www.unhcr.org/50aa0d6f9.pdf>, accessed: September 2018.

<sup>95</sup> See Annex on Kenya for further information on Kenya's response, including the legal landscape, as well as information on informants. Interviews were undertaken in Nairobi and Dadaab between 16 and 21 April 2018. In general, information gathered through interviews informs the proceeding discussion.

<sup>96</sup> For a discussion on historical aspects, see e.g. references listed in footnote 94.

for many aspects of refugee protection.<sup>97</sup> Under this system, UNHCR became responsible for RSD throughout Kenya. UNHCR discharged its responsibility by recognizing refugees under its mandate.

Kenya had become a party to the Refugee Convention much earlier, and to the OAU Convention in 1992, but implementing legislation was many years away.<sup>98</sup> A domestic refugee law, which incorporates the definitions in the Refugee Convention and the OAU Convention, was not adopted until 2006 (Refugees Act).<sup>99</sup> A government authority, the Department of Refugee Affairs (DRA) and its head, the Commissioner for Refugee Affairs, responsible for overall coordination and management of refugee matters in Kenya, was only established pursuant to the Refugees Act. Ongoing efforts to promote greater government capacity and engagement culminated in the DRA assuming authority for taking decisions in July 2014.<sup>100</sup> Since then, refugees are recognized pursuant to the definitions in the Refugees Act, which delineates between “statutory refugees” (the Refugee Convention’s criteria) and so-called “*prima facie* refugees” (the OAU Convention’s broader refugee criteria).<sup>101</sup>

During the intervening period, between 1991 and July 2014, in accordance with its mandate, UNHCR recognized refugees through an individual approach and through a group-based approach, with the latter approach predominant due to the large-scale nature of most movements into Kenya. Where a group-based approach was used, the processing modality implied claimants would be recognized following registration and verification of relevant eligibility criteria, such as nationality, geographic origin, or both. In cases where potential exclusion triggers surfaced, in principle, claimants were channeled to a more detailed individual examination.

In numerous situations, UNHCR has recommended that refugee status be granted through a group-based approach if there was a clear presumption of eligibility under the Refugee Convention or under broader refugee criteria.<sup>102</sup> This was certainly the case in 2011 for Somalis from southern or central Somalia.<sup>103</sup> In Kenya, Sudanese and South

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<sup>97</sup> Physical protection and security-related activities remained within the responsibilities of the Kenyan government.

<sup>98</sup> Kenya acceded to the Convention in 1966 and the Protocol in 1981.

<sup>99</sup> The Refugees Act, 2006, available at: <http://www.refworld.org/docid/467654c52.html>, accessed: September 2018.

<sup>100</sup> Even after July 2014, UNHCR remained engaged in RSD processes throughout Kenya. For more on these aspects, see e.g. Garlick et al., “Building on the Foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya”, UNHCR, 2015, available at: <http://www.unhcr.org/5551f3c49.pdf>, accessed: September 2018.

<sup>101</sup> Section 3, The Refugees Act, 2006, supra note 99.

<sup>102</sup> See discussion in Subsection 2.7.

<sup>103</sup> See discussion in Subsection 3.1.2., and the 2010 Eligibility Guidelines more generally.

Sudanese are among the other nationalities that have been recognized through a group-based approach.

At the time of the escalation in cross-border movement of Somali asylum-seekers in early 2011, this was the prevailing *status quo*. UNHCR recognized Somali refugees pursuant to its mandate. Somalis were recognized primarily based on broader refugee criteria. Some Somalis were also recognized pursuant to the Refugee Convention's criteria. UNHCR's data indicate that prior to 2011, the vast majority of Somali refugees in Dadaab were recognized under the OAU Convention's regional refugee definition (close to 346,000), while nearly 1,000 were recognized under the Refugee Convention's criteria and a little over 500 were recognized under UNHCR's mandate definitions.<sup>104</sup> In practical terms, however, the basis of recognition made little difference,<sup>105</sup> as Somali refugees were, in general, required to live in the Dadaab camps.<sup>106</sup>

Although earlier flows of Somalis had fled multiple root causes and had been granted refugee status in Kenya, with respect to the 2011–2012 movements, the consequences of the drought were a prominent trigger.<sup>107</sup> In this context, it seems that in March 2011 in Nairobi, with a marked increase in arrivals in Dadaab, and months before the UN declared a famine in parts of Somalia, the status of Somalis was the subject of a discussion among a small group comprising the then Commissioner for Refugee Affairs, senior UNHCR staff, WFP personnel and donors.<sup>108</sup> At the meeting, the

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<sup>104</sup> As discussed in Subsection 2.5 of this report, UNHCR's broader mandate criteria draw from broader refugee criteria in the regional refugee instruments, but UNHCR's broader mandate criteria are to some extent textually distinct. Also, as discussed earlier, until July 2014, UNHCR was responsible for conducting RSD. In this sense, although UNHCR's database records the OAU Convention's broader criteria as the basis for recognition (and indeed, Kenya was a party to that Convention and a domestic refugee law which incorporated the broader refugee criteria had been in force since 2006), perhaps UNHCR's database should have recorded the basis for recognition as UNHCR's mandate rather than the OAU Convention's broader refugee criteria. For more on this, see e.g. Wood, *supra* note 39. It is also important to note that these statistics were taken in 2018. Since the elapsed time, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture. Nonetheless, they are included to highlight, in broad terms, the way recognition was referenced in UNHCR's data and provide a sense of the differences in numbers.

<sup>105</sup> Note, however, that the basis of recognition is relevant for resettlement opportunities. In general, in order to qualify for resettlement in third countries, refugees had to show a claim that satisfied the criteria in the Refugee Convention. Informants suggested, however, that with respect to Somali refugees recognized under broader refugee criteria, in practice this impediment to resettlement does not present a significant hurdle, as the vast majority are also able to satisfy a claim based on the Refugee Convention.

<sup>106</sup> Relatively small numbers of Somali refugees were also in the Kakuma refugee camps and in urban settings such as Nairobi. Some Somali nationals had also devised formal and informal ways to integrate and reside in different parts of the country, drawing on ethnic and clan ties, entrepreneurship and fortitude.

<sup>107</sup> This is certainly not to say that the conditions that arose in Somali in 2011, including food insecurity and then famine, did not have human-made causes. On these aspects, see e.g. Maxwell and Majid, *supra* note 72, for a fuller account of the factors that led to the famine.

<sup>108</sup> The discussion here (and in other parts of this report) on the March 2011 meeting is based on an interview with an informant who was present at the meeting.



attendees agreed that the Somalis arriving in conditions of worsening food insecurity, soon to be classified as a famine, should continue to be considered as refugees.

In general, two broad views emerged in terms of the ways in which informants, including government actors, characterized the dynamics that prompted Somali flight, Kenya's responses, and any relationship between them. One group appears to have viewed the extraordinary influx as driven by drought and its consequences for livelihoods and food security. Under this view, Somalis were seeking food and basic assistance and the response was purely humanitarian, in the sense that Somalis were registered as 'refugees' for humanitarian reasons rather than on the basis that they qualified for refugee status under the Refugee Convention. This position is reflected in a statement that the then Commissioner for Refugee Affairs made during the 2015 Global Consultation of the Nansen Initiative Protection Agenda.

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 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.<sup>109</sup>

Even though the Refugees Act also incorporated the broader refugee criteria under the OAU Convention, it was not mentioned in the above statement. There may have been other reasons that motivated this characterization as a humanitarian response.

In contrast, and as highlighted above by the consensus reached during the March 2011 meeting at which the then Commissioner for Refugees was present, another group appears to have acknowledged that Somalis arriving in the context of drought and food insecurity, were refugees. They surmised that the proximate cause prompting flight in many cases was lack of access to humanitarian assistance. However, they considered that the underlying reasons which inhibited humanitarian access stemmed from, *inter alia*, security threats and a breakdown in law and order, influenced by the presence and activities of Al-Shabaab, as well as a vacuum of governance due to limited State control and institutional capacity. What emerges is that there was a general recognition (if not a sophisticated legal analysis) that Somalis were fleeing underlying conflict, generalized

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<sup>109</sup> The Nansen Initiative, "The Nansen Initiative Global Consultation: Conference Report", 2015, pp. 134–135, available at: <https://www.nanseninitiative.org/global-consultations/>, accessed: September 2018.

insecurity, or disruption to public order that potentially brought them within the broader refugee criteria in the region.

Many informants noted that Somali flight must have been influenced by factors beyond the drought, since the drought had also affected Kenya, Ethiopia, and other countries in the region, without creating similarly substantial cross-border movements. Informants reflected less on the applicability of the Refugee Convention to Somalis arriving in 2011, with many noting that the risks were prevalent. Informants, including from UNHCR, explained that in general, people came because of three reasons: insecurity, drought, and lack of humanitarian assistance. Informants perceived that each factor played a different role in the decisions underlying individual movements. Although many Somalis first emphasized depleted livelihoods and humanitarian needs stemming from the drought as the immediate reasons for flight, ongoing discussions during registration highlighted the relevance of conflict, persecution and insecurity, including in relation to the fear of return. Informants recognized that these underlying root causes were interrelated and could not be easily disentangled.

Some informants noted contentious political discussions between the two broad sets of views. However, in practice, the sets of views converged at least to a sufficient extent to address the overall humanitarian imperative by permitting a continuation of the prevailing *status quo*: access to territory, UNHCR registration and available humanitarian assistance. It seems that territorial access was largely unrestricted, even if no real leeway was given on reopening an official border entry point in Liboi, which had been closed in 2007, or permitting regular, organized transport assistance between the border and the Dadaab camps for starved and malnourished Somalis.<sup>110</sup> Views also converged on curtailing incentives that would create expectations of permanence and inhibit return.

Based on UNHCR's data, it appears that more than 121,000 Somalis, who arrived in Dadaab in 2011, were recognized on the basis of broader refugee criteria, through a group-based approach. Similarly, over 50 Somalis were recognized on the basis of the Refugee Convention, and fewer than 10 on the basis of UNHCR's mandate definitions. With respect to Somalis who arrived in 2012 in Dadaab, more than 18,000 were recognized on the basis of broader refugee criteria, through a group-based approach,

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<sup>110</sup> See also, Betts, *supra* note 94; Grant et al., "Asylum Under Threat: Assessing the Protection of Somali Refugees in Dadaab Refugee Camps and Along the Migration Corridor", Refugee Consortium of Kenya and Danish Refugee Council, 2012, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/Asylum\\_Under\\_Threat.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Asylum_Under_Threat.pdf), accessed: September 2018.

while over 70 were recognized on the basis of the Refugee Convention and fewer than 5 under UNHCR's mandate definitions.<sup>111</sup>

In the Dadaab camps, some Somalis also underwent an individual approach to RSD. The data suggest that approximately 129 Somalis who arrived in Dadaab in 2011 were recognized on the basis of broader refugee criteria, following an individual approach to status determination. Similarly, over 40 Somalis were recognized on the basis of the Refugee Convention and about 10 on the basis of UNHCR's mandate definitions. With respect to Somalis who arrived in 2012 in the Dadaab camps, approximately 10 were recognized on the basis of broader refugee criteria, through an individual approach, while over 20 were recognized on the basis of the Refugee Convention and about 6 under UNHCR's mandate definitions. This information is summarized in the table below.

**Table 1: Legal Bases Recorded for Recognition of Somalis (Arrived in Dadaab in 2011 and 2012)**

<b>Legal Basis for Refugee Status</b>	<b>2011<sup>112</sup></b>	<b>2012<sup>113</sup></b>
Broader refugee criteria (group-based)	121,345	18,621
Refugee Convention criteria (group-based)	52	72
UNHCR mandate definitions (group-based)	7	4
Broader refugee criteria (individual)	129	10
Refugee Convention criteria (individual)	42	23
UNHCR mandate definitions (individual)	10	6

Data collected by UNHCR during registration processes suggest that for 2011, the four primary reasons recorded regarding reasons for flight of Somalis related to the following: (1) access to food/assistance (over 23,000 individuals); (2) general insecurity (over 23,000 individuals); (3) livelihood problems (environmental) (over 14,000 individuals); and livelihood problems (security) (over 6,000 individuals).<sup>114</sup>

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<sup>111</sup> The statistics included in this paragraph, the below paragraph and the below table were taken in 2018 rather than in 2011 or 2012. Since that time, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture. Nonetheless, they are included to highlight, in broad terms, the way recognition was referenced in UNHCR's data and provide a sense of the differences in numbers.

<sup>112</sup> These figures do not include Somalis who were provided legal status on other grounds.

<sup>113</sup> These figures do not include Somalis who were provided legal status on other grounds.

<sup>114</sup> These numbers capture *only* the four main reasons recorded, by quantity. Again, similar caveats to those noted in footnote 111 may apply.

Since late 2011, real and perceived security concerns appear to have heightened government interest and engagement on refugee affairs and played a prominent role in Kenya's responses towards refugees—particularly Somalis—and their subsequent presence in Kenya. The courts have rebuffed some government actions, including efforts to suspend registration in urban areas and to cap the number of refugees in Kenya. But other legislative, policy and operational interventions, particularly beginning in October 2011, have circumscribed protection for Somali claimants.<sup>115</sup>

With numbers mounting, in an underlying environment of tension and threat in the camps and elsewhere in the country, the Kenyan government stopped registration of Somalis in the Dadaab camps in October 2011.<sup>116</sup> Some informants surmised that this edict might have been influenced at least in part by concerns that existing systems were inadequate to identify individuals presenting security threats. Another concern conjectured by informants was that registration (and the services that flow from it) were seen as incentives that created a pull factor, without which Somalis may not come or may be more inclined to return.

Starting in October 2011, the Kenyan government opened a number of limited time periods or 'windows' lasting for a week or more to register backlogs of asylum-seekers awaiting registration in the Dadaab camps. Since mid-2015, however, such opportunities have stopped completely.<sup>117</sup> As at July 2018, the number of unregistered new arrivals across the camps in Dadaab stood at 10,083 individuals.<sup>118</sup> Of the total, approximately 9,738 are from Somalia, while 345 are of other nationalities.<sup>119</sup>

The long-held promise of recognition of refugee status, albeit within the parameters of encampment, seems tenuous for Somalis in the contemporary landscape. While territorial access is still practiced, and along with it tacit acceptance of residence in camps, close to 10,000 Somalis have not been able to access RSD procedures that would assess their claims. As a consequence of being unregistered, these Somalis have limited access to the humanitarian assistance available to recognized refugees. Yet for those that arrived in 2016 and 2017, fleeing a mix of root causes that included insecurity and drought, many might have the potential to be recognized as refugees under the definitions in the Refugee Convention and/or the OAU Convention.

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<sup>115</sup> These aspects are discussed in greater detail in the Annex on Kenya.

<sup>116</sup> Security-related dimensions, including terrorist attacks in Kenya, are highlighted in the Annex on Kenya.

<sup>117</sup> Except for limited, exceptional and *ad hoc* registration; UNHCR Kenya, "Timeline of Registration Activities in Dadaab: 2013-July 2018", on file with author.

<sup>118</sup> These numbers are based on figures as at 23 July 2018, shared with the author, and are based on profiling and other ongoing documentation activities, including birth registration. Approximately 56 per cent of households are female headed and 88 per cent of the total are women and children.

<sup>119</sup> *Ibid.*

The last few years have seen the DRA disbanded and the establishment of the new government authority on refugee affairs, the Refugee Affairs Secretariat (RAS), also housed under the Ministry of Interior and Coordination of National Government.<sup>120</sup> An announcement to close Dadaab in mid-2016 was subsequently held to be unconstitutional by the Kenyan High Court in February 2017.<sup>121</sup> Since April 2016, all Somalis, including those from southern or central Somalia are required to undergo an individual approach to RSD and are no longer eligible for a group-based approach.<sup>122</sup> With the signing of a tripartite agreement in late 2013 between the governments of Somalia and Kenya and UNHCR for voluntary repatriation of Somali refugees (Tripartite Agreement), Kenya appears focused on prioritizing this durable solution.<sup>123</sup> Under the circumscribed protection environment created by these changes, at the beginning of April 2018, close to 80,000 Somalis, mostly those who arrived since 2010, had taken advantage of voluntary repatriation and returned to Somalia.<sup>124</sup>

The present stance highlights that Kenya's response has evolved since the beginning of 2011 and appears tied to the 'politics of the day': a securitized environment in which the burden of hosting large numbers of refugees and concerns regarding solidarity have arguably influenced high-level government engagement, sensitivity and scrutiny of refugee affairs. Even if different views exist within the government, they have not manifested in policy and practice changes to permit registration and status

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<sup>120</sup> For further detail, see discussion in Annex.

<sup>121</sup> Republic of Kenya, "Government Statement on Refugees and Closure of Camps", signed by the Principal Secretary of the Interior, 6 May 2016, available at: <https://minbane.wordpress.com/2016/05/06/httpwp-mep1xtjg-2ed/>, accessed: September 2018. This statement announced the closure of both Dadaab and Kakuma. However, a further statement issued on 11 May 2016, clarified that the closure was limited to Dadaab. Ministry of Interior and Coordination of National Government, "Government Statement and Update on the Repatriation of Refugees and Scheduled Closure of Dadaab Refugee Camp", signed by the Cabinet Secretary, 11 May 2016, available at: <http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/98-government-statement-and-update-on-the-repatriation-of-refugees-and-scheduled-closure-of-dadaab-refugee-camp>, accessed: September 2018;

See, *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others*, Petition No. 227 of 2016, Kenya: High Court, 9 February 2017, available at: [http://www.refworld.org/cases,KEN\\_HC,58a19f244.html](http://www.refworld.org/cases,KEN_HC,58a19f244.html), accessed: September 2018.

<sup>122</sup> The Kenya Gazette, Vol. CXVIII-No. 46, Gazette Notice No. 3017, Nairobi, 29 April 2016, available at: [http://kenyalaw.org/kenya\\_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46](http://kenyalaw.org/kenya_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46), accessed: September 2018. See *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others*, Petition No. 227 of 2016, Kenya: High Court, 9 February 2017, available at: [http://www.refworld.org/cases,KEN\\_HC,58a19f244.html](http://www.refworld.org/cases,KEN_HC,58a19f244.html), accessed: September 2018.

<sup>123</sup> Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, November 2013, available at: <http://www.refworld.org/pdfid/5285e0294.pdf> (*Tripartite Agreement*), accessed: September 2018. For more on the Tripartite Agreement and returns, see Annex on Kenya.

<sup>124</sup> UNHCR, "Weekly Update: Voluntary Repatriation of Somali Refugees from Kenya", 6 April 2018, available at: <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/05/Voluntary-Repatriation-Analysis-06042018.pdf>, accessed: September 2018.

determination for most Somali asylum-seekers who have arrived in Dadaab in recent years.

That said, in October 2017, Kenya committed to craft a Comprehensive Refugee Response Framework (CRRF) for the country, including an action plan that reflects commitments Kenya has made in international forums. Informants indicated that new funding mechanisms also seek to address socio-economic inclusion of refugees.<sup>125</sup> In this landscape, with the government responsible for issuing decisions under the Refugee Act using an individual approach, the legal bases upon which Somalis (including those who have fled in the context of nexus dynamics) will be recognized, remain to be seen.

### Timeline

#### Pre-1991:

- Kenyan authorities conducted RSD through an Eligibility Committee, in which UNHCR took part as an observer/advisor applying the criteria under the Refugee Convention.

#### 1991:

- First large-scale Somali influx.
- Beginning of encampment policy in practice.
- UNHCR delegates responsibility for coordination of refugee affairs, including protection and assistance in camps. UNHCR begins to conduct RSD, pursuant to its mandate.

#### 2006–2008:

- Refugee Act is adopted and enters into force.
- Establishment of DRA.
- Liboi border entry point is officially closed, subsequently never officially to be reopened.
- UNHCR-run transit centre in Liboi, near Kenya-Somalia border, is closed.
- Somali cross-border movements begin to increase.

#### 2011:

- Substantial increase in Somali cross-border movements in the context of nexus

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<sup>125</sup> On the CRRF and socio-economic inclusion, see e.g. UNHCR, “CRRF Global Digital Portal: Kenya”, available at: [http://www.globalcrrf.org/crrf\\_country/kenya-2/](http://www.globalcrrf.org/crrf_country/kenya-2/), accessed: September 2018. In March 2017, Kenya also hosted the Intergovernmental Authority on Development’s (IGAD) special summit on the protection and durable solutions for Somali refugees and reintegration of returnees in Somalia, where IGAD member States adopted the so-called “Nairobi Declaration”.

dynamics.

- Small stakeholder meeting in March in Nairobi with then Commissioner for Refugee Affairs, UNHCR, WFP and donors. They agree Somalis should continue to be recognized as refugees.
- Two new camps in the Dadaab area, Ifo 2 and Kambioos, are opened to house burgeoning cross-border movements of Somalis.
- Kenya suspends registration of new arrivals in Dadaab camps in October, following which registration only opens for intermittent 'windows' until mid-2015 (except for limited exceptional, ad hoc registration).

**2013:**

- In November, the governments of Kenya and Somalia, and UNHCR sign a Tripartite Agreement on Voluntary Return of Somali Refugees.

**2014:**

- Kenya officially designates Dadaab and Kakuma as refugee camps, making refugees criminally liable for residing outside camps without official permission.
- In July, DRA assumes authority for recognizing refugees; first time since 1991 that responsibility for granting decisions reverts to Kenyan authorities, although UNHCR remains engaged in registration and status determination through transition period.
- Voluntary repatriation of Somalis begins.

**2015:**

- After July, registration of new asylum-seekers is no longer permitted in Dadaab camps. Unregistered claimants are unable to access RSD procedures and have limited access to the humanitarian assistance provided to recognized refugees.

**2016:**

- From April, Somalis from southern or central Somalia are no longer able to benefit from a group-based approach to RSD. All Somalis must undergo an individual approach to RSD.
- In May, government announces the closure of Dadaab camps.
- DRA is disbanded and with it, the office of the Commissioner for Refugee Affairs becomes vacant. Many trained and experienced staff are dispersed.
- Relocation of non-Somalis to Kakuma.

**2017:**

- In February, Kenyan High Court holds proposed closure of Dadaab camps unconstitutional.

- From February, Somalis are registered in Nairobi, but no longer permitted residence in urban areas, unless an exemption is granted. Once registered, they are issued with a movement pass with the address as Dadaab. For other nationalities, the address is stated as Kakuma.
- In April, Kambioos camp in Dadaab is closed.
- Mid-year, RAS is established as a legal entity and housed under the Ministry of Interior and Coordination of National Government.
- Mid-year, a new Acting Commissioner for Refugee Affairs is appointed.
- Relocation of non-Somalis to Kakuma.

**2018:**

- In May, Ifo 2 camp in Dadaab is closed.

### *3.1.4. Ethiopia's Response*

Ethiopia has provided refuge to large groups of Somalis since the late 1980s, when hundreds of thousands fled to Ethiopia's Somali region.<sup>126</sup> In 2011, the Somali refugee population in Ethiopia grew by more than 100,000, a scale unprecedented in this millennium.<sup>127</sup> Somalis have also arrived in smaller numbers in recent years due to multiple root causes, and Ethiopia has received them in largely the same way, at least since 2011: providing recognition of refugee status, encampment in the arid and desolate border areas of the Somali region of Ethiopia, and access to the protection and opportunities offered within that architecture. This case study describes the form, processes and mechanisms through which Somalis, who arrived in Ethiopia in the context of nexus dynamics, particularly in 2011 and 2012, received international protection, and its characterizations.<sup>128</sup>

With ethnic and cultural ties between communities that straddle its border, Ethiopia has a long-standing history of hosting refugees, especially from neighbouring countries. Many, including Somalis driven by persecution, conflict, violence, environmental

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<sup>126</sup> UNHCR, *supra* note 81. For further reading see e.g. Hammond, *supra* note 94; Ambroso, "Pastoral Society and Transnational Refugees: Population Movements in Somaliland and Eastern Ethiopia: 1998-2000", *New Issues in Refugee Research*, UNHCR, 2002, available at: <http://www.refworld.org/docid/4ff3fa8b2.html>, accessed: September 2018; Moret et al., *supra* note 94.

<sup>127</sup> UNHCR, *ibid.* Relates to refugees and persons in refugee-like situations.

<sup>128</sup> See Annex on Ethiopia for a more detailed discussion of Ethiopia's response, including the legal landscape, as well as information on informants. Interviews were undertaken in Addis Ababa between 23 and 26 April 2018. In general, information gathered through informant interviews informs the proceeding discussion.



change and disasters, as well as their interplay, have benefited from Ethiopia's 'open-door' policy, sometimes explained by informants as a form of 'brotherhood' and 'solidarity' towards its neighbours.

Since 2004, Ethiopia's Refugee Proclamation, based on the international and regional refugee treaties to which Ethiopia is a party, has underpinned the grant of refugee status.<sup>129</sup> The Proclamation defines "refugees" to include persons who satisfy the criteria under the Refugee Convention, as well as the broader refugee criteria under the OAU Convention, albeit with a modification that limits application to refugees coming from Africa. This legal framework provides scope to grant refugee status on the basis of an individual or group-based approach. However, the Proclamation only explicitly provides for a group-based approach pursuant to the OAU Convention's broader refugee criteria. A declaration to recognize that a group of persons may, on its face, satisfy the Refugee Convention definition is not explicit.<sup>130</sup>

For the majority of its refugee population, which arrived in vast numbers, Ethiopia has opted for a group-based approach to RSD due in part to Ethiopia's limited capacity to undertake an individual approach. At April 2018, a group-based approach continued to be applied to Somalis (from southern or central Somalia), South Sudanese, Sudanese (from the Blue Nile and South Kordofan regions), Eritreans and most recently, to Yemenis who had arrived in the country after 1 January 2015. While Ethiopia's Refugee Proclamation permits (but does not require) the head of the National Intelligence and Security Service (NISS) to declare a class of persons as refugees, it appears that *public* declarations have never been issued with respect to Somalis, or for others to whom a group-based approach to status had been applied in practice.<sup>131</sup>

Authority for conducting RSD under the Proclamation rests with NISS. The Administration for Refugee and Returnee Affairs (ARRA), a subordinate department within NISS, has the mandate and responsibilities for the reception, protection, assistance and overall coordination and management of refugee interventions in

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<sup>129</sup> Refugee Proclamation No. 409/2004, available at: <http://www.refworld.org/docid/44e04ed14.html>, accessed: September 2018, preamble. Ethiopia is a State party to the Refugee Convention, but has maintained reservations to a number of articles in the Convention, which are discussed in the Annex on Ethiopia. A new draft Refugees Proclamation, which seeks to address limitations and gaps in the existing law, was endorsed by Ethiopia's Council of Ministers in May 2018 and sent to the House of Peoples' Representative for promulgation. See: <https://arra.et/revised-refugee-law-got-cabinet-approval/>, accessed: September 2018. In late June 2018, the House sent the draft proclamation to its legal standing committee for further scrutiny.

<sup>130</sup> For a more detailed discussion on these aspects, including specific provisions, see the Annex on Ethiopia.

<sup>131</sup> Refugee Proclamation No. 409/2004, *supra* note 129, Article 19.

Ethiopia.<sup>132</sup> Notably, ARRA’s mission includes “[h]osting asylum-seekers seeking a safe-haven into Ethiopia as a result of man-made and *natural disasters* [and] protecting their physical safety through providing asylum and protection”.<sup>133</sup> In practice, ARRA is engaged in registration and status determination, but UNHCR is also integrally involved, working beyond its explicit observer status referenced in the Proclamation. UNHCR *de facto* undertakes RSD and makes recommendations to ARRA. Final decisions are co-signed by the head of the legal and protection unit of ARRA and the UNHCR assistant representative (protection). Indeed, UNHCR plays a prominent role within the legal, institutional, and operational framework relevant to refugees in Ethiopia, including registration and RSD.

UNHCR and ARRA surmise that the beginnings of a group-based approach for Somali refugees must have coincided with the first large-scale movements in the late 1980s. Even if historical clarity is elusive, what emerges is that in 2011, the established policy and practice was to recognize Somalis from southern or central Somalia using a group-based approach.

As at the end of 2010, UNHCR’s data indicate that there were over 67,000 Somali refugees in Ethiopia who were recognized under the broader refugee criteria (over 45,000 in the Dollo Ado camps and over 21,000 in the Jijiga camps). Fewer than 30 Somali refugees had been recognized under the Refugee Convention’s criteria and fewer than 5 under UNHCR’s mandate definitions, with all of them based in the Jijiga camps.<sup>134</sup>

Based on UNHCR’s data for the Dollo Ado camps, broader refugee criteria underpinned recognition for the vast majority of Somalis in Ethiopia during 2011 and 2012, as shown in the table below. Only in 2011 were some Somali refugees recognized pursuant to the criteria in the Refugee Convention.

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<sup>132</sup> See <https://arra.et/>, accessed: September 2018. The Administration for Refugee and Returnee Affairs (ARRA) notes that its operation is mainly driven by three basic principles: maintaining Ethiopia’s long-standing tradition of hosting refugees; meeting the government’s international obligations; and achieving the government’s foreign policy goals relating to building sustainable peace with all of its neighbours through strengthening people-to-people relations.

<sup>133</sup> See <https://arra.et/about-us/our-mission/>, accessed: September 2018. Emphasis added.

<sup>134</sup> The statistics included in this paragraph were taken in 2018 rather than at the end of 2010. Since that time, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture. Nonetheless, they are included to highlight, in broad terms, the way recognition was referenced in UNHCR’s data and provide a sense of the differences in numbers.

**Table 2: Legal Bases Recorded for Recognition of Somalis (Dollo Ado Camps: 2011 and 2012)<sup>135</sup>**

<b>Legal Basis for Refugee Status</b>	<b>2011<sup>136</sup></b>	<b>2012<sup>137</sup></b>
Broader refugee criteria	98,650	34,816
Refugee Convention criteria	17	0
UNHCR mandate criteria	35	12

Exactly when the geographical distinction was introduced into practice is unclear. Some have noted that it was in play well (possibly years) before the 2011 movements. As at April 2018, this policy and practice remains unchanged. At no point in the intervening period has the policy been revised or revoked. Importantly, the declaration of famine in parts of Somalia in July 2011 does not appear to have been a key marker with regard to the recognition of Somalis.

In terms of implementation, in 2011, Somali asylum-seekers were (and still are) subject to a three-step process on their path to recognition. The first step, and a key hurdle, involved pre-registration at border posts, carried out solely by ARRA. Statistics and reasons concerning those who failed to pass this step were not shared with UNHCR. Although the process was a mechanism to obtain biographic and family composition data and unearth Ethiopian Somalis, some informants referred to this hurdle as a “security screening” in which asylum-seekers who were suspected as posing security threats were identified for further scrutiny. The second step involved UNHCR registration, which drew heavily on the pre-registration information provided by ARRA. The third step, immediately following UNHCR registration, and often on the same day, was a so-called “protection” or “screening” interview conducted by a so-called “eligibility team” comprising one person from ARRA and one from UNHCR. This interview primarily focused on ascertaining whether individuals were in fact Somali nationals, who originated from southern or central Somalia, and ostensibly on identifying exclusion triggers. Informants indicated that individuals who failed to surmount this hurdle, were largely Ethiopians of Somali ethnicity. Notably, it appears that cases of exclusion have not been identified in the Dollo Ado or the Jijiga camps, the main locations where Somalis were and continue to be hosted in Ethiopia.

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<sup>135</sup> The statistics included in this table (and the table further below) were taken in 2018. In the elapsed time periods, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture. Nonetheless, they are included to highlight, in broad terms, the way recognition was referenced in UNHCR’s data and provide a sense of the differences in numbers.

<sup>136</sup> Figures provided included approximately 579 others who did not fall within the three categories listed in the table.

<sup>137</sup> Figures provided include approximately 65 others who did not fall within the three categories listed in the table.

With a group-based approach to recognition for Somalis from southern or central Somalia long established, a specific decision point involving UNHCR and ARRA on whether to *continue* this approach to international protection with respect to new arrivals may not have occurred in early 2011, certainly not in any formal sense. A written exchange on the matter has not surfaced. Nonetheless, deliberations between ARRA and UNHCR on a group-based approach to recognition have formed the basis of discussions in contemporary practice, but systematically documenting these key decision points and processes has not necessarily been part of the culture. Both UNHCR and ARRA have the capacity to initiate a discussion on providing recognition through a group-based approach, after which ARRA will assess country of origin situations in continuous consultation with UNHCR, and notify UNHCR of its decision through a written or oral communication. This framework suggests that there may be scope for UNHCR guidance and advice to support ARRA's decisions.

UNHCR protection personnel do not recall Ethiopian authorities expressing concerns about maintaining the *status quo* at the time of the 2011 influx of Somalis. If questions were raised at different levels of government, they did not find footing at the technical and operational levels. At these levels, it seems that exchanges were predominantly focused on responding to the acute emergency. While not directly within the scope of this research, it is worth noting that the timeliness and robustness of the operational response to the Somali movements in 2011 has been the subject of an independent and somewhat critical evaluation.<sup>138</sup>

In Ethiopia, where a group-based approach to recognition of refugee status has continued to be used for Somalis from southern or central Somalia for years, and where recognition has been based predominantly on broader refugee criteria, informants rarely considered Somalis who arrived in 2011 and 2012 as anything other than refugees. Informants discussed the applicability of the "events seriously disturbing public order" ground to the situation in Somalia in 2011. Among the factors highlighted as possible indicators of "events seriously disturbing public order" were: (1) serious restrictions on mobility that prevented distribution of humanitarian assistance or prevented access to humanitarian assistance available within the country; and (2) lack of access to basic services including water, emergency healthcare and subsistence for an 'unreasonable' duration. Some informants also seemed to appreciate that recognition of status, using a group-based approach such as for Somalis from southern or central Somalia, could be based on the Refugee Convention definition, not only broader refugee criteria.

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<sup>138</sup> Nutrition Works, "An Independent Review of UNHCR's Response to the Somali Refugee Influx in Dollo Ado, Ethiopia, 2011", 2013, available at: <http://www.unhcr.org/51bec18a9.pdf>, accessed: September 2018.

Many informants, including those from ARRA, indicated that the underlying insecurity in Somalia in 2011 stemming from conflict, the presence and activities of Al-Shabaab and severely constrained governance capacity, were sufficient to regard Somalis as refugees. Informants suggested that Somalis were fleeing areas affected by relatively regular conflict or insecurity or that these aspects contributed to their fear of return. Informants appeared to recognize that multiple root causes prompted Somali flight, as they reflected on the interactions between the impacts of drought, livelihood depletion, lack of access to basic subsistence, insecurity and conflict. These discussions highlighted the complexity of identifying a sole or dominant cause.

Three broad characterizations relevant to the grant of refugee status in 2011–2012 emerged:

1. Some Somalis faced targeted persecution.
2. For many Somalis, although the proximate cause prompting flight may have been lack of access to food and subsistence resulting from the impacts of the drought (and later, famine) and this framing was often the first ‘reason’ articulated, the underlying insecurity and conflict also affected claimants. In many instances, claimants discussed both causes in articulating their fear and reasons for flight. For others, minimal probing brought out the conflict and insecurity dimensions that imbued their existence.
3. In the rare cases where Somalis claimed they fled due to the impact of the drought (and later, famine) and the inability to access humanitarian assistance, some informants highlighted that in many parts of southern and central Somalia, Al-Shabaab was denying or restricting access to humanitarian assistance or denying humanitarians’ access to affected people. In essence, while the impacts of the drought may have had a direct effect on the need for humanitarian assistance, the conflict and insecurity influenced the inability to access assistance within the country and compelled flight across borders.

In discussions on how to characterize and consider movements arising in the context of nexus dynamics, an ARRA informant in particular highlighted that too much emphasis has been placed on human-made causes, noting that ‘natural’ events can also result in disturbances to public order. On this view, the “serious” criterion should provide the necessary flexibility to ensure every ‘natural’ disaster does not reach the threshold required to satisfy the regional refugee definition. In this context, it is worth highlighting Ethiopia’s statement during the Nansen Initiative Global Consultation in October 2015:

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 natural disasters, 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.<sup>139</sup>

This statement, which arguably reflects Ethiopia's interpretation of the application of the regional refugee definition, suggests that Ethiopia views the impacts of 'natural' disasters as potentially giving rise to claims that could satisfy the broader refugee criteria under the OAU Convention. The prevalence of nexus dynamics, then, arguably reinforces this potential. ARRA's mission statement noted above further bolsters this conclusion.

That said, it is also worth noting that some time between 2013 and 2016, as conditions in Somalia deteriorated and fears of another famine loomed, Ethiopia appears to have entered into discussions on instituting a cross-border initiative in an effort to provide humanitarian assistance within Somalia and limit potential cross-border movements. Informants suggested that the government had engaged in discussions with multiple actors on implementing a mechanism that could provide *in situ* aid (including food and water) within 'safe zones' just inside the border in Somalia, where humanitarian actors could use Ethiopian territory to transport and deliver the assistance. Further information on this initiative has not materialized.

Within ARRA at least, recent discussions on whether to continue to recognize Somalis under the same underlying framework that existed since at least 2011 have taken place. As of April 2018, the *status quo* stands. Efforts to monitor the landscape in Somalia and take note of evidence reflecting improvements in conditions and ongoing stabilization continue. The following table shows the legal bases for recognition of Somalis during 2016 and 2017 in the Dollo Ado camps.

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<sup>139</sup> The Nansen Initiative, *supra* note 109, p. 107.

**Table 3: Legal Bases Recorded for Recognition of Somalis (Dollo Ado Camps: 2016 and 2017)**

<b>Legal Basis for Refugee Status</b>	<b>2016<sup>140</sup></b>	<b>2017<sup>141</sup></b>
Broader refugee criteria	3,088	6,494
Refugee Convention criteria	0	189
UNHCR mandate criteria	0	0

With its nine pledges at the Leaders’ Summit in New York in September 2016, to be implemented through the CRRF process, Ethiopia is arguably charting a new way forward.<sup>142</sup> How these new intentions and frameworks affect the compromise between territorial access and enjoyment and realization of rights for Somalis, as well as other refugees (including those fleeing in the context of nexus dynamics), remains to be seen.

### *3.1.5. Response of Other Destination States*

To gather insights on other destination States’ responses to Somali arrivals in 2011–2012, and to identify avenues for follow up and complementary research, a questionnaire was circulated as part of this study to relevant UNHCR operations. Unless otherwise noted, the summaries below are drawn directly from the responses and related follow-up exchanges and have not benefited from additional corroboration.<sup>143</sup>

#### *Yemen*

Yemen acceded to the Refugee Convention in 1980. The status and treatment of refugees is governed by a domestic decree, implemented by the Ministry of Interior.<sup>144</sup> During

<sup>140</sup> Figures provided included approximately 2 others who did not fall within the three categories listed in the table.

<sup>141</sup> Figures provided included approximately 20 others who did not fall within the three categories listed in the table.

<sup>142</sup> ARRA, “Roadmap: For the Implementation of the Federal Democratic Republic of Ethiopia Government Pledges and the Practical Application of the CRRF in Ethiopia”, available at: [www.globalcrrf.org/wp-content/uploads/2018/04/f0dd7e3ac884a63e0026e16bf442caa430781de1.pdf](http://www.globalcrrf.org/wp-content/uploads/2018/04/f0dd7e3ac884a63e0026e16bf442caa430781de1.pdf), accessed: September 2018.

<sup>143</sup> Other relevant research which discusses destination States’ responses to the cross-border movement of Somalis, includes Betts, supra note 94; Horvil, supra note 94; 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*, Vol. 2, No. 1, 2014, available at: <http://redfame.com/journal/index.php/ijsss/article/view/263>, accessed: September 2018; Wood, supra note 39.

<sup>144</sup> Republican Decree No. (4) of 1994 Concerning the Executive Regulation of Republican Decree on Law No. (47) of 1991 Concerning the Entry and Abode of Foreigners, available at: <http://www.refworld.org/pdfid/400177074.pdf>, accessed: September 2018. The decree does not define refugees, *per se*, but Republican Decree No. (47) of 1994 Concerning the Entry and Abode of Foreigners, available at: <https://www.refworld.org/type/DECREEES,,YEM,400177fe4,0.html>, accessed: September 2018, states that “provisions regarding the entry and residence of foreigners shall not apply to ... [t]hose exempted in accordance with

2011–2012, Yemen experienced a substantial increase in Somali arrivals. A group-based approach was used for status determination and recognition was based on criteria in the Refugee Convention. In 2011, over 27,000 Somalis arrived in Yemen, and the government registered over 24,000. In 2012, over 23,000 Somalis arrived in Yemen, and over 13,000 were registered.

### *Djibouti*

Djibouti is a party to the Refugee Convention, but has only signed the OAU Convention. However, since the signing of the OAU Convention, Djibouti has, in practice, applied the broader refugee criteria. In 2011, over 6,000 Somalis arrived in Djibouti, close to double the figures for the previous year (over 3,300). In 2012, new arrivals reduced to a little over 3,000. All new arrivals in 2011 and 2012 were recognized as refugees through a group-based approach, and pursuant to the broader refugee criteria in the OAU Convention. The questionnaire response highlighted general insecurity, disturbance to public order, drought and famine as relevant considerations in applying the regional refugee definition. The Ministry of Interior was a key actor in the decision to grant international protection. Recognition of refugee status on the same basis has continued to be granted to Somalis since 2012, including approximately 377 claimants in 2017. The practice of recognizing refugees based on the application of the broader refugee criteria in the OAU Convention has been formalized in national legislation promulgated in January 2017.<sup>145</sup>

### *Uganda*

Uganda is a party to the Refugee Convention and the OAU Convention and has a 2006 domestic refugee law, which governed recognition of status during 2011–2012.<sup>146</sup> Based on statistics compiled from UNHCR Yearbooks and Uganda's government database, which is managed by the Office of the Prime Minister (OPM), the questionnaire response indicates approximately 2,195 and 3,008 Somalis sought international

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international conventions to which the republic is a party and that within the bounds of such conventions." See Section 6, Article 38(4).

<sup>145</sup> Loi N° 159/AN/16/7ème L Portant Statut des Réfugiés en République de Djibouti, 5 January 2017, available at: <http://www.presidence.dj/texte.php?ID=159&ID2=2017-01-05&ID3=Loi&ID4=1&ID5=2017-01-15&ID6=n>, accessed: September 2018, Article 3. Prior to the promulgation of this law, A Presidential Ordinance on refugees constituted the domestic law and referenced only the definition in the Refugee Convention. See Ordonnance no77-053/PR/AE Portant Statut des Réfugiés sur le Sol de la République de Djibouti, 9 November 1977, available at: <http://www.presidence.dj/PresidenceOld/jo/1977/ord77n053.htm>, accessed: September 2018.

<sup>146</sup> The Refugees Act, 2006, available at: <http://www.refworld.org/docid/4b7baba52.html>, accessed: September 2018. A process is underway to reform this Act. Between 2012 and 2013, four asylum claims were rejected because they failed to satisfy the applicable definitions. Data on 2011 were unavailable.



protection in Uganda in 2011 and 2012, respectively. A refugee eligibility committee established under Section 11 of the domestic act undertook decisions on status through an individual approach. UNHCR had an observer role within the committee and provided guidance on country-of-origin information and RSD assessments. In 2011, approximately 3,173 Somalis were recognized as refugees, and another 1,902 in 2012.<sup>147</sup> The government database does not disaggregate by reasons for recognition. However, the questionnaire response indicates that the OPM confirmed most refugees were recognized based on Section 4(c) of the domestic refugee act (which reflects the broader refugee criteria in the OAU Convention) for reasons related to violence and insecurity attributed to Al-Shabaab.

## 3.2 Responses to Haitian Cross-Border Movements

### 3.2.1. Background Context in Haiti

Haiti has been marked by frequent disasters and is particularly vulnerable to hazards and the risks of climate change.<sup>148</sup> In addition to hydro-meteorological threats, Haiti is in a seismically active zone.<sup>149</sup> On 12 January 2010, Haiti experienced its strongest earthquake in 200 years, with its epicentre located near the densely populated capital of Port-au-Prince.

The impacts were devastating. Over 220,000 people are estimated to have died, with more than 300,000 injured.<sup>150</sup> In the aftermath of the earthquake, about 600,000 people

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<sup>147</sup> A further 3,000 Somalis were recognized in 2013. Between 2012 and 2013, four asylum claims were rejected because they failed to satisfy the applicable definitions. Data on rejections for 2011 were unavailable.

<sup>148</sup> See e.g. Singh and Barton-Dock, "Toward a New Narrative", The World Bank, 2015, available at: <http://documents.worldbank.org/curated/en/642131467992805241/Haiti-Toward-a-new-narrative-systematic-country-diagnostic>, accessed: September 2018; Marcelin and Cela, "After Hurricane Matthew: Resources, Capacities, and Pathways to Recovery and Reconstruction of Devastated Communities in Haiti", Interuniversity Institute for Research and Development (INHURED), 2017; Alscher, "Environmental Degradation and Migration on Hispaniola Island", *International Migration*, Vol. 49, Special Issue 1, 2011; Nurse et al., "2014: Small Islands", in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, available at: [https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29\\_FINAL.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf), accessed: September 2018; See also Climate Change Vulnerability Index, available at: <https://climate-adapt.eea.europa.eu/metadata/tools/climate-change-vulnerability-index-ccvi>, accessed: September 2018. Exposure to hazards have been compounded by severe environmental degradation, including due to extensive deforestation, high population density, fragile ecosystems and stressed water resources.

<sup>149</sup> Republique d'Haïti, "Analysis of Multiple Hazards in Haiti (Nathat)", 2010, available at: <https://www.iris.edu/hq/files/workshops/2010/03/docs/Report-MULTIHAZARDS-HA-English-SergioMora-Final-Red.pdf>, accessed: September 2018.

<sup>150</sup> United Nations Environment Programme (UNEP), "UNEP in Haiti: 2010 Year in Review", UNEP, 2011, available at: <http://wedocs.unep.org/handle/20.500.11822/17701>, accessed: September 2018; International Crisis Group, "Haiti: Stabilisation and Reconstruction After the Quake", 2010, available at: <https://www.crisisgroup.org/latin-america-caribbean/haiti/haiti-stabilisation-and-reconstruction-after-quake>, accessed: September 2018.

are estimated to have moved to other regions of Haiti and at the peak in numbers, approximately 1.5 million were displaced to camps within the country.<sup>151</sup>

Throughout the course of its history, Haiti has suffered long periods of political instability, often accompanied by violence, which has affected the nation's ability to build robust State institutions and policies, infrastructure and services, as well as the rule of law.<sup>152</sup> Poverty, inequality and lack of economic opportunities have been rife throughout Haiti's history, with notable divides between urban and rural communities.<sup>153</sup> Before the 2010 earthquake, about 75 per cent of the population of Haiti lived in poverty.<sup>154</sup> High levels of crime and violence, including by armed gangs, have also compromised public security with some noting that gang involvement "in criminal and political violence [is] deeply rooted in Haitian politics, and fueled by widespread poverty, inadequate police presence, government weakness, and social and economic inequalities."<sup>155</sup> The United Nations Development Programme (UNDP) is among the actors to have highlighted that a general culture of tolerating, rather than punishing, gender-based violence has been aggravated by protracted political instability, and that the general aftermath of disasters can compound these issues.<sup>156</sup> Indeed, many of these dimensions are intertwined and Haiti has constantly ranked poorly on the Fragile States Index. In 2009, it was ranked 12 out of 178 countries, and this ranking decreased to 11, 5 and 7 during 2010, 2011, and 2012, respectively.<sup>157</sup>

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<sup>151</sup> See e.g. United Nations, "Report of the United Nations in Haiti 2010: Situation, Challenges and Outlook", n.d., available at: [www.un.org/en/peacekeeping/missions/minustah/documents/un\\_report\\_haiti\\_2010\\_en.pdf](http://www.un.org/en/peacekeeping/missions/minustah/documents/un_report_haiti_2010_en.pdf), accessed: September 2018; United Nations, "Report of the United Nations in Haiti 2011", n.d.,

[https://reliefweb.int/sites/reliefweb.int/files/resources/UNHaiti\\_AR2011\\_Eng\\_Web1.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/UNHaiti_AR2011_Eng_Web1.pdf), accessed: September 2018.

<sup>152</sup> See e.g. Singh and Barton-Dock, *supra* note 148. For a deeper discussion on Haiti, including its history, see e.g. Maguire and Freeman, "Who Owns Haiti: People, Power, and Sovereignty", University Press of Florida, 2017; See also, United Nations Development Programme (UNDP), "Disaster-Conflict Interface: Comparative Experiences", 2011, available at: <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/DisasterConflictInterface.html>, accessed: September 2018.

<sup>153</sup> See e.g. The World Bank and Observatoire National de la Pauvreté et de l'Exclusion Sociale (ONPES), "Investing in People to Fight Poverty in Haiti: Reflections for Evidence Based Policy Making", The World Bank, 2014, available at: <http://documents.worldbank.org/curated/en/222901468029372321/pdf/944300v10REPLA0sment0EN0web0version.pdf>, accessed: September 2018.

<sup>154</sup> United Nations, "Report of the United Nations in Haiti 2011", *supra* note 151.

<sup>155</sup> Berg, "Crime, Politics, and Violence in Post-Earthquake Haiti", United States Institute of Peace, PeaceBrief 58, September 2010, available at: <https://www.usip.org/sites/default/files/PB%2058%20-%20Crime%20Politics%20and%20Violence%20in%20Post-Earthquake%20Haiti.pdf>, accessed: September 2018.

<sup>156</sup> UNDP, *supra* note 152.

<sup>157</sup> See Fund for Peace, "Fragile State Index: Country Dashboard: Haiti", available at: <http://fundforpeace.org/fsi/country-data/>, accessed: September 2018. Haiti has constantly been ranked poorly in terms of human development, corruption and inequality. See also, Rencoret et al., "Haiti Earthquake Response: Context Analysis", ALNAP, DAC Network on Development Evaluation and UNEG, 2010, available at: <https://www.alnap.org/help-library/haiti-earthquake-response-context-analysis>, accessed: September 2018.

The earthquake further compounded Haiti's fragility. It destroyed the Presidential Palace, Parliament, the Supreme Court and most ministerial and public administration buildings, and damaged police stations, prisons, courthouses, hospitals and schools.<sup>158</sup> Somewhere between 20–40 per cent of Haitian civil servants are estimated to have died.<sup>159</sup> Close to 400 Haitian national police officers were reported killed, missing or injured, and 10 members of the judiciary were also reported to have died.<sup>160</sup> An estimated 5,000 prisoners escaped prisons following the earthquake.<sup>161</sup>

In this context, the State's capacity to govern, undertake public administration activities, and provide security and basic public services were further undermined and exacerbated pre-existing weaknesses.<sup>162</sup> Violence and crime were reported to have increased,<sup>163</sup> in a context where people were displaced in camps and informal settlements. Sexual and gender-based violence, carried out with impunity, was prevalent, as were other human rights violations.<sup>164</sup> A cholera epidemic in late 2010 further compounded an already overwhelming situation. In the aftermath of the 2010 earthquake in Haiti and the ensuing conditions, many left the country, some traveling along well-established routes, while others ventured into new territories.<sup>165</sup>

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<sup>158</sup> United Nations, "Report of the United Nations in Haiti 2010: Situation, Challenges and Outlook", supra note 151. Government of the Republic of Haiti, "Action Plan for National Recovery and Development of Haiti: Immediate Key Initiatives for the Future", 2011, available at: [https://www.recoveryplatform.org/outfile.php?id=680&href=http://www.recoveryplatform.org/assets/publication/Action\\_Plan\\_12April\\_haiti.pdf](https://www.recoveryplatform.org/outfile.php?id=680&href=http://www.recoveryplatform.org/assets/publication/Action_Plan_12April_haiti.pdf), accessed: September 2018.

<sup>159</sup> Human Rights Watch, "World Report 2011: Haiti: Events of 2010", available at: <https://www.hrw.org/world-report/2011/country-chapters/haiti>, accessed: September 2018.

<sup>160</sup> Ibid.

<sup>161</sup> International Crisis Group, "Keeping Haiti Safe: Justice Reform", 2011, available at: <https://www.crisisgroup.org/latin-america-caribbean/haiti/keeping-haiti-safe-justice-reform>, accessed: September 2018.

<sup>162</sup> United Nations, "Report of the United Nations in Haiti 2010: Situation, Challenges and Outlook", supra note 151.

<sup>163</sup> See e.g. Berg, supra note 155; International Crisis Group, "Keeping Haiti Safe: Police Reform", 2011, available at: <https://www.crisisgroup.org/latin-america-caribbean/haiti/keeping-haiti-safe-police-reform>, accessed: September 2018; International Crisis Group, "Post-Quake Haiti: Security Depends on Resettlement and Development", <https://www.crisisgroup.org/latin-america-caribbean/haiti/post-quake-haiti-security-depends-resettlement-and-development>, accessed: September 2018.

<sup>164</sup> United Nations General Assembly, "Report of the Independent Expert on the Situation of Human Rights in Haiti: Michel Forst", A/HRC/17/42, 4 April 2011; Bookey, "Enforcing the Right to Be Free from Sexual Violence and the Role of Lawyers in post-Earthquake Haiti", *The City University of New York Law Review*, Vol. 14, Issue 2, 2011.

<sup>165</sup> See e.g. Fagen, "Receiving Haitian Migrants in the Context of the 2010 Earthquake", Nansen Initiative Discussion Paper, 2013, available at: [https://www2.nanseninitiative.org/wp-content/uploads/2015/03/DP\\_Receiving\\_Haitian\\_Migrants\\_in\\_the\\_Context\\_of\\_the\\_2010\\_earthquake.pdf](https://www2.nanseninitiative.org/wp-content/uploads/2015/03/DP_Receiving_Haitian_Migrants_in_the_Context_of_the_2010_earthquake.pdf), accessed: September 2018.

### 3.2.2. UNHCR Guidance on Haitian Asylum-seekers

At the time of the Haitian earthquake, UNHCR eligibility guidance on protection considerations relating to Haitian asylum-seekers did not exist, and indeed may never have been issued previously. However, immediately following the earthquake, on 18 February 2010, UNHCR and OHCHR sent a letter to all Permanent Missions in Geneva.<sup>166</sup> The letter emphasized damages and losses, referenced displacement and other protection dynamics, and declared appreciation to States that had temporarily suspended return of Haitians. As an expression of solidarity with Haiti, the letter called on governments to consider the temporary suspension of involuntary returns of Haitians and to grant temporary protection on *humanitarian grounds* to those who fled Haiti until a time when the situation in Haiti stabilized, basic services were restored, and Haitians could return safely and durably. The letter did not refer to international protection obligations.

On 9 June 2011, UNHCR and OHCHR issued a so-called “return advisory”, which updated the earlier communication and explicitly referenced international protection.<sup>167</sup> It noted ongoing efforts to mitigate the “humanitarian crisis in Haiti precipitated by the January 2010 earthquake”, but recognized “large parts of Haiti’s population continue to live in extremely precarious conditions, exacerbated by the destruction and displacement caused by the earthquake”. The letter highlighted risks of eviction, lack of access to basic services, and noted “serious concerns over existing protection gaps and the unmet basic humanitarian needs”. Notably, it acknowledged that “the Haitian State, weakened by the earthquake, cannot yet ensure that vulnerable or disabled people, people with health problems or victims of sexual abuse in Haiti would receive sufficient or adequate care by the State in case of return”. In this context, it requested governments to refrain from conducting returns to Haiti. It appealed to “Governments to renew, on humanitarian grounds, residence permits and other mechanisms that have allowed Haitians to remain outside the country.”

In recognizing the “prerogative of States to return individuals to their country of origin when they are found not to be in need of international protection”, the letter implicitly referenced the expectation that States would assess international protection obligations. Only “in the absence of other applicable legal frameworks”, were States called to apply a series of explicit principles related to return. Under the principle in the letter calling governments to “give special consideration and refrain from returning to Haiti persons

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<sup>166</sup> UNHCR, “OHCHR/UNHCR Urge Extending Suspension of Returns to Haiti”, UNHCR Briefing Notes, available at: <http://www.unhcr.org/4b7543026.html>, accessed: September 2018. Copy of letter on file with author.

<sup>167</sup> Available at: [www.unhcr.org/protection/operations/4e0305666/joint-unhcr-ohchr-return-advisory-update-haiti.html](http://www.unhcr.org/protection/operations/4e0305666/joint-unhcr-ohchr-return-advisory-update-haiti.html), accessed: September 2018.

with special protection needs”, the letter specifically included “any victim of sexual and gender-based violence given the current gaps in the provision of State protection in Haiti”. With this background, the subsequent Sections turn to Brazil and then Mexico’s responses to Haitian movements into their territories in the aftermath of the 2010 earthquake.

### 3.2.3. Brazil’s Response

The discretionary humanitarian response Brazil instituted to address the movement of Haitians into its territory in the aftermath of the 2010 earthquake in Haiti was exceptional. It was based on a special administrative framework, in a context where the prevailing refugee and migration laws were found to be limited. Notably, however, although thousands of Haitians applied for refugee status between 2010 and 2015, none benefited from recognition. This case study discusses how refugee law was considered and featured in Brazil’s response to Haitian movements, emphasizing the years 2010–2012.<sup>168</sup>

Despite Brazil’s history as a recipient of diverse groups of immigrants, prior to 2010, the Haitian population in Brazil was small, numbering a few dozen people, with a total of three refugees and four asylum-seekers.<sup>169</sup> This changed dramatically in the aftermath of the 2010 earthquake in Haiti. Beginning with small groups entering via the north Amazon border through the city of Tabatinga in the state of Amazonas, and expanding to routes that traversed *Brasiléia* in the state of Acre, the numbers grew steadily.<sup>170</sup> Between 2010 and 2015, more than 72,000 Haitians crossed into Brazil.<sup>171</sup>

Brazil’s response, implemented through its National Immigration Council (CNIg), a body housed under the Ministry of Labour, Employment and Social Security,<sup>172</sup> entailed two key dimensions:

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<sup>168</sup> See Annex on Brazil for a more detailed discussion of Brazil’s response, including the legal landscape, as well as information on informants. Interviews were undertaken in Brasília and São Paulo between 26 February 2018 and 3 March 2018. In general, information gathered through informant interviews informs the proceeding discussion.

<sup>169</sup> Cavalcanti et al., “Haitian Immigrants in the Brazilian Labor Market”, *Revista de Estudos e Pesquisas Sobre as Américas*, Vol. 11, No. 1, 2017, p. 192.

<sup>170</sup> For more on routes, paths and Haitian movements to Brazil more generally, see e.g. Cavalcanti and Tonhati, “Haitian Flow to Brazil and New Policies”, forthcoming in *Patterns of Rebordering*, Edinburgh University Press; International Organization for Migration (IOM), “Haitian Migration to Brazil: Characteristics, Opportunities and Challenges”, Migration Notebook No. 6, 2014, available at:

[http://publications.iom.int/system/files/pdf/cuaderno\\_migratorio\\_no6\\_en.pdf](http://publications.iom.int/system/files/pdf/cuaderno_migratorio_no6_en.pdf), accessed: September 2018; Godoy, “El Caso de los Haitianos en Brasil y la vía de la Protección Humanitaria Complementaria” in Lettieri (ed.), *Protección Internacional de Refugiados en el Sur de Sudamérica*, Universidad Nacional de Lanús, 2012, pp. 309–329, available at: [http://209.177.156.169/libreria\\_cm/archivos/pdf\\_1543.pdf](http://209.177.156.169/libreria_cm/archivos/pdf_1543.pdf), accessed: September 2018; Fagen, *supra* note 165.

<sup>171</sup> Cavalcanti et al., *supra* note 169, p. 193. See also, Cavalcanti and Tonhati, *supra* note 170.

<sup>172</sup> Formerly the Ministry of Labour and Employment.

1. Authorization to stay: an administrative practice, beginning in early 2011, of facilitating Haitians to regularize their stay through the grant of a conditional, so-called “permanent residence for humanitarian reasons”, valid initially for five years; and
2. Entry and stay: the creation of a legal pathway to Brazil through a resolution adopted in January 2012, which authorized the grant of so-called “permanent” visas and then the option to obtain a conditional and so-called “permanent residence for humanitarian reasons” upon registration with the Brazilian Federal Police, valid for five years.

These mechanisms benefited tens of thousands of Haitians. By November 2015, approximately 43,871 Haitians had received protection based on the first mechanism (authorization to stay).<sup>173</sup> At the end of July 2018, approximately 57,664 Haitians had received protection based on the second mechanism (entry and stay).<sup>174</sup> Many had found work and made homes in Brazil. Between 2011 and 2015, the number of Haitians in the formal labour market in Brazil grew from a little over 500 to more than 33,000,<sup>175</sup> suggesting that when the informal market is counted, the numbers are likely to be much higher. In 2015, of all immigrants in the Brazilian labour market, Haitians accounted for more than 26 per cent.<sup>176</sup>

Notably, however, between 2010 and 2015, not a single Haitian was recognized as a refugee in Brazil.<sup>177</sup> In 2010, 442 Haitians applied for refugee status and in the following year, another 2,549, for a total of close to 3,000 over the two years.<sup>178</sup> This number had passed 6,000 by the end of 2012.<sup>179</sup> Between 2010 and the end of 2014, 34,770 Haitians

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<sup>173</sup> Joint ministerial act by the Ministry of Labour, Employment and Social Security and the Ministry of Justice. Copy on file with the author. This action is also referenced and discussed in Immigration and Refugee Board of Canada, “Brazil and Haiti: Situation of Haitians in Brazil, Including Rights and Obligations; Permanent Resident Status; Documents Issued to Haitians, Including Foreigner Identity Cards (Cédula de Identidade de Estrangeiro, CIE); Treatment of Haitians in Brazil, Including Access to Employment and Education, State Protection and Support Services (2010-June 2018)”, 2018, available at: <http://www.refworld.org/docid/5b615cfe4.html>, accessed: September 2018.

<sup>174</sup> UNHCR request to Brazil’s Federal Police; details shared with author. Figures as at 27 July 2018.

<sup>175</sup> Cavalcanti et al., *supra* note 169, p. 196.

<sup>176</sup> *Ibid.*, p. 193. See also for detailed demographic breakdowns, qualification levels, work contracts and dismissals, geographic locations of Haitians employed, economic activities, and average salaries.

<sup>177</sup> Secretaria Nacional de Justiça, “Refúgio em Números, 2010-2016”, available at: [http://www.justica.gov.br/news/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017\\_refugio-em-numeros-2010-2016.pdf/view](http://www.justica.gov.br/news/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017_refugio-em-numeros-2010-2016.pdf/view), accessed: September 2018.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

had applied in total,<sup>180</sup> with the vast majority being men between the ages of 20 and 34.<sup>181</sup>

The legal definition of a “refugee” under the domestic refugee law of 1997<sup>182</sup> comprises, in general terms, the definition in the Refugee Convention, and also draws on the Cartagena Declaration to include in Article 1(III), individuals who “due to severe and generalized violations of human rights [are] ... compelled to leave his or her country of nationality to seek refuge in a different country.”<sup>183</sup> A 1996 draft of the law had included a more comprehensive regional refugee definition that captured the other objective situations contemplated by the Cartagena Declaration, but it was deleted by the Ministry of Justice.<sup>184</sup> Intensive lobbying by a range of actors had been necessary to secure the narrower framing.<sup>185</sup> Status determination is through an individual approach. An explicit basis for granting status through a group-based approach is not provided, meaning that an explicit mechanism to mitigate the burden of RSD in the context of a large-scale influx does not exist.<sup>186</sup>

Under the ordinary course of affairs, requests for refugee status were lodged with the Federal Police and captured reasons for flight through a specific claim form. The Federal Police are responsible for sharing the requisite information with the National Committee for Refugees (CONARE), a body established under the domestic refugee law with the competence to determine status at first instance. Prior to issuing a decision, an interview with an applicant is regarded as a mandatory step. As a collective

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<sup>180</sup> Ibid.

<sup>181</sup> Cavalcanti and Tonhati, supra note 170, p. 23. Although these authors source the Brazilian Federal Police database (as does the Secretaria Nacional de Justiça), the numbers for each year are slightly different, with a total between 2010 and 2014 of 34,887 Haitian applications instead of 34,770. In this context, the authors indicate that approximately 78 per cent were men and 19 per cent women. Of the total, 65 per cent were between 20 and 34, while another 30 per cent were between 35 and 49.

<sup>182</sup> Lei No. 9.474 of 22 July 1997, available at: [http://www.planalto.gov.br/ccivil\\_03/leis/19474.htm](http://www.planalto.gov.br/ccivil_03/leis/19474.htm), accessed: September 2018. See translation available on Refworld: <http://www.refworld.org/pd/3f4dfb134.pdf>, accessed: September 2018.

<sup>183</sup> Note that some academic literature translates “severe” as “gross” and “compelled” as “forced”.

<sup>184</sup> Andrade, “Refugee Protection in Brazil (1921-2014): An Analytical Narrative of Changing Policies”, in Cantor et al., (eds.) *A Liberal Tide? Immigration and Asylum Law and Policies in Latin America*, University of London, 2015, pp. 153–183, 174.

<sup>185</sup> Ibid. See also historical narrative on arrival of Angolans in 1993, which had prompted need to take account of broader refugee criteria. 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”, Legal and Protection Policy Research Series, UNHCR, 2013, available at: <http://www.unhcr.org/protection/globalconsult/51c800fe9/32-cartagena-declaration-refugees-protection-people-fleeing-armed-conflict.html>, accessed: September 2018, discussing on p. 17 how unlike the Cartagena Declaration’s regional refugee definition, which only requires that flight be a consequence of the generic threat to life, safety or freedom generated by the objective situation, this modified framing adds an element of compulsion, duress or obligation to the impetus for flight.

<sup>186</sup> See also, Jubilut and Apolinário, “Refugee Status Determination in Brazil: A Tripartite Enterprise”, *Refuge*, Vol. 25, No. 2, 2008, p. 33.

decision-making body comprising seven representatives, one from five different arms of the executive, plus a representative of each of the Federal Police and civil society, CONARE's decisions are made by a majority with quorum set at four. The chair, a representative of the Ministry of Justice, holds the deciding vote. UNHCR has a right to provide advice and guidance and voice its opinions, but not to vote. Pending a decision, asylum-seekers can maintain regular status and are permitted to work and access certain services.<sup>187</sup>

The over 34,000 Haitians who applied for refugee status in Brazil between 2010 and 2014 and others who applied afterwards did not pass through all the steps of this procedure. Based on an underlying administrative mechanism that existed between CONARE and CNIg, in late 2010 or early 2011, CONARE initially transferred the details of approximately 199 Haitians who had applied for refugee status to CNIg for resolution pursuant to a framework that permitted CNIg to examine "special situations" and "omission" cases.<sup>188</sup> CONARE had authority to refer "ineligible" applications for refugee status where "humanitarian reasons" may warrant stay.<sup>189</sup> In March 2011, CNIg granted the first group of 199 Haitians permanent residence for humanitarian reasons. During the rest of 2011 and the following years, CONARE referred the details of thousands of Haitians who had claimed refugee status to CNIg and thousands received permanent residence for humanitarian reasons.<sup>190</sup>

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<sup>187</sup> On these procedural aspects, see the more detailed discussion in the Annex. See also Jubilit, "Refugee Law and Protection in Brazil: A Model in South America", *Journal of Refugee Studies*, Vol. 19, No. 1, 2006; Jubilit and Apolinário, *ibid*; UNHCR, "Help: Brazil", available at: <http://help.unhcr.org/brazil/en/>, accessed: September 2018.

<sup>188</sup> Conselho Nacional de Imigração, "Resolução Normativa No. 27 of 25 November 1998", Article 1-3, available at: <http://portal.mj.gov.br/Estrangeiros/tmp/Resolu%C3%A7%C3%B5es%20Normativas%20do%20Conselho%20Nacional%20de%20Imigra%C3%A7%C3%A3o/Resolu%C3%A7%C3%A3o%20Normativa%20n%C2%BA%2027.pdf>, accessed: September 2018. For a more detailed discussion, see Annex on Brazil.

<sup>189</sup> Conselho Nacional de Imigração, "Resolução Recomendad No. 08 of 19 December 2006", Article 1, and first paragraph, available at: <http://www.acnur.org/fileadmin/Documentos/BDL/2014/9720.pdf>, accessed: September 2018; Comitê Nacional para os Refugiados, "Resolução Normativa No. 13 of 23 March 2007", Articles 1 and 2, available at: [http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22131003/Resolu%C3%A7%C3%A3o-Normativa-n-13-do-CONARE-Revogada-pela-Resolu%C3%A7%C3%A3o-Normativa-n-18.pdf#\\_ga=2.134948017.156727722.1536527125-233521994.1497214613](http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22131003/Resolu%C3%A7%C3%A3o-Normativa-n-13-do-CONARE-Revogada-pela-Resolu%C3%A7%C3%A3o-Normativa-n-18.pdf#_ga=2.134948017.156727722.1536527125-233521994.1497214613), accessed: September 2018. This resolution has been superseded (see, <http://help.unhcr.org/brazil/en/2525-2/>). For a more detailed discussion, see Annex on Brazil.

<sup>190</sup> For more on Brazil's response, see e.g. Zamur and Andrade, "Os Aspectos Jurídicos da Migração Haitiana para o Brasil", in Allgayer et al., (eds), *Refugiados Ambientais*, Universidade Federal de Roraima, 2018, pp. 902–930, available at: <https://ufr.br/editora/index.php/ebook>, accessed: September 2018; Godoy, *supra* note 170; Pacifico and Ramos, "Humanitarian Asylum for Forced Migrants: The Case of Haitians' Arrival in Brazil", in Gacci et al., (eds.), *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Brill, 2015, pp. 218–239; Pacifico et al., "The Migration of Haitians within Latin America: Significance for Brazilian Law and Policy on Asylum and Migration", in Cantor et al., (eds.) *A Liberal Tide? Immigration and Asylum Law and Policies in Latin America*, University of London, 2015, pp. 139–151; Cantor, "Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters", Nansen Initiative Background Paper, 2015, available at: <https://disasterdisplacement.org/wp->



In 2011, as applications for refugee status increased with the growth in Haitian arrivals, and the dangers and exploitation encountered *en route* became clearer, discussions ensued on creating a legal pathway as a means to address irregular Haitian movements and their attendant dangers. In January 2012, Brazil created a legal pathway by authorizing the grant of 1,200 permanent visas per year to be issued through the embassy in Port-au-Prince.<sup>191</sup> In 2013, based on lessons learned, these procedural and quota-related restrictions were lifted.<sup>192</sup> The embassy in Port-au-Prince continued to grant permanent visas until October 2017, when the process was suspended pending the entry into force of a new migration law.<sup>193</sup> Under the new framework, the issuance of temporary visas and residence permits to Haitians for humanitarian reasons is authorized through an Interministerial Ordinance.<sup>194</sup>

As apparent from the preceding discussion, by March 2011, a decision was made that Haitians would not receive refugee status. Nonetheless, there was interest and political will to provide a timely, expedient, group-based, humanitarian response in a context where the disaster in Haiti, and its consequent impacts, were internationally recognized and had been the subject of a specific communication on non-return by UNHCR and OHCHR.<sup>195</sup> Certainly a range of other factors, including solidarity, international standing, pragmatism, the domestic economic context, as well as CONARE's limited capacity and individual approach to RSD, may have played a part.<sup>196</sup> As early as November 2010, a working group was created inside CNIg, being a representative body composed of personnel from government ministries and non-government actors, to assess Haitian arrivals and their needs.

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[content/uploads/2015/07/150715\\_FINAL\\_BACKGROUND\\_PAPER\\_LATIN\\_AMERICA\\_screen.pdf](#) accessed: September 2018.

<sup>191</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 97 of 12 January 2012”, available at: <https://www.legisweb.com.br/legislacao/?id=116083>, accessed: September 2018.

<sup>192</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 106 of 24 October 2013”, available at: <https://www.legisweb.com.br/legislacao/?id=261070>, accessed: September 2018. See also, The Nansen Initiative, *supra* note 15, Vol. II, p. 45.

<sup>193</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 113 of 12 December 2014”; Conselho Nacional de Imigração, “Resolução Normativa No. 113 of 12 August 2015”; Conselho Nacional de Imigração, “Resolução Normativa No. 113 of 13 September 2016”, available at: <https://www.legisweb.com.br/legislacao/?id=116083>, accessed: September 2018.

<sup>194</sup> Ministério da Justiça e Segurança Pública/Gabinete do Ministro, “Portaria Interministerial No. 10 of 6 April 2018”, available at: <https://sistemas.mre.gov.br/kitweb/datafiles/Cingapura/en-us/file/Portaria%2010-2018.pdf>, accessed: September 2018.

<sup>195</sup> See Subsection 3.2.2.

<sup>196</sup> See e.g. Cavalcanti et al., *supra* note 169; Pacífico et al., *supra* note 190; Seitenfus, “Brazilian and South American Political and Military Engagement in Haiti”, in Maguire and Freeman (eds.), *Who Owns Haiti? People, Power and Sovereignty*, University Press Florida, 2017; Fagen, *supra* note 165.

Refugee status was certainly considered as an option to respond to Haitian arrivals. However, it appears there was a general perception, among members of CONARE and more generally, that refugee status was unsuitable or inapplicable, as Haitians did not face a well-founded fear of persecution on Refugee Convention grounds. If Haitians were refused recognition as refugees by CONARE, a scenario that was perceived as likely, it was thought that Haitians might remain in Brazil, without timely recourse to regularize their status.

The extent to which the earthquake and the ensuing disaster, the most prominent and proximate factor prompting flight, played into these perceptions, and overshadowed other underlying conditions in Haiti, cannot be dismissed. Recognition or acknowledgement of the mixed nature of Haitian movements seems to have been limited. The possibility that serious harms relating to the ongoing consequences of the disaster, potentially compounded by the underlying State fragility in Haiti, could found claims in refugee status may not have been adequately considered.

Perceptions that Haitians would not satisfy the Refugee Convention criteria were based at least partly on reviews and discussions of early requests for refugee status. Some informants noted the requests referenced the earthquake primarily; particularly its destructive impacts on property and consequences for livelihood and basic subsistence. Informants indicated, sometimes based on indirect information, that many Haitians expressed a desire to return home as soon as possible and to provide for relatives left behind. Others perceived Haitians were solely interested in employment and income and eventual return to Haiti. In this context, some informants noted that the ultimate response was appropriately tailored to Haitian desires and circumstances.

Questions remain around whether any Haitians were interviewed pursuant to the domestic RSD process prior to CONARE's decision to refer Haitian cases to CNIg. Or indeed, whether the decision to transfer to CNIg was made on the basis of a preliminary review of some of the early requests for refugee status submitted to the Federal Police and forwarded to CONARE. Informant interviews suggest the latter. Relevant information may have also been gathered in January 2011, when in the context of a broader mission, a tripartite group of actors, including representatives of UNHCR, CONARE, and civil society travelled to Acre and met Haitian asylum-seekers and other key stakeholders. Definitively confirming these dimensions has proved difficult, since unlike CNIg, whose deliberations were publicly available, CONARE's were not.<sup>197</sup> CONARE's limited capacity at the time (fewer than five staff members) and a backlog in

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<sup>197</sup> CNIg deliberations on creating a response to Haitian movements were available online in early 2018, but at September 2018 are no longer available.

assessing cases also meant that claims lodged in 2010 by Haitians would have taken at least two years to reach CONARE's decision stage.

While CONARE members appear to have taken some note of the "difficult and volatile" situation in Haiti in March 2011, and acknowledged that access to the RSD system should remain open to Haitians since some may potentially satisfy the requisite criteria, there are no indications that a single Haitian was interviewed by CONARE at any time between 2010 and 2015. Once the decision was made to transfer Haitian requests to CNIg, it appears CONARE did not revisit them in any level of detail, except as necessary to transfer batches of names and details of Haitians to CNIg. Even if discussions occurred within CONARE or other levels of government on whether Haitian requests should revert to CONARE to be assessed under refugee law, the *status quo* did not change in the intervening years.

These circumstances raise questions of effective access to information and the RSD system in practice, even if in principle no restrictions were imposed. Beginning most likely at the start of 2012, it appears there was also a period of some months when CONARE stopped accepting Haitian claims for refugee status on the basis that such claims were "manifestly unfounded". This shift coincided with the creation of the legal pathway to Brazil in January 2012 and appears to have influenced the change. During the relevant months, irregular entrants were unable to lodge claims for refugee status. Others have highlighted border restrictions that may have coincided with these policy changes.<sup>198</sup> Sometime towards the middle of 2012, CONARE's policy was reversed and Haitians were again able to lodge refugee claims.

In November 2015, a joint ministerial act by the Ministry of Labour, Employment and Social Security and the Ministry of Justice, published in Portuguese, listed 43,871 Haitians who had received permanent residence for humanitarian reasons through CNIg, following the transfer of their cases from CONARE.<sup>199</sup> It also highlighted the process and requirements for renewing or obtaining permanent residence.<sup>200</sup> Haitians interested in continuing their requests for refugee status were instructed to make requests directly to CONARE or the Federal Police within 30 days.

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<sup>198</sup> See e.g. Fagen, *supra* note 165; Zamur and Andrade, *supra* note 190; Louidor, "Los Flujos Haitianos Hacia América Latina: Situación Actual y Propuestas", Jesuit Refugee Service for Latin America and the Caribbean, 2011, available at: [https://www.entreculturas.org/files/documentos/estudios\\_e\\_informes/Flujos%20haitianos%20haciaAL.pdf](https://www.entreculturas.org/files/documentos/estudios_e_informes/Flujos%20haitianos%20haciaAL.pdf), accessed: September 2018.

<sup>199</sup> See *supra* note 173.

<sup>200</sup> The initial grant of 'permanent' residence for five years was regarded as temporary. This process permitted application for other forms of permanent residence. For more on these aspects, see e.g. Immigration and Refugee Board of Canada, *supra* note 173.

Sometime during this period, CONARE closed and archived many of its files on Haitian claimants. In the course of these processes, informants also suggested that the files and details of somewhere around 6,000–8,000 Haitians who claimed refugee status have fallen through the ‘cracks’, and were never transferred to CNIg nor analysed by CONARE. Informants indicated that verification exercises are being undertaken to address this oversight.<sup>201</sup>

A comprehensive review of the extent to which the application of broader refugee criteria in Brazil’s refugee law was considered has proved challenging, given the inability to review CONARE’s deliberations. Informants suggested that the applicability of broader refugee criteria to Haitians was quickly dismissed. CONARE’s past practice indicates that circumstances in which the broader refugee criteria have grounded individual claims for refugee status related only to situations of conflict. Informants confirm this understanding.<sup>202</sup> For example, claimants from Syria, Libya, Nigeria, Democratic Republic of the Congo, Ukraine, and Sudan, are among those who have been recognized on the basis of the broader refugee criteria. CONARE has not developed specific formal guidance on how to apply the broader refugee criteria in the domestic refugee law, although internal discussions on the necessity for such guidance have taken root recently and informants suggested that efforts are underway to develop guidance.

Some insight on consideration of the broader refugee criteria is also available from a judicial decision. Around the time CONARE stopped accepting Haitian claims for refugee status, in January 2012, Acre’s Federal Public Ministry filed a civil claim (‘tutela’) against the Federal Government, relating to the period from mid-2010 to mid-2011.<sup>203</sup> Acre’s Federal Public Ministry requested:

- i. To recognize the refugee status of all Haitians who are in Brazil or coming to Brazil;
- ii. To cease any and all impediments to Haitians entering Brazil;
- iii. To cease any threat of deportation of Haitians who are in Brazil seeking refuge; and
- iv. To provide humanitarian aid to Haitian refugees who are in Brazil until they obtain employment and can provide livelihoods for themselves and their families.

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<sup>201</sup> Additionally, Haitians refused protection by CNIg following a referral from CONARE has not been ascertained.

<sup>202</sup> For more on these aspects, see e.g. Godoy, *supra* note 170; Zamur and Andrade, *supra* note 190. Experts also suggested that a compilation had been developed during the present decade, which summarized how CONARE had tackled refugee decisions, including the application of the regional refugee definition in domestic law.

<sup>203</sup> Procuradoria da República no Acre, Inquérito civil n. 1.10.00.000134/2011-90, 25 January 2012. See also discussion in Zamur and Andrade, *ibid*.

With respect to refugee status, Acre's Federal Public Ministry argued that Haitians should be recognized pursuant to the broader refugee criteria (i.e. Article 1(III) of the refugee law) and highlighted reasons why "gross and generalized violations of human rights" prevailed in Haiti and compelled Haitian flight.

In rejecting the requests, a single judge of the Federal Court decided, at first instance, that gross and widespread violations of human rights did not exist in Haiti.<sup>204</sup> The decision also affirmed the exclusive competence of the Federal Government to decide on matters related to immigration and refugee policy. Nonetheless, the decision provides some insights into the court's understanding of when Article 1(III) may be applicable and also references CONARE's consideration of the broader refugee criteria and their applicability to Haitians. The below summary is consistent with information gathered through interviews. The judge stated:

On the case, ... [a UNHCR Protection Officer] wrote: 'The National Committee for Refugees (CONARE) of the Ministry of Justice is the competent body to decide on the recognition of the refugee status in Brazil. During the specific discussion of Haitian cases, in addition to analysing the well-founded fear of persecution, it was necessary that the members of the Committee also examine the broader concept of refugee.

On the broader definition of refugee, three aspects were considered relevant to the application of Section III of Law 9.474/1997: [1] the total inability of action of the State; [2] the lack of lasting peace; and [3] recognition of the international community about the grave and widespread human rights violations in the territory or State. In addition, the applicant should demonstrate that there is a threat to his/her life, safety or freedom. Moreover, another aspect considered was that the concept of refugee from the 1951 Convention does not include the cases of victims of natural disasters, unless these have also well-founded fear of persecution for one of the reasons mentioned by the legislation on refugees. Therefore, CONARE's conclusion is that the protection of persons who cannot return to their country of origin due to natural disasters should be considered in the context of another scenario, beyond the 1951 Convention and the Brazilian Refugee Law.'<sup>205</sup>

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<sup>204</sup> Justiça Federal, Autos n. 723-55.2012.4.01.3000 - Ação Civil Pública - Sentença, Rio Branco - Acre, 14 January 2013.

<sup>205</sup> Ibid, paragraph 38. The decision does not appear to have been appealed.

It is also worth noting here a review of the interpretation and application of the regional refugee definition in 17 Latin American countries, including with fieldwork in Brazil.<sup>206</sup> The study highlighted that the regional refugee definition is infrequently applied in RSD, and cases that could potentially be assessed under the regional refugee definition are instead assessed under complementary forms of protection.<sup>207</sup> With respect to Brazil in particular, the study observed a “practice ... of subsuming recognition according to the regional variant only if status is granted under the Convention grounds.”<sup>208</sup> According to the study, the practice in Brazil and other countries demonstrates that the “task of analysing the objective situations contained in the regional refugee definition is interpreted in a way that contradicts the non-political and humanitarian nature of refugee protection, and strays far from the intention of the drafters of the Cartagena Declaration.”<sup>209</sup> Although the present study did not scrutinize Brazil’s application of the broader refugee criteria under its domestic law more generally, this earlier research is notable and relevant for identifying implications and recommendations.

In May 2017, Brazil’s President sanctioned a new migration law, which entered into force on 21 November 2017.<sup>210</sup> Many noted that the Haitian influx and its lessons created momentum for the adoption of a new migration law and influenced its content.<sup>211</sup> The new law replaced the so-called “Statute of the Foreigner” of 1980,<sup>212</sup> which prevailed at the time of the Haitian influx and did not provide an explicit basis for granting visas or residence for humanitarian reasons.<sup>213</sup> The new law, regarded as embracing a more human rights- and humanitarian-based approach to migration, explicitly permits the grant of humanitarian visas and authorizes the provision of residence permits.<sup>214</sup> However, unlike the administrative framework that was created under the authority of CNIg to address Haitian movements, the approval of three ministries is needed. Article 14, § 3<sup>o</sup> states:

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<sup>206</sup> Reed-Hurtado, *supra* note 185.

<sup>207</sup> *Ibid.*, p. 20.

<sup>208</sup> *Ibid.*, p. 22.

<sup>209</sup> *Ibid.*, p. 20.

<sup>210</sup> Lei No. 13.445 of 24 May 2017, available at: [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2017/Lei/L13445.htm](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2017/Lei/L13445.htm), accessed: September 2018. On entry into force, see e.g. Library of Congress, “Brazil: New Immigration Law Enacted”, Global Legal Monitor, available at: <http://www.loc.gov/law/foreign-news/article/brazil-new-immigration-law-enacted/>, accessed: September 2018.

<sup>211</sup> According to informants in São Paulo, experience and lessons from the Haitian influx led to changes in policies and practice at municipal level in São Paulo.

<sup>212</sup> Lei No. 6.815 of 19 August 1980, previously available at: [http://www.planalto.gov.br/ccivil\\_03/LEIS/L6815.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L6815.htm), accessed: September 2018.

<sup>213</sup> For more on the Statute of the Foreigner and its limitations see e.g. Zamur and Andrade, *supra* note 190; Godoy, *supra* note 170; Pacifico and Ramos, *supra* note 190;

<sup>214</sup> Lei No. 13.445 of 24 May 2017, *supra* note 210, Articles 14 and 30.

Temporary visas for humanitarian assistance may be granted to stateless persons or to the national of any country in situation of serious or imminent institutional instability, armed conflict, disaster of major proportions, environmental disaster, severe violations of human rights or international humanitarian law, or otherwise noted in form of a regulation.<sup>215</sup>

On their face, these mechanisms—the option to grant humanitarian visas for a wide range of reasons and to grant residence—provide a legal pathway to Brazil and access to rights and entitlements for people who may qualify for international protection as refugees as well as those who may not. Informants noted that the new law provides greater scope for addressing situations of mass influx and greater scope for irregular entrants to regularize their status, and thus has the potential to lessen the burden on the refugee system in Brazil.<sup>216</sup>

At the time of the Haitian influx, in contrast to permanent residence for humanitarian reasons, refugee status would have provided, in principle, stronger protection against *refoulement*, access to some humanitarian assistance, and certain family reunification benefits, among other things. At the same time, it would have entailed certain restrictions on travel, particularly to Haiti.<sup>217</sup>

As the preceding discussion demonstrates, by mid-2018, over 100,000 Haitians had received protection through ‘permanent’ residence for humanitarian reasons.<sup>218</sup> Even though the refugee population in Brazil has grown over that period too, from about 4,200 at the end of 2009 to over 10,000 at the end of 2017, only eight refugees were Haitian, and none had been recognized between 2010 and 2015.<sup>219</sup>

In 2015 and 2016, as Brazil experienced an economic downturn, many Haitians left Brazil, transiting and undertaking onward movements within and outside the region to countries such as the United States of America, Mexico, Chile, and others in the Americas. These movements and their regional dynamics and repercussions made headlines around the world, sparking various debates, including on the merits and implications of different forms of protection. In the context of arrests, detention and

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<sup>215</sup> The translation is taken from a UNHCR note for file, on file with the author.

<sup>216</sup> For more on the framework of the new migration law, procedures for temporary visas and residence permits, see e.g. Immigration and Refugee Board of Canada, *supra* note 173.

<sup>217</sup> For a more detailed discussion on the differences in rights and obligations, see Annex on Brazil.

<sup>218</sup> As noted above, at the end of 2015, approximately 43,871 Haitians had received protection based on the first mechanism (authorization to stay) and as at 27 July 2018, approximately 57,664 Haitians had received protection based on the second mechanism (entry and stay) under the older framework. The total number of Haitians protected under both mechanisms is likely to be higher when figures for 2016–2018 under the first mechanism are counted.

<sup>219</sup> UNHCR, *supra* note 81.

deportation of Haitians holding Brazilian permanent residence documents, Brazil has evinced an intention to accept their return, provided it is informed and voluntary.

### **Timeline**

#### **November 2010:**

- Working Group is created within CNIg to consider Haitian arrivals.

#### **Late 2010/early 2011:**

- CONARE transfers first Haitian requests for refugee status to CNIg.

#### **March 2011:**

- CNIg grants permanent residence for humanitarian reasons to first group of 199 Haitians who requested refugee status. Practice continues in ensuing years.

#### **January 2012:**

- CNIg creates a legal pathway to Brazil by permitting the grant of 1,200 visas from embassy in Port-au-Prince. In 2013, quota and process restrictions are lifted.
- Acre's Federal Public Ministry files a public civil action against the Federal Union on Haitian Migration to Brazil.

#### **First months of 2012:**

- CONARE stops accepting Haitian claims for refugee status, but reverses policy stance around the middle of the same year.

#### **November 2015:**

- CONARE, CNIg and Migration Department of Ministry of Justice publish list of approximately 43,871 Haitians who applied for refugee status and received permanent residence for humanitarian reasons from CNIg (authorization to stay).

#### **July 2018:**

- Over 57,664 Haitians have received permanent residence for humanitarian reasons based on permission to enter and stay pursuant to the old migration law.

### *3.2.4. Mexico's Response*

In the aftermath of the 2010 earthquake and resulting disaster in Haiti, Mexico implemented a humanitarian response to permit temporary admission and stay for



certain categories of Haitians. Access to Mexico's RSD system also remained open. Prior to 2010, Haitians had been recognized as refugees, including pursuant to the regional refugee definition. Following the earthquake, it appears that affected Haitians were also recognized in Mexico under the regional refugee definition. This case study discusses how refugee law featured in Mexico's response to Haitian movements following the 2010 earthquake in Haiti, emphasizing the years 2010–2012. Compared to the other three destination State responses discussed in detail in this report, limited access to key informants and information has constrained the depth of the discussion.<sup>220</sup>

Mexico is sometimes characterized as a country of origin, transit and destination for refugees and migrants, but prior to the 2010 earthquake, Haitians had largely used Mexico as a transit point.<sup>221</sup> A census conducted between 2009 and 2010, for the period up until the end of 2009, indicated 733 Haitian residents in Mexico.<sup>222</sup> Of this number, 126 were refugees, a figure that represented 26 per cent of total refugees (490) in Mexico at the time, and the highest of any nationality.<sup>223</sup> UNHCR holds conflicting estimates with a total of 1,200 refugees at the end of 2009, of which Haitians comprised the fourth-highest nationality at 175 refugees and 10 asylum-seekers.<sup>224</sup> The difference is perhaps explained by the possibility that the census figures comprise only refugees who applied for and received residence permits, through a post-recognition administrative process.<sup>225</sup>

Following the 2010 earthquake, a new flow of Haitians arrived in Mexico.<sup>226</sup> During each of 2010, 2011, and 2012, between 2,300 and 2,400 Haitians arrived in Mexico by air alone,<sup>227</sup> whereas in each of the previous three years, Haitian arrivals by air had

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<sup>220</sup> See Annex on Mexico for a more detailed discussion of Mexico's response, including the legal landscape, as well as information on informants. Interviews were carried out in Mexico City between 5 and 8 March 2018. In general, information gathered through informant interviews informs the proceeding discussion.

<sup>221</sup> For more background on Mexico's response to Haitian movements in the aftermath of the earthquake, see e.g. Fagen, *supra* note 165.

<sup>222</sup> Cháves and Cobo, "Extranjeros Residentes en México: Una Aproximación Cuantitativa con Base en los Registros Administrativos del INM", INM, 2012, available at: [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Poblacion\\_Extranjera/ExtranjerosResMex.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Poblacion_Extranjera/ExtranjerosResMex.pdf), accessed: September 2018, pp. 8 and 35.

<sup>223</sup> *Ibid.*, p. 39.

<sup>224</sup> UNHCR, *supra* note 81.

<sup>225</sup> For more background on refugees in Mexico, see e.g. Cobo and Fuerte, "Refugiados en México: Perfiles Sociodemográficos e Integración Social", 2012, available at: <http://www.acnur.org/fileadmin/Documentos/Publicaciones/2013/9167.pdf>, accessed: September 2018.

<sup>226</sup> Statistics provided by the Mexican government are available from: [http://www.politicamigratoria.gob.mx/es\\_mx/SEGOB/Boletines\\_Estadisticos](http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Boletines_Estadisticos), accessed: September 2018.

<sup>227</sup> In 2010, there were 2,316 Haitian arrivals by air to Mexico, in 2011, 2,312 and in 2012, 2,386. See [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2010/BoletinEst2010.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2010/BoletinEst2010.pdf), accessed: September 2018, p. 57; [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2011/Bole](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/Bole)

averaged around 1,440 persons.<sup>228</sup> Information on arrivals by land, disaggregated by nationality, does not appear to be available.

Within the legal architecture in effect at the time, in February 2010, through an instruction issued by Mexico's National Institute for Migration (INM), Mexico specifically authorized entry and stay for Haitians based on humanitarian reasons.<sup>229</sup> An official press release issued by INM in April 2013 stated that as a response to the earthquake in Haiti, INM had implemented temporary measures for the entry and stay of Haitian nationals in coordination with other actors, including the Mexican Commission for Aid to Refugees (COMAR).<sup>230</sup> These measures lasted for a period of 90 days ending on 10 May 2010, and benefited 1,123 Haitians. The measures included the following: (1) the facilitation of entry and stay for relatives of Haitian nationals residing in Mexico; (2) priority attention in migration procedures; and (3) work permits for students.<sup>231</sup>

Many of these Haitians were issued a so-called "FM3" non-immigrant document with an annotation indicating it was issued for humanitarian reasons.<sup>232</sup> The status was valid for a period of one year and permitted work.<sup>233</sup> In principle, the status granted to

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[tinEst2011.pdf](#), accessed: September 2018, p. 57; and

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2012/Boletin2012.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/Boletin2012.pdf), accessed: September 2018, p. 71, respectively.

<sup>228</sup> In 2007, there were 1,325 Haitian arrivals by air, in 2008, 1,645, and in 2009, 1,337. See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2007/BoletinEst2007.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2007/BoletinEst2007.pdf), accessed: September 2018, p. 57;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2008/BoletinEst\\_2008.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2008/BoletinEst_2008.pdf), accessed: September 2018, p. 57;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2009/BoletinEst\\_09.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2009/BoletinEst_09.pdf), accessed: September 2018, p. 57, respectively.

<sup>229</sup> INM, "Oficio Instrucción INM/045/10, Asunto: Medidas Temporales Aplicables para la Internación y Estancia en el País de Extranjeros de Nacionalidad Haitiana", 8 February 2010, on file with author.

<sup>230</sup> INM, "Reitera INM Apoyo a Extranjeros Haitianos Que Cuenten con Requisitos Legales para Ingresar a México", Boletín No. 023/13, 21 April 2013, available at: <https://www.gob.mx/inm/prensa/reitera-inm-apoyo-a-extranjeros-haitianos-que-cuenten-con-requisitos-legales-para-ingresar-a-mexico>, accessed: September 2018.

<sup>231</sup> For more information on migration pathways, see e.g. Fagen, *supra* note 165. See also, Cantor, *supra* note 190.

<sup>232</sup> INM, *supra* note 229; UNHCR Mexico Office's response to questionnaire circulated by author. See also, Fagen, *ibid*.

<sup>233</sup> INM, *supra* note 229. Some were also permitted to study; Fagen, *ibid*, notes that other forms of official assistance was not provided. See also, Sin Fronteras, "Haitianos en México Tras El Terremoto de 2010: Una Experiencia de Trabajo Psicosocial en Situaciones de Emergencia", 2011, available at <https://sinfronteras.org.mx/wp-content/uploads/2017/05/Haitianos-en-Me%CC%81xico-tras-el-terremoto-de-2010.-Una-experiencia-de-trabajo-psicosocial-en-situaciones-de-emergencia.-1.pdf>, accessed: September 2018;

Sin Fronteras, "Situación de la Población Haitiana en México", 2012, available at: [https://www.alainet.org/images/SITUACION%20DE%20LA%20POBLACION%20HAITIANA%20EN%20MEXICO\\_ABR12.pdf](https://www.alainet.org/images/SITUACION%20DE%20LA%20POBLACION%20HAITIANA%20EN%20MEXICO_ABR12.pdf), accessed: September 2018; Loudior, *supra* note 198.

Haitians could be renewed.<sup>234</sup> Informants noted that some Haitians were able to obtain renewals while others reported difficulties, or were unaware of the option, and that discretion and uncertainty permeated the process in different states of Mexico. The following table shows the number of Haitians who received an FM3 non-immigrant document between 2010 and 2012, as well as the number of Haitians who obtained renewals. These numbers may include Haitians who received such a status for reasons unrelated to the earthquake.

**Table 4: FM3 Non-immigrant doc. to Haitians with ‘Humanitarian Reasons’ Annotation**

2010	2011	2012
637 (338 renewals) <sup>235</sup>	179 (572 renewals) <sup>236</sup>	109 (455 renewals) <sup>237</sup>

INM’s 2010 instructions authorizing the execution of specific measures on humanitarian grounds also identified the process to be followed for Haitians who applied for refugee status.<sup>238</sup> The instructions noted that Haitians are required to lodge their applications within 15 days of admission and requested the relevant decision-making bodies to accelerate the RSD process for Haitians, reopen previously abandoned claims upon request, and examine potential *sur place* claims. These specific measures were also to be applied for a period of 90 days.<sup>239</sup> Finally, the instructions required expeditious decisions on requests for authorization to travel to Haiti from previously recognized Haitian refugees.

Mexico acceded to the Refugee Convention in 2000,<sup>240</sup> but its framework would not be incorporated into domestic legislation until 2011.<sup>241</sup> Until then, internal notices and

<sup>234</sup> Ibid.

<sup>235</sup>

See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2010/BoletinEst2010.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2010/BoletinEst2010.pdf), pp. 69 and 77, accessed: September 2018. Presumably, any renewals in 2010 were unrelated to the earthquake.

<sup>236</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2011/BoletinEst2011.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/BoletinEst2011.pdf), pp. 71 and 75, accessed: September 2018.

<sup>237</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2012/BoletinEst2012.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/BoletinEst2012.pdf), pp. 89 and 95, accessed: September 2018.

<sup>238</sup> INM, *supra* note 229.

<sup>239</sup> It seems the administrative instruction stated a period of application of 45 business days beginning on 12 January 2012, which appears to be incorrect.

<sup>240</sup> Mexico made reservations to Article 17(2)(a)-(c) related to wage-earning employment and Article 26 and 31(2) related to freedom of movement. Reservations made to Article 32 were withdrawn in 2014. Mexico has also made an interpretive declaration to Article 1 of the Convention. See UNHCR, “Submission by the United Nations High

instructions issued by INM and COMAR authorized the grant of refugee status pursuant to the Refugee Convention's criteria.<sup>242</sup> Article 42 of Mexico's 1974 General Law on Population<sup>243</sup> authorized the grant of refugee status pursuant to broader refugee criteria, which had been incorporated in 1990, even before Mexico acceded to the international instruments.<sup>244</sup> In essence, the 1974 General Law on Population, its implementing regulations,<sup>245</sup> and internal notices and instructions<sup>246</sup> underpinned the assessment of refugee status and other forms of international protection.

According to informants, in general, in 2010 and earlier, Haitians were being recognized on the basis of the Refugee Convention definition, particularly under the grounds of "membership of a particular social group" and "political opinion". Haitians were also being recognized under the regional refugee definition as reflected in Article 42, including the "other circumstances which have seriously disturbed public order" ground.<sup>247</sup> It also appears that in practice, some Haitians who failed to satisfy the applicable criteria for refugee status may have been granted complementary protection status, which was authorized by an INM instruction.<sup>248</sup>

Up until 2003, UNHCR was responsible for conducting mandate RSD in Mexico, even though COMAR had been established much earlier. Beginning in 2003, COMAR became the key institution on refugee matters. UNHCR remained directly engaged in the RSD process, and was able to participate and provide advice and guidance on the

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Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Mexico," July 2018, available at: <http://www.refworld.org/docid/5b57009a7.html>, accessed: September 2018.

<sup>241</sup> UN News Service, "UN Agency Welcomes Mexico's New Refugee Law", 28 January 2011, available at: <http://www.refworld.org/docid/4d4a52bc2c.html>, accessed: September 2018.

<sup>242</sup> See e.g. INM, "Circular CRM/06/2007" and "Circular CRM/028/2007".

<sup>243</sup> Ley General de Población, available at: [https://legislacion.vlex.com.mx/vid/ley-general-poblacion-42602368?\\_ga=2.209646801.297685283.1536311993-905009517.1536311993](https://legislacion.vlex.com.mx/vid/ley-general-poblacion-42602368?_ga=2.209646801.297685283.1536311993-905009517.1536311993), accessed: September 2018.

<sup>244</sup> Reed-Hurtado, supra note 185, p. 17.

<sup>245</sup> Reglamento de la Ley General de Población, available at: [https://legislacion.vlex.com.mx/vid/reglamento-ley-general-poblacion-43534261?\\_ga=2.242563905.297685283.1536311993-905009517.1536311993](https://legislacion.vlex.com.mx/vid/reglamento-ley-general-poblacion-43534261?_ga=2.242563905.297685283.1536311993-905009517.1536311993), accessed: September 2018.

<sup>246</sup> See e.g. INM, "Circular CRM/04/07, Asunto: Internación o Regularización por Razones Humanitarias", 12 April 2007; INM, "Circular CRM/016/2007, Asunto: Protección Complementaria", 3 July 2007.

<sup>247</sup> See also Talsma, "Human Trafficking in Mexico and Neighbouring Countries: A Review of Protection Approaches", New Issues in Refugee Research, UNHCR, 2012, available at: <http://www.refworld.org/pdfid/5142e3df2.pdf>, accessed: September 2018, p. 18. fn. 137, which confirms that COMAR had granted protection pursuant to the regional refugee definition to asylum-seekers from Haiti (as well as Colombia and Sri Lanka). The study does not disaggregate this information by year or the particular circumstance. The pertinent information was based on an interview carried out with a COMAR official in March 2012.

<sup>248</sup> INM, "Circular CRM/016/2007", supra note 246. For more on complementary protection in Mexico, see e.g. Dicker and Mansfield, "Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia", New Issues in Refugee Research, UNHCR, 2012, available at: <http://www.refworld.org/docid/4fe02d332.html>, accessed: September 2018.

eligibility of individual applicants.<sup>249</sup> With the adoption of a domestic refugee law in 2011, the practice of RSD also changed. COMAR has remained responsible for assessing and determining first instance claims and appeals related to refugee status and complementary protection. However, UNHCR’s direct engagement and ability to advise on individual applications stopped.

As is evident from Table 5 below, in the years immediately before the 2010 earthquake, the number of Haitians applying for refugee status was relatively high. Haitian applications for refugee status reduced noticeably between 2010 and 2012 and have remained lower than 2009 levels up until a surge in 2016 and 2017. Informants surmised a range of reasons for the fewer applications for refugee status from Haitians in the year of, and following, the earthquake in Haiti. Some noted that as the Mexican government provided alternative mechanisms to access territory and permit stay, refugee status was unnecessary. Many perceived that Haitians were largely interested in transiting through Mexico, as a means to access the United States. They suggested that substantial numbers of Haitians who received FM3 documents left Mexico. Others perceived that Haitians were privy to limited, uneven, and inaccurate information about their ability and eligibility to access refugee protection. In this sense, the possibility of claiming refugee status was “invisible”, a feature which according to some, also reflected the standing of key refugee institutions such as COMAR and UNHCR at the time. Yet others explained that while it was initially possible to renew the FM3 document, renewals subsequently became more difficult. Moreover, by the time some Haitians sought to access the refugee system, the application deadlines had passed.

**Table 5: Applications for Refugee Status and Decision Points<sup>250</sup>**

<b>Year</b>	<b>Applied</b>	<b>Recognized</b>	<b>Rejected</b>	<b>Abandoned or Withdrawn</b>	<b>Complementary Protection</b>	<b>Pending</b>

<sup>249</sup> For more information on this process, see Annex on Mexico.

<sup>250</sup> Figures based on UNHCR Mexico Office’s response to questionnaire circulated by author. Figures for 2013–2017 have been corroborated and are available at:

[https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS\\_2013\\_A\\_4TO\\_TRIMESTRE\\_2017.pdf](https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf), accessed: September 2018. Recognition figures for 2009, 2010, 2011 and 2012 are available at:

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2009/BoletinEst\\_09.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2009/BoletinEst_09.pdf), p. 79;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2010/BoletinEst2010.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2010/BoletinEst2010.pdf), p. 102;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2011/BoletinEst2011.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/BoletinEst2011.pdf), p. 100; and

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2012/BoletinEst2012.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/BoletinEst2012.pdf), p. 125, respectively, all accessed: September 2018.

2008	64					
2009	65	25				
2010	39	16				
2011	20	12				
2012	8	3				
2013	14	1	8	5	0	
2014	25	0	20	5	0	
2015	16	0	13	3	0	
2016	47	7	16	23	0	1
2017	436	0	15	48	0	373

In January 2011, Mexico enacted a specific law on refugees—the Law on Refugees and Complementary Protection (LRCP)<sup>251</sup>—which aligned Mexico’s domestic framework more closely with the architecture of the Refugee Convention and incorporated INM instructions issued up to that point. Article 13 provided three bases for recognition as a refugee. It incorporated, in general terms, the inclusion criteria in the Refugee Convention, adding gender as a ground for persecution. It captured the regional refugee definition and it explicitly referenced recognition *sur place*. In addition, the law permitted the grant of complementary protection to those who failed to satisfy the refugee definition in Article 13.<sup>252</sup> Article 26 indicated that recognition of refugee status should be undertaken on an individual basis, but provided scope to undertake a group-based approach in contexts where a mass influx of persons satisfying the refugee definitions in Article 13 produced a substantial increase in applications for refugee status. A 2014 modification to the LRCP changed the title to the Law on Refugees, Complementary Protection and Political Asylum (LRCPPA), but did not alter the provisions discussed in this report.<sup>253</sup>

A request to COMAR to obtain information on the grounds and reasons pursuant to which Haitians were recognized between 2006 and 2017, and particularly between 2010 and 2012, has not furnished results.<sup>254</sup> Cantor’s earlier research indicates that, “Mexico

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<sup>251</sup> Ley Refugiados y Protección Complementaria (LRCP), available at:

<http://www.acnur.org/fileadmin/Documentos/BDL/2010/8150.pdf?file=fileadmin/Documentos/BDL/2010/8150>,

accessed: September 2018.

<sup>252</sup> Ley Refugiados y Protección Complementaria, *ibid*, Article 28. For more on complementary protection in Mexico, see e.g. Dicker and Mansfield, *supra* note 248.

<sup>253</sup> Ley Sobre Refugiados, Protección Complementaria y Asilo Político (LRCPPA), available at: [https://www.gob.mx/cms/uploads/attachment/file/211049/08\\_Ley\\_sobre\\_Refugiados\\_Proteccion\\_Complementaria\\_y\\_Asilo\\_Politico.pdf](https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados_Proteccion_Complementaria_y_Asilo_Politico.pdf), accessed: September 2018. The LRCPPA largely maintained the framework under the LRCP, but added provisions related to political asylum. Other normative documents related to refugees in Mexico are available at: <https://www.gob.mx/comar/documentos/marco-juridico-en-materia-de-refugiados>, accessed: September 2018.

<sup>254</sup> In the past, COMAR has responded to a public request which sought information on the grounds upon which refugee status was recognized between 2013–2017. This request did not relate to a specific nationality, however.

... recognized some asylum claims from Haitians fleeing zones affected by the earthquake ... [based on other circumstances which have seriously disturbed public order] due to the lack of protection and increased insecurity faced by these individuals.”<sup>255</sup> This is consistent with information gathered through interviews with former COMAR officials.

It appears that in the aftermath of the earthquake in Haiti, COMAR had discussions on how to assess Haitian claims in light of refugee criteria, including how to apply the regional refugee definition’s “other circumstances which have seriously disturbed public order” ground. COMAR’s consideration and efforts included reaching out to key academic experts in the refugee field. Prompting these overtures was the recognition that institutions in Haiti were unable to function and to support and protect people: even if humanitarian assistance was provided by various actors, the protection and security environment for Haitians was precarious, chaotic and had certainly been negatively affected by the impacts of the earthquake.

Former COMAR officials indicated that assessing claims within the criteria of the Refugee Convention was difficult because Haitians were suffering from serious psychosocial harms and struggling to articulate coherent claims.<sup>256</sup> In this context, they also reflected that UNHCR guidance was held in high regard and consulted regularly when conducting RSD. The suggestion was made that specific guidance and advice explaining how Haitians might have satisfied the definition in the Refugee Convention or broader refugee criteria, in light of evolving conditions in Haiti after the earthquake, would have enhanced the technical capacity of COMAR personnel, particularly given the uncommon nature of the necessary analysis.

Informants reflected on the conditions that arose in Haiti in the aftermath of the earthquake and their relevance for grounding refugee claims.<sup>257</sup> They opined that in general, a ‘natural’ disaster *per se* could not ground claims in refugee status, but acknowledged that in principle, the impacts and consequences of a disaster may do so, including, and perhaps particularly, based on broader refugee criteria. In this context, and with respect to the conditions in Haiti, informants mentioned the nature of the chaos and social disruption following the earthquake. They also referenced the significantly limited capacity of the government and key institutions in Haiti to protect

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<sup>255</sup> Cantor, *supra* note 190, p. 18. Based on correspondence with UNHCR Mexico Office, it seems that information on file with civil society at Ibero-American University in Mexico City also suggests that at least two Haitians were recognized in 2011 on the grounds of “other circumstances which have seriously disturbed public order”.

<sup>256</sup> On psychosocial needs of Haitians, see e.g. Sin Fronteras, “Haitianos en México Tras El Terremoto de 2010: Una Experiencia de Trabajo Psicosocial en Situaciones de Emergencia”, *supra* note 233.

<sup>257</sup> Discussion with former representatives of COMAR and representative of INM.

Haitians from insecurity and violence, as well as to provide food and other essential services. The suggestion was that prior to the earthquake, Haitians had been recognized pursuant to the regional refugee definition's "other circumstances which have seriously disturbed public order" ground, and arguably, the chaos, social disruption and government incapacity in the aftermath of the earthquake heightened disruptive conditions. As noted earlier, this ground had been used to recognize Haitians affected by the earthquake. Where decisions have the capacity to create precedent, informants also noted consistency and coherence as being fundamental to the robust implementation of the regional refugee definition.<sup>258</sup>

It is worth noting here that during the Cartagena +30 process and the adoption of the Brazil Declaration and its Plan of Action, Mexico may have made statements that reflect and therefore reinforce the views stated above.<sup>259</sup> Efforts to identify official statements or records of the same, however, have proved unfruitful.<sup>260</sup> That said, some evidence of Mexico's perspective could perhaps be gleaned from the Memories of the Thirtieth Anniversary of the Cartagena Declaration on Refugees.<sup>261</sup> The theme of "Climate Change, Natural Disasters and Cross-Border Movement" featured strongly in the Mesoamerica subregional consultation in Managua in July 2014. In the conclusions and recommendations stemming from that meeting, the Memories state that:

the delegation of Mexico mentioned that during the regional consultation of the *Nansen Initiative* ... there was wide agreement that it is not necessary to create new legal instruments to assist persons displaced across borders due to climate change and natural disasters and that it was agreed to strengthen existing cooperation schemes in the areas of prevention, coordination and mitigation.<sup>262</sup>

More recently, a quality assurance initiative in Mexico has resulted in the publication in 2017 of a Manual on Procedures and Criteria for Determining Refugee Status in Accordance with Mexico's LRCPPA.<sup>263</sup> This Manual has been used for training purposes but not as a tool of compulsory application for RSD procedures. One chapter focuses on recognition of refugee status according to the regional refugee definition. Its four subsections discuss in turn the definition, the application of the definition, criteria for RSD, and State protection and internal flight alternative. In the subsection on criteria for

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<sup>258</sup> Ibid.

<sup>259</sup> Based on discussion with INM informant.

<sup>260</sup> A request by UNHCR Mexico Office to Mexico's Ministry of Foreign Affairs has not received a response.

<sup>261</sup> UNHCR, "Memories of the Thirtieth Anniversary of the Cartagena Declaration on Refugees, 2015, available at: <http://www.refworld.org/docid/568cf7e74.html>, accessed: September 2018.

<sup>262</sup> Ibid., p. 170.

<sup>263</sup> UNHCR Mexico has been keenly engaged in this process.



RSD, the Manual notes that Article 4(XI) of the regulation relating to the domestic refugee law defines “other circumstances which have seriously disturbed public order” as “[s]ituations which seriously alter public peace in the country of origin or habitual residence of the applicant and which are the result of acts attributable to man.”<sup>264</sup> In commentary, the Manual provides that:

... the notion of ‘public order’ does not have a universally accepted definition, but can be interpreted in the context of this definition of refugee as a reference to peace and security as well as the internal and external stability in the State and society, and the normal functioning of state institutions based on the rule of law and human dignity. This can happen in times of conflict and/or peace.

In the jurisprudence of the Inter-American Court of Human Rights, ‘circumstances that have disturbed public order’ has been defined in part, with reference to the approach of States to take measures that suspend and/or limit their human rights obligations in cases of declaration of a state of emergency. However, a declaration of a state of emergency should not be seen as a prerequisite for the existence of ‘circumstances which have disturbed public order’, although it would normally be indicative in such a situation.

The inclusion of the term ‘other’ provides some flexibility to ensure protection from circumstances that either fall below the violence threshold of the other four situations reflected in the Cartagena refugee definition or do not coincide with the nature of the other situations.

Persons forced to leave their country of origin due to natural or ecological disasters are not, strictly speaking, protected under this definition of refugee contained in section II of article 13 of the Law on Refugees, Complementary Protection and Political Asylum.<sup>265</sup>

The reference to ‘natural’ disasters in domestic commentary on the regional refugee definition and reflections on the need for coherent and consistent implementation of broader refugee criteria, particularly in precedent-setting situations, suggests that there is a demand for better guidance and support to States on these issues.

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<sup>264</sup> Reglamento de la Ley Sobre Refugiados y Protección Complementaria, available at: [https://www.gob.mx/cms/uploads/attachment/file/211032/19\\_Reglamento\\_de\\_la\\_Ley\\_sobre\\_Refugiados\\_y\\_Proteccion\\_Complementaria.pdf](https://www.gob.mx/cms/uploads/attachment/file/211032/19_Reglamento_de_la_Ley_sobre_Refugiados_y_Proteccion_Complementaria.pdf), accessed: September 2018. These regulations were adopted under the LRCP, but continue to be applicable under the LRCPPA.

<sup>265</sup> Internal citations omitted.

In 2016 and 2017, the movement of Haitians into and through Mexico intensified. Some of these Haitians had previously travelled and lived in other countries in the Americas, including Brazil, but had since travelled onwards and northward.<sup>266</sup> Others had left in the aftermath of the devastation wreaked by so-called “hurricane Matthew”.<sup>267</sup> Many made their way through Mexico and into the United States, benefiting in some cases from the grant of an “oficio de salida” upon entering Mexican territory, which comprised a 20-day waiver period in which to leave Mexican territory. Large numbers were also detained.<sup>268</sup> In tune with changes in United States’ policies, the number of Haitians ‘stranded’ in Tijuana and Mexicali eventually grew, overwhelming available capacity in shelters.<sup>269</sup> They became dependent, at least initially, on civil society and community actors for alleviating needs, including shelter and basic subsistence.<sup>270</sup> Mexico’s refugee framework perhaps also experienced the reverberations of these circumstances. In 2016, as shown in Table 5, Haitians claiming refugee status grew to 47 applications, the highest number of claims since 2009. In 2017, a record 436 applications for refugee status were lodged.

In 2011, in addition to the adoption of a refugee law, Mexico also adopted a new migration law, which included measures relating to refugees, asylum-seekers and beneficiaries of complementary protection.<sup>271</sup> In 2013, this law was reformed and

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<sup>266</sup> See also, e.g. Amnesty International, “Urgent Action: Hundreds Stranded on Mexico–US Border at Risk”, 10 October 2018, available at: <https://www.amnesty.org/download/Documents/AMR4149632016ENGLISH.pdf>, accessed: September 2018.

<sup>267</sup> Ibid.

<sup>268</sup> In 2015, 77 Haitians were detained in the context of migration. In 2016, the migratory detention numbers soared to 17,078. In 2017, they fell to 1,190. Based on government statistics, of those detained, 30, 21 and 27, respectively returned voluntarily to Haiti. See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2015/Boletin\\_2015.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2015/Boletin_2015.pdf), pp. 134 and 147, accessed: September 2018;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2016/Boletin\\_2016.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2016/Boletin_2016.pdf), pp. 136 and 147, accessed: September 2018; and

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2017/Boletin\\_2017.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2017/Boletin_2017.pdf), pp. 136 and 146, accessed: September 2018, respectively.

<sup>269</sup> See also Amnesty International, *supra* note 266; Comisión Nacional de los Derechos Humanos (CNDH), “Solicitud CNDH Más Medidas Cautelares Ante El Gran Flujo de Personas Africanas y de Haití, Que ha Rebasado la Capacidad de Albergues y Recintos Que Ofrecen Ayuda Humanitaria en Tijuana y Mexicali”, Comunicado de Prensa DGC/256/16, 8 October 2016; CNDH and El Colegio de la Frontera Norte, “Migrantes Haitianos y Centroamericanos en Tijuana Baja California, 2016–2017: Políticas Gubernamentales y Acciones de la Sociedad Civil”, 2018, available at: <http://www.cndh.org.mx/sites/all/doc/Informes/Especiales/Informe-Migrantes-2016-2017.pdf>, accessed: September 2018.

<sup>270</sup> Ibid.

<sup>271</sup> Ley de Migración, available at:

[https://www.gob.mx/cms/uploads/attachment/file/211048/07\\_Ley\\_de\\_Migraci\\_n.pdf](https://www.gob.mx/cms/uploads/attachment/file/211048/07_Ley_de_Migraci_n.pdf), accessed: September 2018. See also Reglamento de la Ley de Migración, available at:

[https://www.gob.mx/cms/uploads/attachment/file/211033/18\\_Reglamento\\_de\\_la\\_Ley\\_de\\_Migraci\\_n.pdf](https://www.gob.mx/cms/uploads/attachment/file/211033/18_Reglamento_de_la_Ley_de_Migraci_n.pdf), accessed: September 2018, which also contains provisions relevant to refugees and asylum-seekers.

specifically included the authority to grant a temporary so-called “visitor card for humanitarian reasons” (Tarjeta de Visitante por Razones Humanitarias) to, *inter alia*, asylum-seekers and persons faced with a “humanitarian or public interest reason that makes their access to Mexican territory necessary”.<sup>272</sup> The temporary visitor card allows for a 1-year renewable stay, permits work, and access to free medical services from the government.<sup>273</sup> Informants suggested that some of the changes to the migration law framework were influenced by the Haitian experience.<sup>274</sup> With the refugee system overburdened, in 2017, INM granted 2,797 Haitians visitor cards for humanitarian reasons.<sup>275</sup> Fewer than 10 Haitians had received such cards in each of the previous three years.<sup>276</sup> In this context, it may be fruitful to better understand how the 436 applications for refugee status lodged in 2017 were handled administratively, including whether assessments were made on the merits of the claims.

Arguably, a key difference in the entitlements of refugees and beneficiaries of visitor cards for humanitarian reasons relates to medium- to longer-term certainty. Recognized refugees are able to receive permanent residence in Mexico through INM, which in turn provides a path to naturalization. Certain aspects of the naturalization exam related to language competency and Mexican history are waived for refugees. By contrast, beneficiaries of a visitor card for humanitarian reasons are required to renew their status each year, which can be subject to discretion and other procedural vagaries. Refugees are also able to access specific family reunification procedures. This is in addition to the entitlement to *non-refoulement*. That said, certain movement-related restrictions that are imposed on asylum-seekers do not affect beneficiaries of visitor cards for humanitarian reasons.<sup>277</sup>

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<sup>272</sup> Ley de Migración, *ibid.*, Article 52, fraction 5.

<sup>273</sup> Also based on response from UNHCR Mexico Office to questionnaire circulated by author.

<sup>274</sup> See also Cantor, *supra* note 190, for a more on how the migration framework ascribes to the term “humanitarian” slightly different meanings under different migratory or procedural contexts and on migration law mechanisms and criteria with potential to address admission in the context of nexus dynamics.

<sup>275</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2017/Boletin\\_2017.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2017/Boletin_2017.pdf), accessed: September 2018, p. 124.

<sup>276</sup> Five Haitians in 2014, four in 2015, and six in 2016; See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2016/Boletin\\_2016.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2016/Boletin_2016.pdf), accessed: September 2018; p. 125;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2015/Boletin\\_2015.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2015/Boletin_2015.pdf), accessed: September 2018; p. 124; and

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2014/Boletin\\_2014.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2014/Boletin_2014.pdf), accessed: September 2018. p. 127, respectively.

<sup>277</sup> In addition to informant interviews, this summary is based on UNHCR Mexico Office’s response to a questionnaire circulated by the author, as well as further communication with the Office, including on material yet to be included in UNHCR’s “Help: Mexico” webpage. Since the author’s communication with the Office, it appears that information has been published in Spanish on the webpage. See: <http://help.unhcr.org/mexico/>, accessed: September 2018.

### 3.2.5. Responses of Other Destination States

To gather insights on the responses of other destination States towards Haitian arrivals in the aftermath of the 2010 earthquake and to identify avenues for follow-up and complementary research, a questionnaire was circulated as part of this study to relevant UNHCR operations. A selection of helpful responses is discussed below. Unless otherwise noted, the summaries below are drawn directly from the responses and related follow up exchanges and have not benefited from additional corroboration.<sup>278</sup>

#### *Argentina*

The table below displays the number of Haitian applications for refugee status in Argentina between 2008 and 2017. Disaggregated information reflecting the reasons for recognition by year was not provided.

2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
15	41	46	28	11	52	65	112	294	385

Nonetheless, UNHCR's office in Argentina indicates that according to the information provided by Argentina's National Commission for Refugees (CONARE), out of the 32 Haitian nationals who were granted refugee status between 2010 and 2014:

- Twenty-four were recognized on the basis of family reunification procedures; and
- Eight were recognized under Article 4 of the domestic refugee law, which incorporates the definitions in the Refugee Convention and the Cartagena Declaration.<sup>279</sup> Four had left Haiti following the earthquake.

With respect to the eight recognized Haitians, the questionnaire response provides the following summary based on the technical opinions provided by CONARE:

- Three refugees (one principal applicant and two children) who had left Haiti after the 2010 earthquake were recognized on the basis of "membership of a particular social group". The applicant had expressed that she was unaffected by the earthquake as she was not in the affected areas at the time. Nevertheless, CONARE referred to the fact that the earthquake increased institutional weakness and the high risk of sexual and gender-based violence.

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<sup>278</sup> Other relevant research, which discusses destination States' responses to the cross-border movement of Haitians include, Cantor, *supra* note 190 and Fagen, *supra* note 165.

<sup>279</sup> Ley No. 26.165 de 2006, Ley General de Reconocimiento y Protección al Refugiado, 8 November 2006, available at: <http://www.refworld.org/docid/46d559e92.html>, accessed: September 2018.

- One case was recognized on the basis of persecution for reasons of imputed “political opinion”. The technical report on this case mentioned the consequences of the earthquake as a part of the country-of-origin information, which focused on the general context of violence and political instability, but this issue was not taken up in the eligibility opinion.

In many cases, CONARE recommended that rejected Haitians be granted temporary residence permits for humanitarian reasons in accordance with the applicable migration law in Argentina.<sup>280</sup> The attendant decree requires that for the issuance of humanitarian residencies, the migration authority consider non-refugee persons who are in need of international protection and that are covered by the principle of *non-refoulement* and who are unable to regularize their status through other means.<sup>281</sup> Temporary residencies are granted for two years, permit work and access to social and other basic services. After two years, beneficiaries may request a change of status to permanent residence upon meeting specific requirements. Since the beginning of 2018, CONARE has ceased to include this recommendation.

In Argentina, UNHCR participates as a member of CONARE, with a right to express its views, but not to vote. In this sense, UNHCR participated in the analysis of individual cases. The response also suggests Haitian claimants who left pre-earthquake (e.g. during 2004–2006) had been granted status in the aftermath of the earthquake, under the broader refugee criteria due to generalized violence in Haiti.

### *Chile*

The following table shows the number of new Haitian applications for refugee status in Chile between 2008 and 2017. Of the applications decided during each of the years, which was no more than one during most, except for 2008 (three decisions) and 2010 (five decisions), only one Haitian was recognized as a refugee, which was in 2010. It seems this claim did not relate to the earthquake or the claimant was not in Haiti at the time.

2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
17	3	1	2	0	0	0	0	23	8

<sup>280</sup> Ley No. 25.871 de 2004, Política Migratoria Argentina, 21 January 2004, available at: <http://www.refworld.org/topic/50ffbce5124,50ffbce513f,401fcb74,0,,,ARG.html>, accessed: September 2018.

<sup>281</sup> Decreto No. 616/2010 - Reglamentación de la Ley de Migraciones No. 25.871 y sus Modificatorias, available at: <http://www.refworld.org/docid/4be2de512.html>, accessed: September 2018.

In the aftermath of the earthquake, many Haitians were granted a form of temporary visa, pursuant to Chile's migration law, which permitted beneficiaries to work and access health, education and other basic services, but did not protect against *refoulement*. It appears that the relevant UNHCR operation also provided advice to Chilean authorities within the migration department and the refugee commission, consistent with the letters issued by UNHCR and OHCHR in February 2010 and June 2011.<sup>282</sup>

### *Colombia*

Between 2008 and 2017, only four Haitians had applied for refugee status in Colombia, three in 2011 and another in 2013. One was recognized as a refugee. The only available additional information on the individual case analysis and the decision maker's rationale was as follows:

The (eligibility) Commission, upon reviewing the case ... analysed the applicant's state of vulnerability. His absolute lack of protection and vulnerability, in addition to his conditions in Haiti previous to the natural disaster, and his form of arrival to Colombian territory, allow consideration that although no persecution within the terms of the 1951 Convention or Decree 4503 of 2009 has occurred, there is a situation of a strictly humanitarian nature. Taking this into account, the Commission recommends that the Minister of Foreign Affairs recognize [the applicant's] refugee status.

At the domestic level, UNHCR's advice and advocacy at meetings with authorities echoed the letter circulated to permanent missions in February 2010. The advice occurred on the operation's own initiative and upon request for guidance by the authority responsible for RSD, including requests for technical advice on the applicability of the refugee definition. The reference to "a situation of a strictly humanitarian nature" is conspicuous; it reflects the language used in the 2010 letter. UNHCR's regional legal unit also supported the operation to explain that the regional refugee definition, which was incorporated into domestic law at the time, does not protect individuals fleeing disasters, but in the context of disaster situations of grave disruption of public order, generalized violence etc. may arise or become exacerbated.

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<sup>282</sup> As at mid-2018, relevant policy changes are also taking place in Chile. It seems Haitians are now required to apply for a tourist visa to enter Chile and a so-called "humanitarian visa" has been introduced for family reunification. For more information, see: <https://chile.gob.cl/chile/blog/haiti/requisitos-para-ciudadanos-haitianos-que-quieran-viajar-a-chile>, accessed: September 2018.

## Peru

The table below shows Haitian applications for refugee status in Peru and the substantial increase after the earthquake (first line). It also displays the number of Haitian claimants recognized during each of the years between 2008 and 2017, although recognition in a given year does not necessarily correspond to an application in the same year (second line).<sup>283</sup>

2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
16	1	10	85	84	19	14	7	54	6
NA	NA	1	5	1	4	5	4	20	1

The response to the questionnaire (which in this case was from the government of Peru) suggests Haitians affected by the earthquake were recognized pursuant to the Refugee Convention criteria as implemented in domestic law, and largely on the basis of “political opinion” or “membership of a particular social group”. The response notes that lack of public order and institutional capacity meant victims of gangs were unprotected and defenseless. Cantor reinforces that Haitians were recognized, not because of the earthquake directly but because of a “well-founded fear of persecution [from] non-State actors that arose from the vacuum of governmental authority after the earthquake in Haiti.”<sup>284</sup> Haitian claimants were not, however, recognized pursuant to the broader refugee criteria in the Cartagena Declaration, even though the regional refugee definition is incorporated into the applicable domestic law.<sup>285</sup> Finally, it also appears that the two letters issued by UNHCR and OHCHR in February 2010 and June 2011, informed Peru’s responses towards Haitians and the questionnaire response notes that Peru respected *non-refoulement*.

## Panama

In Panama, Haitian applications for refugee status have also been minimal, although the numbers increased in 2015 and 2016. Panama has not incorporated the regional refugee definition into domestic law. As is evident from the table below, eight applications were recorded in 2011, one in 2012, but none in 2010. Recognition rates were expressed to be extremely high, although a number of caveats were noted on the quality and accuracy of the statistics.

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<sup>283</sup> Data on applications abandoned, withdrawn, or otherwise undecided were not requested.

<sup>284</sup> Cantor, *supra* note 190, p. 17.

<sup>285</sup> Ley No. 27.891, 20 December 2002, available at:

<http://www.acnur.org/fileadmin/Documentos/BDL/2003/1938.pdf?file=fileadmin/Documentos/BDL/2003/1938>, accessed: September 2018, Article 3(b).

2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
0	0	0	8	1	2	0	36	17	4

Of three decision resolutions available to and examined by UNHCR colleagues overseeing operations in Panama, one Haitian was found to be a refugee *sur place*. With regard to this claim, the assessment presented by the National Office for the Care of Refugees (ONPAR) to the inter-ministerial body in charge of issuing decisions, states the individual applicant meets the criteria of the Refugee Convention. Questions were raised, however, regarding the quality of the assessment and the reasoning grounding the recognition. Cantor also notes that a small number of Haitian students who applied for asylum were recognized as refugees “due to the risks in return deriving from the ensuing chaos in Haiti rather than on the basis of the disaster itself.”<sup>286</sup> Pursuant to its migration law, and based on discretionary humanitarian reasons, Panama granted residence permits valid for two years to Haitians affected by the earthquake. Some Haitians were also able to benefit from work permits.

### Canada

In Canada there is evidence to suggest that the impact of the earthquake was taken into account in the assessment of refugee claims. In one example, the Refugee Board of Canada recognized the refugee status of a claimant who had been outside Haiti since 2002 and filed a supplementary narrative in September 2010 in which she stated a fear of sexual violence, including rape in Haiti. The claimant was regarded as facing a well-founded fear of persecution based on her “membership of a particular social group” on the basis of the claim in her supplementary narrative. The analysis to the decision states that “[d]ocuments also indicate that since the January 2010 earthquake many women in Haiti have become even more vulnerable to rape, kidnapping, and other criminal acts” and “evidence demonstrates that women appear to be bearing the brunt of the serious problems and unrest in Haiti following the earthquake.” In the analysis leading to a finding that there is no state protection available to the claimant, the decision quotes a report which “points out that ‘protection mechanisms for women and girl victims of sexual violence were deficient before the earthquake, now they are totally absent.’”<sup>287</sup>

<sup>286</sup> Cantor, *supra* note 37, p. 37; Cantor, *supra* note 190, p. 17.

<sup>287</sup> See *X (Re)*, 2011, *CanLII 26575 (CA IRB)*, available at:

<https://www.canlii.org/en/ca/irb/doc/2011/2011canlii26575/2011canlii26575.html?searchUrlHash=AAAAAQAYSGFdGkgZWFydGhxdWFrZSByZWZ1Z2VIAAAAAAE&resultIndex=1>, accessed: September 2018. See also, *X (Re)*, 2016

*CanLII 106941 (CA IRB)*, available at:

<https://www.canlii.org/en/ca/irb/doc/2016/2016canlii106941/2016canlii106941.html?searchUrlHash=AAAAAQAYSGFdGkgZWFydGhxdWFrZSByZWZ1Z2VIAAAAAAE&resultIndex=12>, accessed: September 2018.



Undertaking research on Canada's grant of refugee protection to Haitian claimants following the 2010 earthquake may be a fruitful area for further research.<sup>288</sup>

### *France*

In France and in French departments in the Americas, Haitian claims were well above 1,500 in each of the years 2010–2012 and it appears that many claimants referred to the consequences of the 2010 earthquake, including insecurity, as well as economic and social consequences in applications. In 2010, 9.7 per cent of Haitian claims were recognized (111 under the Refugee Convention and another 41 based on subsidiary protection). In 2011, 6.3 per cent of claims were recognized (78 based on the Refugee Convention and 39 based on subsidiary protection). The recognition rate is much lower in 2012, at 3.5 per cent.<sup>289</sup> In addition, Cantor notes that in the French Antilles and Guyana, more than half of all Haitian asylum claimants between 2010 and 2015 were granted subsidiary protection and that between 2010 and 2012, the principal reasons related to the economic, social and security consequences of the earthquake.<sup>290</sup> As with the Canadian cases, it may be worthwhile to delve deeper into an examination of the cases that were recognized by France.

## IV. OBSERVATIONS AND IMPLICATIONS

This Section sets out 12 observations and their implications for efforts to strengthen the implementation of international protection based in refugee law in the context of nexus dynamics. The observations and implications draw on the responses of Kenya and Ethiopia to Somali movements in 2011–2012 and Brazil and Mexico to Haitian movements in 2010–2012.

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<sup>288</sup> In addition, it is worth noting that in recognition of the fact that the risks of gender-based violence and in particular sexual violence were exacerbated in post-earthquake Haiti due to heightened impunity and limited State protection, *inter alia*, UNHCR advocated for a range of solutions including in-country resettlement. Through such a programme, it appears that cases of single-female headed households were referred to Canada; tens of cases comprising both adults and children were ultimately resettled to Canada through the in-country programme and are considered in statistical compilations as 'Government Assisted Refugees'. These cases related to IDP women and girls at risk, and particularly those who had been deemed acutely vulnerable because of trauma and severe sexual and gender-based violence (SGBV) and for whom solutions within Haiti were unavailable or unpalatable.

<sup>289</sup> For more on France's recognition of Haitians on these bases, see e.g. <https://www.ofpra.gouv.fr/fr/l-ofpra/nos-publications/rapports-d-activite> and the reports for the years 2010, 2011 and 2012, accessed: September 2018.

<sup>290</sup> Cantor, *supra* note 52, p. 51, referencing a paper by Audebert, "The Recent Geodynamics of Haitian Migration in the Americas: Refugees or Economic Migrants?", *Revista Brasileira de Estudos de População*, 2017, Vol. 34, No. 1.

#### **4.1. Use of Refugee Law Frameworks**

##### **Refugee law frameworks played primary or secondary roles in international protection.**

In the four destination States—Kenya, Ethiopia, Brazil and Mexico—refugee law frameworks formed a component of the response to cross-border movements in the context of nexus dynamics, but the way in which they were used varied.

In Kenya and Ethiopia, refugee law frameworks played a primary role in the provision of international protection to Somalis who arrived in 2011–2012. Long-standing, large-scale influxes of Somalis (and other nationalities) meant that systems and structures to recognize refugee status in the context of mass influxes and provide international protection, albeit within an encampment architecture, were well established in Kenya and Ethiopia.

Refugee law frameworks played a secondary role in Brazil and Mexico. In Brazil, the applicable refugee and migration laws were considered limited in their capacity to respond to the arrival of Haitians. Brazil's exceptional response towards Haitians was based on a special administrative framework authorized by CNIg, a body largely responsible for labour-related migration. Nonetheless, Brazil used its refugee law framework as an interim measure to permit irregular Haitian entrants to regularize their status. Haitian asylum-seekers were permitted to work, and, in principle, to access certain government services. Mexico fashioned an intervention within the parameters of its then-applicable migration framework, which permitted admission and temporary stay for Haitians. Mexico also continued to allow Haitians access RSD procedures.

There were, of course, important differences in the nexus dynamics and social, political, economic, environmental, security, human rights and humanitarian conditions in Somalia and Haiti during the applicable periods under consideration in this report. Admittedly, the conditions in each country supported different scales and types of claims for refugee status.

##### **Implications:**

- The other legal and policy options available to States may be relevant to how and when refugee frameworks are used in response to cross-border movements in the context of nexus dynamics.
- Refugee law frameworks may form part of a 'toolbox' of options, when multiple frameworks are available to provide international protection.

- When only one framework (refugee, migration, other) is operational, the potential to tailor appropriate and differentiated international protection responses is constrained.
- In regions with pre-existing conflict and histories of refugee influxes, destination States may have normative and institutional frameworks and established practices for admitting and recognizing refugees. In this context, mischaracterization or misunderstanding of root causes and human factors underpinning flight may be a particular challenge.
- In other destination States, such frameworks and practice may be limited. In this context, barriers to effective access to RSD procedures and refugee protection may be a challenge.

#### **4.2. Access to RSD Procedures**

##### **Access to, and availability of, RSD procedures, varied.**

Effective access to RSD procedures varied in the destination States. As noted above, in Kenya and Ethiopia, pre-existing frameworks for recognition of refugee status underpinned international protection for Somalis. In general, both countries maintained access to RSD mechanisms at the height of the crisis. Long-standing and well-worn pathways from Somalia to Kenya and Ethiopia, and ethnic and cultural ties between communities that straddle border regions, meant there was little need for targeted information campaigns on accessing RSD mechanisms. However, from late 2011, access to RSD procedures was curtailed in the Dadaab camps, and since mid-2015, Somali asylum-seekers cannot, in general, access RSD procedures.

Brazil and Mexico used chiefly other frameworks to respond to Haitian movements. Although over 43,000 Haitians applied for refugee status in Brazil between 2010 and 2015, they were not interviewed by CONARE, raising questions about effective access to RSD procedures. During this period, not a single Haitian was recognized as a refugee. It appears that approximately 6,000–8,000 Haitians who applied for refugee status in Brazil never received an interview or a resolution to their request. For some months in early 2012, Brazil also stopped accepting claims for refugee status on the basis that Haitian claims were manifestly unfounded. Mexico maintained access to its RSD procedures in the aftermath of the earthquake, even as it provided entry and stay through other migratory mechanisms. However, the number of Haitians who applied for refugee status between 2010 and 2012 was noticeably lower than in previous years, in a context where Haitian arrivals by air, for example, were much higher. Concrete conclusions regarding effective access to RSD procedures cannot be drawn from this data, as a range of unrelated factors may have influenced the lower application figures.

However, informants noted concerns regarding the availability and accuracy of information provided on RSD procedures.

### **Implications:**

- When refugee law frameworks are secondary to other interventions used to support admission and stay in the context of nexus dynamics, directed efforts may be needed to promote effective access to RSD procedures. If timely, targeted and accurate information on RSD procedures is unavailable, the priority accorded to other interventions may become entrenched such that refugees cannot effectively access international protection based in refugee law. Administrative interventions may become necessary to minimize barriers to access and to promote the potential to recognize refugees.
- Guidance on procedures for handling claims for refugee status may be important, particularly when refugee claims are not examined or finally determined, but are resolved through migration or other frameworks.

### **4.3. Group vs. Individualized Approaches**

**States favoured the use of mechanisms that permitted group- or category-based interventions.**

Somalis in Kenya and Ethiopia were recognized predominantly through a group-based approach to RSD. With histories of large-scale influxes overwhelming capacity, group-based approaches to recognition of refugee status were an enduring practice in both countries. Arguably, this architecture permitted Kenya and Ethiopia to accommodate the substantial numbers of Somalis who arrived on their territories in 2011–2012. Since April 2016, however, Somali asylum-seekers are subject to an individual approach to RSD in Kenya, while Ethiopia maintains the *status quo*.

At the end of 2009, both Brazil and Mexico had relatively small populations of refugees. RSD was conducted largely through individual approaches. Brazil's domestic refugee law does not provide an explicit basis for granting status through a group-based approach, meaning an explicit mechanism to mitigate the burden of RSD in the context of large-scale influxes does not exist. The mechanism Brazil instituted to regularize the status of the thousands of Haitians who arrived on its territory was arguably a group-based approach, with limited administrative burdens. When granting permanent residence for humanitarian reasons to 'batches' of Haitians transferred by CONARE, CNIg did not conduct individual interviews or detailed assessments. Informants also

emphasized how the newly adopted 2017 migration law could address mass influxes and regularize the status of irregular entrants and thereby mitigate the burden on the RSD system in Brazil. Mexico's migratory interventions were also targeted towards particular categories of Haitians. At the time of the 2010 earthquake in Haiti, an individual approach to RSD was the norm in Mexico. An explicit legal basis for a group-based approach appears to have been introduced in 2011 with the adoption of a specific refugee law. While access to RSD in Mexico remained open, Haitian applications do not appear to have reached a point at which capacity was overwhelmed.

### **Implications:**

- When cross-border movements in the context of nexus dynamics are large scale, or are relatively so compared to historical practice, States may favour mechanisms that facilitate the timely and efficient grant of international protection, with minimal administrative burdens.
- For States to consider refugee law frameworks within efforts to fashion appropriate responses to large-scale movements in the context of nexus dynamics, functional, group-based approaches for undertaking RSD may be necessary. The absence of such mechanisms may incline States towards other frameworks when political will exists to accommodate admission and stay.
- Understanding why States choose to pursue other frameworks to support admission and stay (including how the viability of extant refugee law frameworks and RSD procedures are considered) may provide insights on necessary policy and operational reforms.

## **4.4. Recognition under the Refugee Convention**

### **A small number of claims were recognized under the Refugee Convention.**

When refugee law frameworks were used, a relatively small number of claimants were recognized based on the Refugee Convention. However, further data, assessments or decision letters that granted status on the basis of the Refugee Convention were not analysed by this study. This could be another avenue for further research and analysis.<sup>291</sup>

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<sup>291</sup> In Kenya and Ethiopia, field operations provided data on the number of Somalis granted status based on the Convention. In general, it appears that specific decision letters were not provided to these refugees, since they were recognized largely following a registration process. In Brazil, as discussed, Haitians were not recognized as refugees between 2010 and 2015. In Mexico, a request to obtain decision letters has not received a response. In the other country practices discussed, information was gathered through a questionnaire and correspondence only.

From the early 1990s until July 2014, UNHCR was responsible for conducting RSD in Kenya pursuant to its mandate. UNHCR's data suggest that fewer than 100 Somalis in Dadaab were recognized on the basis of the Refugee Convention's criteria in each of 2011 and 2012. In Ethiopia, refugees were recognized under a domestic law that incorporated the definitions in the Refugee Convention and the OAU Convention. UNHCR's data suggest that in 2011, 17 Somalis in the Dollo Ado camps were recognized pursuant to the criteria in the Refugee Convention, but none in 2012.

As noted earlier, between 2010 and 2015, Brazil did not recognize any Haitian refugees. Data on Mexico's recognition of Haitians between 2010 and 2012 could not be obtained. Informants noted that assessing claims under the Refugee Convention definition was difficult as Haitians were suffering from serious trauma and psychosocial harms, and struggled to articulate coherent claims.

### **Implications:**

- The Refugee Convention will continue to be relevant for responses to cross-border movements in the context of nexus dynamics, but its relevance may vary based on the particular characteristics of the nexus dynamics.
- The occurrence of a disaster does not detract from the possibility that pre-existing conditions in the country of origin, including conditions that relate to conflict or violence, may continue to underpin claims pursuant to the Refugee Convention. Marginalized groups who were persecuted prior to a disaster may continue to face pre-existing forms of persecution. Some individuals or groups may be differentially treated in the aftermath of a disaster. Indeed, the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention
- Guidance on the types of claims that may satisfy the Refugee Convention's criteria may facilitate recognition of refugees on this basis. Guidance may be especially important in situations where the most prominent or proximate trigger prompting flight is a disaster. In situations where pre-existing conflict exacerbates the impacts of disasters or adverse effects of climate change (as was arguably the case in Somalia), it may be important to explain human factors and root causes. It may be necessary to also explain how the consequences of a disaster or adverse effects of climate change are linked to conflict or violence and could potentially underpin refugee claims. In the absence of conflict, when disasters exacerbate pre-existing State fragility (as was arguably the case in Haiti), again, it may be important to identify the human dimensions that may support claims under the Refugee

Convention. Explanation of disproportionate impacts on marginalized groups may also be important.

#### **4.5. Recognition under Regional Refugee Definitions**

**When refugee law frameworks were used, and regional refugee definitions were applicable, status was recognized largely pursuant to broader refugee criteria.**

In Kenya and Ethiopia, the vast majority of Somali asylum-seekers who arrived in 2011 and 2012 were recognized based on broader refugee criteria. In Kenya, UNHCR was responsible for recognition of refugee status pursuant to its mandate. UNHCR's database recorded the legal basis for recognition as the OAU Convention's regional refugee definition. In Ethiopia, refugees were recognized on the basis of broader refugee criteria in Ethiopia's domestic refugee law.

Brazil's domestic refugee law incorporates one of the five objective situations contemplated in the Cartagena Declaration (severe and generalized violations of human rights), which in practice has only grounded claims in situations of conflict and violence. In Mexico, the regional refugee definition has formed part of the domestic legal architecture since 1990 and was used to recognize Haitian claimants prior to the 2010 earthquake. Afterwards, some Haitians affected by the earthquake were also recognized pursuant to the regional refugee definition, on the basis of disturbances to public order. Informants also suggested that COMAR sought to determine how to apply the regional refugee definition to Haitian claimants.

#### **Implications:**

- Where regional refugee definitions are applicable at the domestic level, they may facilitate recognition of refugee status in the context of nexus dynamics.
- Guidance on the applicability of broader refugee criteria and their relevance to claims in the context of nexus dynamics may be necessary to enhance understanding and robust, regionally-coherent implementation of regional refugee instruments. In situations where pre-existing conflict exacerbates the impacts of disaster, which become a prominent or proximate trigger for flight, it may be important to counter any perceptions that claimants are *solely* victims of disaster. This imperative is also relevant when, in the absence of conflict, disaster exacerbates pre-existing State fragility, and is the most prominent or proximate trigger for flight. In both types of nexus situations, identifying how the combined consequences of conflict and/or violence and disaster and/or adverse effects of climate change support claims under

broader refugee criteria, particularly on the basis of disruptions to public order, may be valuable.

#### **4.6. Views on the Relevance of Refugee Law Frameworks**

**Various stakeholders recognized the relevance and applicability of refugee law frameworks for international protection in the context of nexus-related movements, even when the most prominent/proximate triggers were disasters, food insecurity or famine.**

In Kenya, two broad views emerged on the ways in which informants characterized the dynamics that prompted Somali flight in 2011–2012 and Kenya’s responses. One group saw the extraordinary influx as driven by drought and its consequences for livelihoods and food security. Under this view, Somalis were seeking food and basic assistance and Kenya’s response was purely humanitarian, in the sense that Somalis were registered as ‘refugees’ for humanitarian reasons rather than on the basis that they qualified for refugee status under legal frameworks. In contrast, during a March 2011 meeting in Nairobi in which the then-Commissioner for Refugee Affairs was present, another group of actors acknowledged that Somalis arriving in the context of drought, food insecurity and later, famine, were refugees. They surmised that the proximate cause prompting flight was lack of access to humanitarian assistance. However, they considered that the underlying reasons which inhibited humanitarian access stemmed from, *inter alia*, security threats and a breakdown in law and order, influenced by the presence and activities of Al-Shabaab, as well as a vacuum of governance, due to limited State control and institutional capacity. In other words, there was recognition that Somalis were fleeing a situation that potentially brought them within the broader refugee criteria in the region.

In Ethiopia, informants rarely considered Somalis who arrived in 2011 and 2012 as anything other than refugees. Informants discussed the applicability of the ground “events seriously disturbing public order” to the situation in Somalia in 2011. Many indicated that the underlying conflict and insecurity in Somalia, the presence and activities of Al-Shabaab and severely constrained governance capacity were sufficient to regard Somalis as refugees. Informants suggested that Somalis were fleeing areas affected by relatively regular conflict or insecurity, or that these aspects contributed to their fear of return. They appeared to recognize the multiple root causes prompting Somali flight, reflecting on interactions between conflict and insecurity and the impacts of drought, effects on livelihood and access to humanitarian assistance. These discussions highlighted the complexity of identifying a sole or dominant cause of flight. Three characterizations relevant to the grant of refugee status in Ethiopia in 2011 are



discussed in that case study. Arguably, Ethiopia may view the impacts of ‘natural’ disasters, on their own, as potentially giving rise to claims that could satisfy broader refugee criteria.

In Mexico, informants opined that in general, a ‘natural’ disaster *per se* could not ground claims in refugee status, but acknowledged that in principle, the impacts and consequences of a disaster may do so, including, and perhaps particularly, based on broader refugee criteria. In this context, and with respect to the conditions in Haiti, informants mentioned the nature of the chaos and social disruption following the earthquake. They further mentioned the significantly limited capacity of the government and key institutions in Haiti to protect Haitians from insecurity and violence, as well as to provide food and other essential services. The suggestion was that prior to the earthquake Haitians had been recognized pursuant to the regional refugee definition’s “other circumstances which have seriously disturbed public order” ground, and arguably, the chaos, social disruption and government incapacity in the aftermath of the earthquake heightened disruptive conditions.

Finally, in Brazil, it appears that CONARE members and others perceived that Haitians would not satisfy the criteria in the Refugee Convention. These perceptions were based at least partly on reviews and discussions of early requests for refugee status lodged by Haitians, which referenced primarily the earthquake, its destructive impacts on property and consequences for livelihood and basic subsistence. While CONARE members appear to have taken note of the “difficult and volatile” situation in Haiti in March 2011, and acknowledged that access to RSD procedures should remain open to Haitians since some may potentially satisfy the requisite criteria, there are no indications that a single Haitian was interviewed by CONARE at any time between 2010 and 2015. The relevance and applicability of the domestically incorporated regional refugee definition was also dismissed, although an unsuccessful public civil court action argued that Haitians should be recognized under this framework.

### **Implications:**

- Informants from governments, UNHCR and civil society recognized that refugee law frameworks, and in particular broader refugee criteria, are relevant for providing international protection in the context of nexus dynamics.
- Sometimes, popular perceptions and narratives on the ‘causes’ prompting flight may lead to the disregard of refugee law frameworks. This may be more likely when prominent or proximate triggers relate to root causes, which are not regarded as traditional causes of refugee flight. In this context, ensuring refugee law frameworks

remain within a ‘toolbox’ of responses to address cross-border movement the context of nexus dynamics may be a key policy challenge.

- Guidance to enhance understanding of the pertinent inquiry and evidentiary burdens in determining claims for refugee status under broader refugee criteria may be useful to mitigate preoccupation with prominent factors for flight that may prejudice the decision-making process.
- In certain nexus contexts, the relevance of refugee law frameworks may become apparent only as time passes and as conditions in countries of origin evolve.

#### 4.7. Rights and Benefits

**International protection pursuant to refugee law frameworks offered different and unique entitlements, but also certain limitations in comparison to protection through other channels.**

In the two African States, where encampment is an entrenched practice, Somalis who arrived in 2011–2012 were received and hosted within the same architecture. This framework imposed limits on movement and access to employment. In Kenya, heightened security concerns and changes in the legal and policy landscape have combined with dwindling donor engagement and humanitarian presence to further undermine protection for Somalis. Ethiopia’s pledges to improve refugee protection at a Leaders’ Summit in New York in September 2016 and efforts to implement them through the CRRF arguably suggests a different trajectory in that country.

In Brazil, the entitlements granted to Haitians who received permanent residence for humanitarian reasons were, in many respects, similar to the entitlements granted to recognized refugees. In principle, recognized refugees were uniquely entitled to protection from extradition and *refoulement*, facilitation for family reunification and a Brazilian travel document. These entitlements are preserved even upon naturalization. However, unlike beneficiaries of permanent residence for humanitarian reasons, refugees are required to obtain authorization from the Brazilian government to travel back to Haiti. Recent legal reforms have changed aspects of the rights landscape, particularly by incorporating a wider *non-refoulement* provision. In Mexico, recognized refugees receive permanent residence, which provides a path to naturalization. Certain aspects of the naturalization exam are waived for refugees. Refugees are also entitled to facilitation of specific family reunification procedures and protection from *refoulement*. By contrast, migration framework-based interventions were subject to discretion and other procedural vagaries providing less medium- to longer-term certainty. However, certain movement-related restrictions imposed on asylum applicants did not apply.

## **Implications:**

- When multiple frameworks (e.g. refugee or other) are available to support international protection in the context of nexus-related movements, entitlements and limitations under each applicable framework may need to be communicated effectively so claimants can make informed decisions about whether to lodge or continue with refugee claims.

### **4.8. UNHCR's Engagement on RSD and Recognition of Refugee Status**

**Although UNHCR's engagement and access varied, in each domestic context UNHCR had scope to inform, advise, support and in some cases, recognize refugee status.**

The institutional landscape in Kenya and Ethiopia meant UNHCR played an integral role in the response to Somali movements in 2011–2012, and in Somalis being recognized as refugees. In both countries, UNHCR had been deeply engaged in registration and RSD for decades. In Kenya UNHCR was responsible for recognizing refugees pursuant to its mandate. In Dadaab, UNHCR discharged this function largely through registration. In Ethiopia, UNHCR was also integrally involved in the group-based approach to recognition, and presumably also in conveying its guidance and available country-of-origin information on international protection considerations relating to Somalia. More generally, UNHCR was a key counterpart and advisor to ARRA.

Both Brazil and Mexico have dedicated institutions charged with responsibilities on refugee matters. In 2010, decisions on refugee status were made through a collective decision-making process in which UNHCR was also involved. In Brazil, this body, CONARE, remains responsible for RSD. During 2010–2012 UNHCR had the right to voice opinions, but not the right to vote on final decisions. Prior to the collective decision-making process, UNHCR had scope to inform and advise on the recommended decisions put forward for a collective decision. However, Haitians do not appear to have been individually interviewed by CONARE between 2010 and 2015. In Mexico, a collective decision-making process, in effect in 2010, gave way in 2011 to COMAR becoming solely responsible for assessment and decisions at first instance. Fewer than 40 Haitians applied for recognition in 2010, when UNHCR was able to participate in collective decision making.

## **Implications:**

- When UNHCR has presence, it has scope to inform, advise and assist decision makers to understand how individuals or groups may satisfy the definitions in the Refugee Convention or regional refugee instruments. Where UNHCR is integrally involved in RSD procedures, UNHCR's potential to inform and advise States on the relevance and application of refugee law and to support the grant of refugee status is much greater. When UNHCR is able to observe and advise, UNHCR's guidance, technical support and training may be crucial to building the proficiency and capacity of decision makers on the relevance and application of refugee law frameworks and thereby fostering the robust grant of refugee status in the context of nexus-related movements.

### **4.9. UNHCR Guidance on International Protection and Nexus Dynamics**

#### **Targeted UNHCR guidance on the application of refugee law frameworks to persons seeking international protection in the context of nexus dynamics in Somalia and Haiti was unavailable at the relevant time periods.**

At the time of Somali cross-border movements in 2011, the May 2010 Eligibility Guidelines was the most pertinent UNHCR guidance on assessing international protection needs of Somali asylum-seekers. Although these Guidelines acknowledged that Somali displacement “due to human rights violations, conflict, natural disasters and economic crises [has] been commonplace”, there was little discussion of how nexus dynamics, including the impacts of the drought interacted with the actions of the parties to the conflict, and their combined bearing on eligibility for the grant of refugee status. Admittedly, at the time the 2010 Eligibility Guidelines were issued, the famine declaration was more than a year away. UNHCR's thinking on these aspects, however, appears to have evolved as discussed in Subsection 3.1.2.

Similar UNHCR guidance on assessing Haitian asylum claims was unavailable. As discussed in Subsection 3.2.2, together with OHCHR, UNHCR issued two letters, one in February 2010 and another in June 2011, requesting States to temporarily suspend involuntary returns and to grant temporary protection in solidarity and on humanitarian grounds. The 2011 letter explicitly referenced international protection. In recognizing the “prerogative of States to return individuals to their country of origin when they are found not to be in need of international protection”, the letter alluded to the expectation that States would assess international protection obligations. Only “in the absence of other applicable legal frameworks”, were States called to apply certain principles related to return. Responses to questionnaires indicate that these letters

formed part of the advice provided by UNHCR operations to government actors. Respondents and informants also suggested the letters were taken into consideration in efforts to respond to Haitian movements.

Informants noted that UNHCR guidance was generally consulted and held in high regard. In Mexico, informants suggested that specific guidance explaining how Haitians might have satisfied the definitions in the Refugee Convention and/or the Cartagena Declaration in the context of evolving conditions following the earthquake in Haiti would have benefited and enhanced the technical capacity of COMAR personnel. This was particularly so given the uncommon nature of the necessary analysis, which would have required decision makers to grapple with the consequences and relevance of the impacts of the disaster. Informants also highlighted the need for coherence and consistency on the implementation of the regional refugee definition, particularly in precedent-setting situations. In Mexico, a quality assurance initiative supported by UNHCR has resulted in the publication in 2017 of a manual, which also discusses recognition of status under broader refugee criteria. It provides commentary on the “other circumstances which have seriously disturbed public order” ground, and discusses its relevance to ‘natural’ and ecological disasters. The manual has been used for training purposes but not as a tool of compulsory application for RSD procedures. Informants indicated that efforts to prepare a similar manual are also underway in Brazil.

### **Implications:**

- Decision makers and practitioners may hold UNHCR guidance, including its legal interpretive guidance and its country- or profile-specific eligibility guidance, in high regard. Documents that fall into the latter suite may need to be updated regularly to account for prevailing conditions and evolving nexus dynamics to enhance their utility and promote reliance.
- UNHCR advisory letters issued in the aftermath of disasters (as occurred following the 2010 earthquake in Haiti) may be taken into consideration in State decisions on responses. Such letters may need to be issued as a matter of course, whenever UNHCR learns of cross-border movements in the context of disasters, and be crafted to support the grant of international protection under refugee law frameworks.
- Global- and/or regional-level UNHCR legal interpretive guidance may be necessary to promote clarity, coherence, consistency on the application of broader refugee criteria to movements in the context of nexus dynamics, especially given domestic efforts to develop commentary on the relevance of regional refugee definitions to ‘natural’ or ecological disasters.

#### 4.10. Changing Legal Landscapes

**In some countries, domestic migration frameworks have been adopted and/or amended to support the provision of temporary, humanitarian forms of international protection.**

New migration laws have been adopted in Brazil and Mexico, which permit the grant of so-called humanitarian visas, permits, visitor cards and/or residence on discretionary grounds for persons fleeing conditions that have the potential to also ground claims in refugee status.

##### **Implications:**

- A deeper analysis of domestic refugee law frameworks in destination States, as well as migration and other relevant frameworks may be necessary to understand opportunities and limitations for granting international protection in the context of nexus-related movements. Such an analysis may also be necessary to appreciate how domestic migration or other frameworks affect, support or constrain the provision of international protection on the basis of obligations pursuant to domestic, regional or international refugee law.

#### 4.11. Exclusion

**Exclusion of claimants seeking international protection appears limited.**

Exclusion appears to have played a limited role in Ethiopia's response to Somali movements in 2011–2012. Government authorities were engaged in pre-screening prior to the registration of asylum-seekers, and the extent to which Somalis were singled out for further scrutiny at this early stage is unclear. Information from Kenya and Mexico on exclusion was not obtained.

##### **Implications:**

- Insufficient attention to exclusion has the potential to raise questions about the robustness of RSD systems, particularly in the context of real and perceived security threats. To ensure State confidence in the integrity of RSD procedures and provide space to pursue international protection based in refugee law in the context of nexus dynamics, those who should be excluded need to be rigorously identified. This is particularly important when UNHCR's advice is to implement group-based

approaches to RSD. These issues, which should be considered within broader discussions on RSD, are not taken up in the recommendations.

#### **4.12. Onward Movements**

##### **Onward movements of Somalis and Haitians granted international protection occurred.**

Onward movements of Somalis and Haitians emerged as another relevant theme. With the tightening landscape in Kenya, informants indicated that Somali refugees in Kenya who returned to Somalia through assisted voluntary repatriation are undertaking onward movements to other countries. These aspects were not corroborated and would benefit from further research. Reports of onward movement of Haitians who received permanent residence for humanitarian reasons in Brazil to other countries in the Americas, including Chile, Mexico, and the United States also emerged. Similarly, informants in Mexico perceived that Haitians with FM3 documents moved through the country into the United States.

##### **Implications:**

- The entitlements and limitations that attach to the international protection provided by States in the context of nexus dynamics may create incentives, or influence decisions, to undertake onward movements. Again, these issues, which should be considered in broader discussions on onward movements, are not taken up in the recommendations.

Drawing on these observations and implications, the final Section of this report turns to recommendations. It begins with a brief discussion of the contemporary policy landscape.

## **V. RECOMMENDATIONS**

In the 2016 New York Declaration, in a section specifically focused on commitments to refugees, States reaffirmed that “international refugee law, ... provide[s] the legal framework to strengthen the protection of refugees” and committed to “ensure, in this context, protection for all who need it.”<sup>292</sup> 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

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<sup>292</sup> UN General Assembly, paragraph 66, *supra* note 12.

Refugees”,<sup>293</sup> acknowledging the significance of regional frameworks for protecting refugees. At the beginning of the Declaration, States had explicitly recognized the multiple factors underpinning human movements, from armed conflict, poverty, food insecurity, persecution, terrorism, human rights violations and abuses, to adverse effects of climate change, ‘natural’ disasters (some of which may be linked to climate change), or other environmental factors. In this high-level, negotiated Declaration, adopted by the General Assembly, States understood that many people “move, indeed, for a combination of these reasons”, that refugees are among such movements of people, and that efforts are needed to strengthen their protection.<sup>294</sup>

Almost two years on, discussions had moved forward through the Global Compact on Refugees (GCR), one of two central follow-up pillars to the New York Declaration. The GCR is grounded in the existing refugee protection regime established over decades and comprising customary international law, international, regional and domestic instruments, General Assembly and ECOSOC resolutions, ExCom Conclusions, State practice, and judicial interpretation. The primary focus of the GCR is on strengthening the functioning of the existing regime to address challenges posed by large-scale movements. Building on the New York Declaration, the GCR states that “[w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.”<sup>295</sup> Recognizing that in certain situations, “external forced displacement may result from sudden-onset natural disasters and environmental degradation”, within a narrative that appreciates the “composite character” of human movements, the GCR acknowledges the “complex challenges for affected States, which may seek support from the international community to address them.”<sup>296</sup>

In this regard, and given the scope of this report, the discussion on “Identifying international protection needs” in the GCR is particularly relevant.<sup>297</sup> It highlights the need for fair and efficient determination of individual international protection claims to duly determine status in accordance with 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.<sup>298</sup> The section goes on to note that:

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<sup>293</sup> Ibid. Internal citations omitted.

<sup>294</sup> Ibid., paragraph 1.

<sup>295</sup> Global Compact on Refugees, Advance Version, 20 July 2018, available at:

<http://www.unhcr.org/events/conferences/5b51fd587/advance-version-proposed-global-compact-refugees-20-july-2018.html>, accessed: September 2018, paragraph 8.

<sup>296</sup> Ibid., paragraph 12.

<sup>297</sup> Ibid., Chapter III, Part B, 1.6.

<sup>298</sup> Ibid., paragraph 61. It also highlights the relevance of group-based protection (such as *prima facie* recognition of refugee status) in the context of large refugee movements.



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.<sup>299</sup>

These statements imply that when international or regional refugee law applies, obligations under these bodies of law 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 that eligible persons can 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 commitments and proposed measures are also applicable to ‘smaller-scale’ and indeed, cross-border movements generally.<sup>300</sup> Strengthening the implementation of the international refugee regime, including through directed improvements that facilitate identification and determination of international protection claims in accordance with the Refugee Convention and regional refugee instruments, is at the heart of the regime and UNHCR’s mandate.

The Refugee Convention was intended to be interpreted and implemented in order to meet evolving protection challenges and secure for refugees the “widest possible exercise of [their] fundamental rights and freedoms”.<sup>301</sup> These objectives, and the need to address region-specific international protection needs, are also at the heart of the regional refugee instruments. For example, the 2017 General Assembly resolution on the “Office of the United Nations High Commissioner for Refugees” emphasizes, “international protection is a dynamic and action-orientated function” and “includes, in cooperation with States and other partners, the promotion and facilitation of the admission, reception and treatment of refugees in accordance with internationally

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<sup>299</sup> Ibid., paragraph 63. Emphasis added. Internal citations omitted.

<sup>300</sup> Large-scale is not defined in the New York Declaration.

<sup>301</sup> See e.g. Convention relating to the Status of Refugees, *supra* note 24, preamble.

agreed standards”.<sup>302</sup> The resolution notes the “importance of States and the Office ... discussing and clarifying the role of the Office in mixed migratory flows in order to better address protection needs ... including by safeguarding access to asylum for those in need of international protection”.<sup>303</sup> It calls on States “to process asylum applications by duly identifying those in need of international protection, in accordance with their applicable international and regional obligations, so as to strengthen the refugee protection regime”.<sup>304</sup> Notably, the resolution also “expresses concern about the challenges associated with climate change and environmental degradation ... and urges the Office to continue to address such challenges in its work, within its mandate, and in consultation with national authorities”.<sup>305</sup>

Certainly, for many years now, UNHCR has undertaken activities to respond to the protection concerns and challenges posed by disasters and adverse effects of climate change.<sup>306</sup> UNHCR’s Strategic Directions 2017–2021 builds upon a history of efforts related to displacement in the context of disasters and climate change, the umbrella issue area under which nexus dynamics are presently considered from an institutional perspective.<sup>307</sup> The convening of an expert roundtable on climate change and cross-border displacement in 2011 was a notable milestone in such efforts. The summary of deliberations 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 analysed further”, but efforts in advancing these recommendations, including in the context of nexus dynamics, have been limited.<sup>308</sup>

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<sup>302</sup> General Assembly, “Office of the United Nations High Commissioner for Refugees”, A/RES/72/150, 17 January 2018, available at: <http://www.unhcr.org/excom/bgares/5ad5e9ca7/resolution-adopted-general-assembly-19-december-2017.html>, accessed: September 2018, paragraph 32.

<sup>303</sup> *Ibid.*, paragraph 49.

<sup>304</sup> *Ibid.*, paragraph 51.

<sup>305</sup> *Ibid.*, paragraph 52.

<sup>306</sup> See documents and links listed on UNHCR’s Climate Change and Disaster Displacement webpage, available at: <http://www.unhcr.org/climate-change-and-disasters.html>, accessed: September 2018. See also, e.g. Goodwin-Gill and McAdam, “Climate Change, Disasters, and Displacement”, UNHCR, 2017, available at: <http://www.unhcr.org/en-my/596f25467.pdf>, accessed: September 2018; McAdam, “Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010-2013”, *Refugee*, Vol. 29, No. 2, available at: <http://www.unhcr.org/protection/environment/542e9a509/jane-mcadam-unhcr-climate-change-2013.html>, accessed: September 2018.

<sup>307</sup> UNHCR, *supra* note 10.

<sup>308</sup> UNHCR, “Summary of Deliberations on Climate Change and Displacement”, April 2011, available at: <http://www.unhcr.org/4da2b5e19.pdf>, accessed: September 2018, 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. Principle VII of ten Nansen Principles recommended in 2011 by experts and policymakers at an influential conference, “to guide responses to some of the of the urgent and complex challenges raised by displacement in the context of climate change and other environmental hazards” reinforces that “existing norms of international law should be fully

Addressing displacement related to disasters and climate change was also a key theme during the High Commissioner’s December 2015 Dialogue on Protection Challenges, in which the relevance of refugee frameworks was referenced.<sup>309</sup> Earlier in October 2015, the Nansen Initiative’s Protection Agenda, endorsed by 109 State delegations, had advanced as a priority the use of so-called “humanitarian protection measures”, including measures based in refugee law, to address cross-border displacement in the context of disasters and climate change.<sup>310</sup>

Within this policy and institutional landscape, drawing on the descriptions of destination State responses, observations and implications, and guided by UNHCR’s mandate, strategic priorities and activities, this Section sets out recommendations under four thematic areas.

1. Guidance
2. RSD and access
3. ‘Toolbox’ of international protection measures
4. Data, knowledge gaps, and communication

The recommendations relate to UNHCR, as well as States and other stakeholders, and aim to strengthen the implementation of international protection based in refugee law in the context of nexus dynamics. Some of the recommendations are accompanied by commentary.

## 5.1. Guidance

**Recommendation 1: UNHCR should develop legal interpretive guidance in the form of UNHCR Guidelines on International Protection to inform States, practitioners, decision makers and UNHCR personnel regarding the relevance and application of the Refugee Convention and regional refugee instruments to international protection in the context of nexus dynamics, and to apply them in practice.**

There is merit in producing legal interpretive guidance on the applicability of refugee law frameworks because some States are using them in practice to grant international

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utilized, and normative gaps addressed.” See “The Nansen Conference: Climate Change and Displacement in the 21<sup>st</sup> Century”, 2011, available at: <http://www.unhcr.org/4ea969729.pdf>, accessed: September 2018, p. 5.

<sup>309</sup> 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, available at: <http://www.unhcr.org/58be72337>, accessed: September 2018. For more on the 2015 Dialogue, see: <http://www.unhcr.org/high-commissioners-dialogue-on-protection-challenges-2015.html>, accessed: September 2018.

<sup>310</sup> The Nansen Initiative, *supra* note 15; See also, Goodwin-Gill and McAdam, *supra* note 306.

protection in the context of nexus dynamics. The enduring relevance and potential applicability of the Refugee Convention and broader refugee criteria to cross-border movements in the context of nexus dynamics should be explained to build awareness and proficiency among decision makers, practitioners and UNHCR and to mitigate prejudgment and dismissal of such frameworks. Including the guidance in UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, and convening trainings to enhance capacity to implement the guidance may promote these objectives.<sup>311</sup>

As a majority of States in Africa and Latin America have accepted provisions enshrining broader refugee criteria, legal interpretive guidance that explains the applicability and supports the assessment of the disturbance to public order ground as reflected in the OAU Convention and the Cartagena Declaration, will be crucial.<sup>312</sup> States in Africa and Latin America used broader refugee criteria to recognize claims from Somalis and Haitians, respectively, and informants recognized the relevance of broader refugee criteria, in particular, for addressing cross-border movements in the context of nexus dynamics. In some States, UNHCR is supporting efforts to develop domestic commentary interpreting regional refugee definitions, which make reference to 'natural' disasters.<sup>313</sup> Elaborating on the other events/circumstances listed in the regional refugee definitions, including "massive violations of human rights" and "generalized violence" may also be important.

UNHCR's Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence (GIP 12) is particularly relevant for this exercise.<sup>314</sup> It provides commentary and examples of disturbances to public order (as well as the other events/circumstances listed in the regional refugee definitions). GIP 12 also identifies factual indicators stemming from situations of conflict and violence that reflect disturbances to public order. It may be helpful to supplement the commentary and factual indicators listed in GIP 12 to capture disturbances to public order in the context of nexus situations (or stemming specifically or uniquely from disaster or from the adverse effects of climate change).

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<sup>311</sup> It is worth bearing in mind that in regions where there is limited ratification of the Refugee Convention and where regional refugee instruments are not applicable, but cross-border movements in the context of nexus dynamics are, nonetheless, occurring or are predicted to occur, there would be merit in clarifying how human rights norms support admission and prohibitions on return.

<sup>312</sup> A detailed review of key literature discussing the interpretation and application of these events/circumstances in Africa and Latin America would be helpful. Some of the literature highlighted in this report addresses these aspects.

<sup>313</sup> Elaborating on the other events/circumstances listed in the regional refugee definitions, including "massive violations of human rights" and "generalized violence" may also be important in the context of nexus dynamics.

<sup>314</sup> GIP 12, *supra* note 3.

In this sense, and drawing on literature, UNHCR's legal interpretive guidance may need to distinguish and consider specific and pertinent 'types' of nexus situations. As highlighted earlier, the origin situations framing the inquiry in this report represent quite distinct nexus dynamics. In reductionist and imperfect terms, Somalia, during the period under consideration, can be characterized as a situation where pre-existing conflict exacerbated the impacts of disaster and adverse effects of climate change. Similarly, Haiti could be viewed as a situation in which a disaster, stemming from an earthquake, exacerbated pre-existing State fragility.

These distinct situations highlight the importance of examining the interactions of different types of natural hazards and disasters (including those influenced by climate change) with violence and conflict, since seemingly disparate nexus dynamics have the potential to ground refugee claims. UNHCR appears to have begun this process with its Legal Considerations on Conflict and Famine.<sup>315</sup>

Identifying how different manifestations of nexus dynamics could satisfy the threshold that a situation amounts to a serious disturbance to public order, or the other events/circumstances listed in the regional refugee definitions, is likely to be valuable. In some contexts, an inquiry regarding the objective circumstances in the country of origin may be relatively uncomplicated, such as where conflict or violence predominates, particularly given the guidance in GIP 12. When conflict or violence in and of themselves support eligibility under the events/circumstances listed in the regional refugee definitions, any new guidance may need to consider the relevance and bearing of disasters or adverse effects of climate change. In other situations, including where the prominent or proximate triggers relate to hazards, disasters or adverse effects of climate change, detailed guidance may be important to support decision makers to recognize claims under the regional refugee definitions, as well as the relevance of cumulative factual indicators.

Practice highlighted in this report also indicates that States have recognized refugees based on the Refugee Convention in the context of nexus dynamics. The occurrence of a disaster does not detract from the possibility that pre-existing conditions in the country of origin, including conditions that relate to conflict or violence, may continue to underpin refugee claims. Marginalized groups who were persecuted prior to a disaster may continue to face pre-existing forms of persecution. Some individuals or groups may be differentially in the aftermath of a disaster. Indeed, the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention, such as when heightened government incapacity further

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<sup>315</sup> UNHCR, *supra* note 92.

marginalizes victims of sexual and gender-based violence.<sup>316</sup> Interpretive guidance that explains how nexus dynamics relate to well-founded fear, the concept of persecution, the Convention grounds, and the internal flight alternative, would be particularly important. In this context, it is critical to highlight relevant “human” dimensions to support claims under the Refugee Convention.

Finally, political, socio-economic, environmental, legal, security and other motivations and factors influenced the State responses discussed in this report. Undoubtedly, such factors will continue to wield influence in the future, including in the face of mixed movements. In this respect, a comprehensive and authoritative UNHCR document can support informed and strategic advocacy at the domestic and regional levels, especially given the regard with which UNHCR guidance is viewed.

**Recommendation 2: In UNHCR’s country- or profile-specific Guidelines on Eligibility (and the related suite of guidance documents), UNHCR should explain explicitly 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 applicable refugee definitions. UNHCR should also provide information on the processes and timing of updates and revisions to promote reliance.**

This recommendation is a necessary complement to the first. As noted in Subsection 2.9, UNHCR exercises its supervisory responsibilities through the issue of legal interpretive guidance and country- or profile-specific eligibility guidance. Guidelines on Eligibility (and the related suite of eligibility guidance documents) are legal interpretations of refugee criteria in respect of specific profiles on the basis of assessed social, political, economic, security, human rights and humanitarian conditions in the country or territory of origin concerned. In other words, they provide detailed analysis of international protection needs based on country-of-origin research and provide recommendations on how applications for international protection relate to relevant principles and refugee law criteria (and, where relevant, complementary or subsidiary protection criteria). Systematically building in consideration and discussion of the effects of disasters and adverse effects of climate change to this largely country- or profile-specific suite of eligibility documents will promote awareness on nexus dynamics that support refugee claims.

Once Guidelines on Eligibility or related eligibility guidance documents are issued, it may be beneficial to provide information on the regularity with which such documents will be updated or supplemented. Alternatively, it may be important to identify regular

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<sup>316</sup> See e.g. discussion on Canada in Subsection 3.3.5.

intervals at which such documents will be reviewed to determine the need for updates or supplementary material. These efforts can promote reliance and predictability. For example, a phased analysis of eligibility for international protection under refugee law frameworks may be necessary, especially if nexus dynamics evolve to bolster the potential to satisfy refugee claims. With respect to Haiti, the second letter issued by UNHCR and OHCHR referenced international protection, and noted limited State protection for victims of sexual and gender-based violence.

**Recommendation 3: UNHCR should ensure other guidance issued to States, such as specific letters requesting non-return, includes reference to international protection pursuant to refugee law to ensure States are abreast of its potential applicability, even in situations where the most prominent or proximate trigger may be a disaster. UNHCR should consider the issuance of such letters systematically, and as a matter of course, when it becomes aware of cross-border movement in the context of disasters.**

**Recommendation 4: UNHCR (and States and regional actors, as appropriate) should develop tailored regional- (and subregional-) level strategies to inform and promote the interpretation and application of the Refugee Convention and broader refugee criteria to nexus-related cross-border movements.**

In Africa, “events seriously disturbing public order” appears to be the primary ground of Article I(2) of the OAU Convention under which refugee status is determined.<sup>317</sup> In her monograph on the OAU Convention, Sharpe provides commentary on elements of the regional refugee definition, including each of the listed ‘events’, drawing conclusions based on rules governing treaty interpretation.<sup>318</sup> Her discussion on “events seriously disturbing public order” considers whether persons fleeing *solely* as a consequence of disasters and the adverse effects of environmental change could be regarded as refugees. Sharpe highlights divisions in literature, but concludes that ‘environmental disasters’ may, on their own, support claims under broader refugee criteria. This conclusion suggests that when nexus dynamics exist, there may be greater potential for supporting refugee claims.

In this respect, it is pertinent to note the discussion in the Ethiopia case study regarding overemphasis on human-made factors. Indeed, disasters and climate change are intimately connected to human factors.<sup>319</sup> And certainly, when it comes to nexus dynamics, an argument can be made that these considerations are less relevant or

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<sup>317</sup> GIP 12, *supra* note 3, paragraph 56.

<sup>318</sup> Sharpe, *supra* note 29. On the themes in this commentary, see also Wood, *supra* note 17.

<sup>319</sup> See e.g. definitions discussed in the “Key Terms” Section of this report.

perhaps even redundant, since ‘human-made’ factors are intrinsic. Practice in Ethiopia and Kenya demonstrates that broader refugee criteria supported the recognition of the majority of Somalis in 2011–2012, as it had in the past. Djibouti and Uganda also recognized Somalis under the OAU Convention’s broader refugee criteria in 2011–2012.<sup>320</sup>

By contrast in Latin America, it appears that national adjudication bodies apply the “other circumstances which have seriously disturbed public order” ground least frequently when determining claims under broader refugee criteria.<sup>321</sup> A legal study published by UNHCR in 2013, on the interpretation and application of broader refugee criteria in 17 Latin American countries, notes that although definitions inspired by the Cartagena Declaration exist in domestic laws, they are seldom applied, or are misinterpreted in practice and usage.<sup>322</sup> Cases that could be assessed under the regional refugee definition are instead assessed under complementary forms of protection.<sup>323</sup> The study notes limited doctrinal and jurisprudential development of the broader refugee criteria; a key obstacle to its maturity as an authoritative source of law and as an autonomous basis for extending protection is the fact that authorities subsume recognition under the Refugee Convention and conflate the two definitions.<sup>324</sup> The study recommends further doctrinal development of the regional refugee definition in Latin America.<sup>325</sup>

The Summary Conclusions of an expert roundtable convened by UNHCR as part of Cartagena +30 events to mark the 30<sup>th</sup> anniversary of the Cartagena Declaration also recognized the need for further guidance on the interpretation of the regional refugee definition given current protection challenges in the region.<sup>326</sup> Indeed, as with the OAU Convention, the question of whether disasters alone could underpin recognition under the “other circumstances seriously disturbing public order” ground has been a point of debate.<sup>327</sup> Cantor indicates, “States have tended to apply this situational element as

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<sup>320</sup> In the contemporary space, South Sudanese fleeing nexus dynamics are also being hosted as refugees in Uganda, Ethiopia and Kenya, among other countries, and it would be instructive to examine the grounds for recognition.

<sup>321</sup> GIP 12, *supra* note 3, paragraph 78. See also, Reed-Hurtado, *supra* note 185, p. 15; UNHCR, “Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration”, Expert Roundtable, Montevideo, Uruguay, 15–16 October 2013, 2014, available at:

<http://www.refworld.org/docid/53c52e7d4.html>, accessed: September 2018, paragraph 24.

<sup>322</sup> Reed-Hurtado, *ibid.*, pp. 15 and 20. At the time of the study, 13 countries incorporated a Cartagena Declaration inspired regional refugee definition into domestic law.

<sup>323</sup> *Ibid.*, p. 20.

<sup>324</sup> *Ibid.*, p. 21.

<sup>325</sup> *Ibid.*, p. 33.

<sup>326</sup> UNHCR, *supra* note 321. The expert roundtable was also organized as part of a broader project to develop GIP 12. Participants included experts from six countries in the region, drawn from government, the judiciary, legal practitioners, international organizations, NGOs, and academia.

<sup>327</sup> Cantor, *supra* note 190, p. 18.



requiring a direct link to governmental or political circumstances.”<sup>328</sup> The Summary Conclusions from UNHCR’s expert roundtable suggests 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 ... it was accepted that such an approach is not [sic] proscribed.”<sup>329</sup> Nonetheless, Cantor acknowledges, “whether a ‘man-made’ natural disaster would engage the definition thus remains an open question.”<sup>330</sup> How this question should be explored when nexus dynamics, rather than ‘solely’ a disaster, leads to cross-border movements, does not appear to have been considered either.

Practice discussed in this report suggests that some States, such as Mexico, recognize that broader refugee criteria could support claims for refugee status in situations where the consequences of a disaster create serious disturbances to public order. The manual discussed in Subsection 3.2.4 on Mexico arguably leaves open this possibility, especially in the context of nexus dynamics, since it suggests that “[p]ersons forced to leave their country of origin *due* to natural or ecological disasters are not, *strictly* speaking, protected”. The views of key informants in Mexico also support this contention.

The foregoing bolsters the argument for regional strategies to develop authoritative, normative, regional commentary and consensus building on the application of regional refugee definitions to cross-border movements in the context of nexus dynamics. Both Africa and Latin America have region-specific jurisprudential mechanisms that could pronounce on these aspects. Although heterogeneous, the broad similarities in domestic legal, policy and socio-economic landscapes in subregions of Africa and Latin America, the nature of cross-border movements in the context of nexus dynamics, the presence of cultural and ethnic ties between communities in States of origin and States of destination, and historical practices suggest that subregional research, discussions and consensus building could also be instructive. In this regard, there is merit in initiating inter-governmental discussions at regional or subregional levels in affected parts of the world to discuss and identify best practices and harmonize laws and policies.<sup>331</sup>

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<sup>328</sup> Cantor, *supra* note 37, p. 20. See also, *ibid.*

<sup>329</sup> UNHCR, *supra* note 321, paragraph 26. Paragraph 10 also states that “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.”

<sup>330</sup> Cantor, *supra* note 190, p. 18, footnote 67.

<sup>331</sup> Similar efforts have been undertaken within the framework of the Nansen Initiative. 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 States”, available at: <https://disasterdisplacement.org/wp-content/uploads/2016/11/PROTECTION-FOR-PERSONS-MOVING-IN-THE-CONTEXT-OF-DISASTERS.pdf>, accessed: September 2018. A similar guide for South America is also being developed with support from the PDD. Drawing in an understanding of the scope and applicability of free-movement agreements, as well as other regional and subregional agreements relevant to cross-border mobility may also be instructive. On these aspects, see e.g. Wood, “The Role of Free Movement of Persons

Besides the regional refugee instruments—the OAU Convention in Africa and the Cartagena Declaration in Latin America—there are contemporary multi-lateral frameworks and policy discussions that also frame and support the need for strategic, regional approaches to promote refugee protection in the context of nexus dynamics. For example, in Latin America, every ten years since the adoption of the Cartagena Declaration, States have adopted a new declaration to build on its premise of a regional approach to refugee protection.<sup>332</sup> In the 2014 Brazil Declaration and Plan of Action, the latest iteration, States committed to work together to maintain the highest standards of protection at the international and regional levels.<sup>333</sup>

The Brazil Declaration requests “UNHCR to continue to provide support to States, including for the implementation of the Plan of Action in the annex, through technical support and assistance, ... and dissemination of its policies and guidelines, as appropriate, to guide the work of States in the protection of refugees”.<sup>334</sup> The declaration “[r]ecognizes the challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region, and ... the need to conduct studies and give more attention to this matter, including by UNHCR.”<sup>335</sup> This recognition and the explicit request to UNHCR for a study “with the aim of supporting the adoption of appropriate national and regional measures, tools and guidelines, including response strategies for countries in the region ... within the framework of its mandate” pertains to climate change and ‘natural’ disasters.<sup>336</sup> In this context, it is also incumbent on UNHCR to provide guidance and advice to States on the need to better understand refugee law-based international protection considerations as they relate to nexus dynamics since these aspects are relevant to the region. As the Memories of the Thirtieth Anniversary of the Cartagena Declaration on Refugees states:

Today, ten years after the Mexico Declaration and Plan of Action, the Mesoamerican regional context faces new challenges. The prevailing trend has been to link this migration to an economic motivation, which leads to the invisibility of forced migrations and displacements arising from situations of violence, disruption of public order, and *natural disasters*, among others. The movement of people in need of international protection to countries within the

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Agreements in Addressing Disaster Displacement”, forthcoming; draft dated May 2018 on file with author. See also, Cantor, *supra* note 37; Cantor, *supra* note 190.

<sup>332</sup> See Cantor, *supra* note 36, p. 20.

<sup>333</sup> See Cantor, *supra* note 37, p. 1; See Brazil Declaration and Plan of Action, 3 December 2014, available at: [www.refworld.org/docid/5487065b4.html](http://www.refworld.org/docid/5487065b4.html), accessed: September 2018.

<sup>334</sup> Brazil Declaration and Plan of Action, *ibid.*, p. 6.

<sup>335</sup> *Ibid.*, p. 7.

<sup>336</sup> *Ibid.*, Chapter 7 of the Plan of Action on “Regional Cooperation”.

region has transcended the traditional forms of persecution linked to the armed conflict in Colombia or refugees from other continents (still current and with its own protection challenges).<sup>337</sup>

In Africa, too, contemporary policies provide helpful entry points. The AU's Migration Policy Framework for Africa and Plan of Action (2018–2030) acknowledges that “deteriorating political, socio-economic and environmental conditions, as well as armed conflict, insecurity, environmental degradation and poverty, have been significant root causes of mass migration and forced displacement in Africa.”<sup>338</sup> The document also recognizes inter-linkages:

The root causes of migration and mobility in Africa are numerous and inter-related. The push–pull framework provides insight into this complex web of factors. Lack of socio-economic opportunities and the rule of law, weak institutions of governance, patronage and corruption, inequality, political instability, conflict, terrorism, civil strife and climate change are major push factors.<sup>339</sup>

Most notably, the Declaration states that a “major challenge in Africa is displaced populations, *inter alia*, triggered by conflict, terrorism, and climatic pressure.”<sup>340</sup> With the 50<sup>th</sup> anniversary of the OAU Convention in 2019, opportunities exist to begin discussions on strategies to promote understanding of nexus dynamics and recognition of their potential to engage the regional refugee definition (as well as the Refugee Convention), to reinforce and consolidate on the long-standing practice of certain States.

Ultimately, it is imperative to aspire for a fuller, robust implementation of the extant framework for international protection of refugees. With respect to nexus dynamics, this arguably means that principled, dynamic and progressive development of the regional frameworks and regional practice is indispensable. This is consistent with the commitments that UNHCR has made in its Strategic Directions for 2017–2021.

## 5.2. RSD and Access

**Recommendation 5: In keeping with the affirmations made in the New York Declaration, States (and other stakeholders, as appropriate) should ensure effective access to domestic RSD procedures, including in the context of nexus-related**

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<sup>337</sup> UNHCR, *supra* note 261, p. 141. Emphasis added.

<sup>338</sup> African Union (AU), “Migration Policy Framework for Africa and Plan of Action (2018–2030)”, African Union Commission, AU Department for Social Affairs, 2018, p. 16.

<sup>339</sup> *Ibid.*, p. 20

<sup>340</sup> *Ibid.*, p. 21.

**movements where the most prominent or proximate trigger may be a disaster or other factors not historically considered as supporting refugee claims.**

States, UNHCR and other stakeholders should ensure that RSD procedures are always available and accessible to provide international protection to refugees who cross international borders in the context of nexus dynamics, even when States favour and prioritize other frameworks for supporting admission and stay. In the New York Declaration, States “reaffirm[ed] respect for the institution of asylum and the right to seek asylum [as well as] ... respect for and adherence to the fundamental principle of *non-refoulement* in accordance with international refugee law.”<sup>341</sup> This would require that the opportunity to present requests for refugee status and for those requests to be assessed are not foreclosed in lieu of other forms of international protection that may in some domestic contexts present very similar (but not identical) entitlements. It may also require timely and appropriate information on the options available to allow persons in need of international protection to understand and to assess the available choices.

**Recommendation 6: UNHCR and other stakeholders should create or update targeted training packages to build the proficiency of RSD decision makers, including UNHCR personnel, to apply the Refugee Convention and broader refugee criteria to movements in the context of nexus dynamics.**

Analysing and assessing claims related to nexus dynamics requires decision makers to engage in an unfamiliar and unexplored legal analysis. The inquiry into country conditions, including the combined effects of conflict and/or violence and disaster and/or adverse effects of climate change, and their assessment for the purposes of determining claims based on the Refugee Convention or broader refugee criteria, is conceivably complex and foreign to many.

Additionally, if asylum-seekers cannot articulate claims grounded in the Refugee Convention (see Mexico case study), advice and assistance to assess claims under broader refugee criteria can facilitate recognition, since the emphasis on objective conditions in the country of origin arguably limits the breadth of the inquiry into individual circumstances. Informants in Kenya and Ethiopia indicated that some Somalis first discussed lack of access to food, water, humanitarian assistance and consequences for livelihood resulting from the drought during registration. In such situations, relevant personnel must be qualified and attuned to the need to probe

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<sup>341</sup> UN General Assembly, *supra* note 12, paragraph 67. States also committed to “ensure that refugee admission policies or arrangements are in line with our obligations under international law. We wish to see administrative barriers eased, with a view to accelerating refugee admission procedures to the extent possible. We will, where appropriate, assist States to conduct early and effective registration and documentation of refugees.” Paragraph 70.

underlying factors that prompted flight, notwithstanding the constraints of emergency response. This may also require scrutiny of data collection, interviewing and knowledge management systems used for individual and group-based approaches to RSD.

In this regard, there is a very clear role for UNHCR in building capacity and facilitating the potential for refugee law frameworks to be used to provide international protection in the context of nexus dynamics. Given the various roles that UNHCR plays in domestic RSD procedures, from mandate RSD, direct and co-engagement in registration and RSD, to advisory roles within collective decision-making bodies, UNHCR has significant scope to also raise awareness and proficiency of other decision makers.

**Recommendation 7: UNHCR should provide technical support to States to develop domestic refugee law frameworks with the scope and operational capacity to undertake group-based approaches to RSD, in order to foster the use of refugee law frameworks in the context of (relatively) large-scale movements.**

The CRRF states that:

At the outset of a large movement of refugees, receiving States, bearing in mind their national capacities and international legal obligations, in cooperation, as appropriate, with the Office of the United Nations High Commissioner for Refugees ..., in conformity with international obligations, would: Ensure, to the extent possible, that measures are in place to identify persons in need of international protection as refugees ... [.]<sup>342</sup>

The capacity to undertake group-based approaches to RSD may be important in situations where (relatively) large-scale movements occur in the context of nexus dynamics. Group-based approaches, (including when combined with assessment of claims under broader refugee criteria), have the potential to ameliorate resource constraints and backlogs and to accommodate situations in which individual approaches to RSD may be impractical and/or unnecessary.<sup>343</sup>

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<sup>342</sup> Ibid., Annex I, subsection on 'Reception and admission', paragraph 5(a). The Global Compact on Refugees also reinforced the importance of registration and identification of refugees. See supra note 295, paragraph 58.

<sup>343</sup> Arguably, this recommendation is also in line with UNHCR's strategic direction on RSD. See e.g. Executive Committee of the High Commissioner's Programme, supra note 41.

### 5.3. 'Toolbox' of International Protection Measures

**Recommendation 8: UNHCR, States and other stakeholders, as applicable, should analyse domestic legal frameworks, including refugee laws and policies to determine opportunities and limitations for providing international protection in the context of nexus dynamics. When applicable, States should develop or reform—and UNHCR and other stakeholders should promote the development of or reforms to—domestic frameworks to support the grant of international protection based on refugee law.**

As domestic legal landscapes change in relevant ways to foster the grant of international protection, such as through adoption and revision of migration and refugee law frameworks, they present distinct opportunities and limitations for the grant of international protection in the context of nexus dynamics. Stakeholders that advise and support States on international protection should analyse the opportunities, limitations and complementarities among the possible options at the domestic level, including under refugee law and migration frameworks.

A deep and detailed familiarity with these aspects means that precise and discerning advice can be offered which not only responds to the diverse international protection needs that may arise in the context of nexus dynamics, but also upholds obligations and commitments undertaken at multilateral levels. Ultimately, discretionary humanitarian responses should complement the possibility of claiming refugee status, for those who may prefer that status and its attendant entitlements. Such knowledge is also important for effective communication on the similarities and differences in entitlements associated with available options.

When domestic frameworks do not support or inadequately support the possibility to grant international protection based on refugee law in the context of nexus dynamics, States may need to develop or reform domestic laws and policies to address such limitations. UNHCR and other relevant stakeholders have roles to play in promoting and advocating for such changes.

**Recommendation 9: In the context of nexus-related cross-border movements, UNHCR should advocate with destination States and other stakeholders to ensure refugee law frameworks are consistently considered and remain available and accessible in a 'toolbox' of responses to address international protection needs, even if other frameworks are used or prioritized.**

Preference should be given to mechanisms and frameworks, which in a given domestic context, are most effective in addressing international protection needs and respecting

and promoting the rights of persons affected by nexus dynamics. In some domestic contexts, structural impediments (such as extended delays in RSD, inadequate due process safeguards, or other administrative and technical barriers), as well as circumscribed entitlements, may mean that some may regard refugee law frameworks as potentially inferior to other frameworks for providing international protection. At the same time, as a matter of international law, refugees are entitled to the protections offered under the refugee regime. The option to choose to have refugee status recognized should remain available in States parties to refugee law instruments. Distinct entitlements can flow from refugee status, which may not necessarily be based in law, when discretionary and humanitarian options are implemented.

Moreover, at times, responses based on migration or other frameworks may become politically or economically unpalatable or infeasible. The role that needs to be played by refugee law may also be heightened when these other responses are not available, are time limited, or are available for a relatively defined number or category of people.

In certain nexus contexts, the relevance of refugee law frameworks may become apparent only as time passes and as conditions in countries of origin evolve. For example, arguably, the conditions in Haiti deteriorated to such an extent that in June 2011, UNHCR and OHCHR considered it necessary to send a follow-up letter to States in which they highlighted the ongoing protection gaps and explicitly referred to international protection. This suggests that in situations involving nexus dynamics, the perceived relevance of refugee law for addressing the needs of persons seeking international protection may vary at different times. UNHCR should stay abreast of changes to provide timely advice on when States should re-evaluate the use of refugee law frameworks, even if other frameworks underpin the initial response.

#### **5.4. Data, Knowledge Gaps and Communication**

**Recommendation 10: UNHCR and other stakeholders should build knowledge and data by documenting domestic practice at points in time when refugee law frameworks have underpinned international protection for persons fleeing in the context of nexus dynamics.**

In this regard, UNHCR's data collection mechanisms, including registration and interviews that support individual and group-based approaches to RSD, may need to be reviewed to ensure they provide the flexibility to gather primary as well as secondary and tertiary reasons for flight and fear of return. More generally, data collection systems should be scrutinized to foster understanding of flight and claims for refugee status in the context of nexus dynamics.

In addition, State practice on the use of refugee law frameworks to grant international protection in the context of nexus dynamics should be documented in a timely manner to build a repository of knowledge on practice. Efforts could be directed and led by UNHCR, in partnership with international or domestic scholars. Research should also document contemporaneous nexus dynamics and conditions prevalent in origin countries.

**Recommendation 11: UNHCR and other stakeholders should conduct comparative research on multiple destination State responses to nexus-related movements from a single origin country to gather region- or subregion-specific insights on the use, opportunities and limitations of refugee law frameworks.**

Such research endeavors will be important for efforts to build regional and subregional strategies to strengthen the implementation of the Refugee Convention and broader refugee criteria in the context of nexus dynamics.

**Recommendation 12: UNHCR should scrutinize the ways in which it communicates publicly about movements that relate to nexus dynamics and frame communication to avoid and negate singular inferences on the ‘causes’ prompting flight in the context of nexus dynamics (e.g. by avoiding use of terminology such as ‘drought displacement’).**

This report has sought to describe how refugee law frameworks have featured in destination State responses to cross-border movements in the context of nexus dynamics. The responses of Kenya, Ethiopia, Brazil and Mexico to nexus-related cross-border movements have illuminated pertinent observations and implications on the use of refugee law frameworks and informed the recommendations in this report. The observations, implications and recommendations are framed to advance reflection and discussion by States, UNHCR, the PDD and other stakeholders on normative and practical solutions to strengthen implementation of refugee law in the context of nexus dynamics.





## VI. ANNEXES

### 6.1. Kenya

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## I. INTRODUCTION

### Overview of Somali Cross-Border Movements

Encamped generations of Somali refugees have remained a constant in Dadaab since the first large-scale influx in the early 1990s.<sup>1</sup> The numbers have fluctuated in the ensuing years, in tune with political, security and environmental conditions in Somalia and with return and repatriation efforts, but the protracted predicament continues to affect hundreds of thousands of individuals and families.<sup>2</sup> Even so, the number of Somalis that arrived in 2011 was extraordinary. At the end of 2010 the registered Somali refugee population in the Dadaab camps was over 285,000, but by the end of 2011, the population had increased to almost 444,000, and more than 519,000 in Kenya.<sup>3</sup> For years, Kenya has hosted the largest population of Somali refugees.<sup>4</sup>

At 31 March 2018, Kenya was home to over 272,000 Somali refugees and asylum-seekers, hosted primarily within the four camps in Dadaab in north-eastern Kenya.<sup>5</sup> A relatively small number of Somali refugees also live in the Kakuma camps (approximately 34,000), and in urban areas, such as Nairobi (over 20,000).<sup>6</sup> These figures do not capture the many Somali nationals who have devised formal and informal ways

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<sup>1</sup> In 1990, there were 330 refugees in Kenya. UNHCR, “UNHCR Population Statistics Database”, available at: [http://popstats.unhcr.org/en/persons\\_of\\_concern](http://popstats.unhcr.org/en/persons_of_concern), accessed between February and September 2018. Since the 1990s, the numbers have consistently been in the hundreds of thousands.

<sup>2</sup> Many have written on the protection provided to Somalis in Kenya, including during 2011 and 2012. They include Lindley and Haslie, “Unlocking Protracted Displacement: Somali Case Study”, Working Paper Series No. 79, Oxford Refugee Studies Centre, 2011, available at: <https://www.rsc.ox.ac.uk/publications/unlocking-protracted-displacement-somali-case-study>, accessed: September 2018; Lindley, “Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya”, *Refugee Survey Quarterly*, Vol. 30, No. 4, pp. 14–49; Hammond, “History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region”, *New Issues in Refugee Research*, UNHCR, 2014, available at: <http://www.refworld.org/docid/53301a444.html>, accessed: September 2018; Betts, “Survival Migration: Failed Governance and the Crisis of Displacement”, Cornell University Press, 2013; Horvil, “Protection for Refugees, not from Refugees: Somalis in Exile and the Securitisation of Refugee Policy”, International Refugee Rights Initiative, 2017, available at: <https://reliefweb.int/report/somalia/protection-refugees-not-refugees-somalis-exile-and-securitisation-refugee-policy>, accessed: September 2018; Moret et al., “The Path of Somali Refugees into Exile: A Comparative Analysis of Secondary Movements and Policy Responses”, *Swiss Forum for Migration and Population Studies*, 2006, available at: <http://www.unhcr.org/50aa0d6f9.pdf>, accessed: September 2018.

<sup>3</sup> Kenya’s response to circulated questionnaire, on file with author.

<sup>4</sup> See UNHCR, “UNHCR Data Portal, Horn of Africa: Somalia Situation, Kenya”, available at: <https://data2.unhcr.org/en/situations/horn/location/178>, accessed: September 2018.

<sup>5</sup> See UNHCR, “Kenya: Registered Refugees and Asylum-seekers, 31 March 2018”, available at: [http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/05/Kenya-Infographics\\_March-2018.pdf](http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/05/Kenya-Infographics_March-2018.pdf), accessed: September 2018. In May 2018, one of the four camps (Ifo #2) was closed.

<sup>6</sup> See UNHCR, “Statistical Summary as of 31 March 2018: Refugees and Asylum Seekers in Kenya”, available at: <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/05/KENYA-Statistics-Package-March-2018.pdf>, accessed: September 2018.

to integrate and reside in different parts of the country, drawing on ethnic and clan ties, entrepreneurship and fortitude.<sup>7</sup>

Somali refugees in Kenya have sometimes been considered along two distinct lines: the Somalis who arrived in the 1990s and the Somalis who arrived since the late-2000s, driven by a range of dynamic factors, including conflict, insecurity, persecution, drought, food insecurity and famine, which have featured in assorted permutations. The 'older generation' of Somalis and the majority that arrived before 2011 predominantly live in Ifo, Hagadera and Dhagahaley, the older camps in Dadaab.<sup>8</sup> With burgeoning cross-border movements at the turn of the last decade and as the outskirts of the older camps became inhumanely congested, two new camps, Ifo 2 and Kambioos, were built and opened in the middle of 2011. Through relocation exercises, these eventually hosted most Somalis who fled in 2011 and 2012.<sup>9</sup>

Kambioos was closed in April 2017.<sup>10</sup> Ifo 2 was also closed in May 2018.<sup>11</sup> Many of the residents of these camps had voluntarily repatriated to Somalia under the umbrella of a Tripartite Agreement between the United Nations High Commissioner for Refugees (UNHCR) and the governments of Kenya and Somalia, signed in late 2013 (Tripartite Agreement).<sup>12</sup>

At the end of July 2015, the government of Kenya stopped registration of new arrivals in the Daadab camps, a policy that primarily affects Somalis. Since then and in 2016 and 2017, during which drought and near-famine conditions intermingled with violence in Somalia,<sup>13</sup> Somalis have continued to arrive in Dadaab, but in much smaller numbers. As at July 2018, the number of unregistered new arrivals across the camps in Dadaab stands at over 10,000 individuals.<sup>14</sup> They are unable to access procedures that would

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<sup>7</sup> See e.g. Hammond, *supra* note 2; Lindley and Haslie, *supra* note 2.

<sup>8</sup> Some were also housed in the Kakuma camps in North-western Kenya. See e.g. Lindley, *supra* note 2.

<sup>9</sup> Informants indicated that high-level political interventions and other efforts were needed to get land allocated to construct the structures and to open them for relocation purposes. See also Hammond, *supra* note 2.

<sup>10</sup> UNHCR, "Somalia Situation: Supplementary Appeal: January–December 2017", available at: <http://www.unhcr.org/591ae0e17.pdf>, accessed: September 2018.

<sup>11</sup> Repatriation is discussed in more detail later in this case study.

<sup>12</sup> Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, November 2013, available at: <http://www.refworld.org/pdfid/5285e0294.pdf>, accessed: September 2018. This Agreement is discussed alongside repatriation, later in this case study.

<sup>13</sup> See e.g. Yarnell and Thomas, "On the Edge of Disaster: Somalis Forced to Flee Drought and Near Famine Conditions", Field Report, Refugees International, 2017, available at: <https://www.refugeesinternational.org/reports/somaliadroughtandfaminereport>, accessed: September 2018.

<sup>14</sup> These numbers are based on figures as at 23 July 2018, shared with the author, and are based on profiling and other ongoing documentation activities, including birth registration. Approximately 56 per cent of households are female headed and 88 per cent of the total are women and children.

assess their claim to refugee status. Of the total, approximately 9,738 are from Somalia, while approximately 345 are of other nationalities. Given their unregistered status, they have limited access to the assistance and protection offered to recognized refugees in Dadaab, and are increasingly reliant on kin and connections for subsistence. Some of the ‘new’ arrivals include individuals who had previously returned to Somalia, having relinquished their status by drawing on repatriation assistance.<sup>15</sup>

The underlying frameworks and methods used to grant and process recognition of refugee status, including during large-scale influxes, has not been mapped comprehensively in Kenya.<sup>16</sup> Much of the responsibility for protecting and assisting Somalis and others seeking asylum was delegated to UNHCR in the early 1990s, with the first large-scale Somali influx.<sup>17</sup> This period also saw the genesis of Kenya’s encampment policy. UNHCR became responsible for assessing refugee status and recognizing refugees, which it undertook pursuant to its mandate. In July 2014, the Kenyan government took authority for taking decisions, although UNHCR remains operationally engaged and deeply involved in registration and status determination.<sup>18</sup>

Historically, a group-based approach (sometimes used synonymously with a so-called “*prima facie* approach”) to refugee status determination (RSD) applied to a number of nationalities that sought refuge in Kenya, including Somalis, Sudanese and South Sudanese. Indeed, most refugees in Kenya have been recognized through a group-based approach by UNHCR. In April 2018, the South Sudanese remained the only group to which Kenya applied a group-based approach to RSD. Claimants from all other nationalities are subject to an individual approach. Somalis, who had benefited from a group-based approach to RSD for decades, are no longer able to do so. Beginning in April 2016, Somali asylum-seekers are required to undergo an individual approach to RSD throughout Kenya.<sup>19</sup>

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<sup>15</sup> Of the Somali total of 9,738, approximately 1,746 individuals have returned to Kenya, having previously benefited from assistance to voluntarily repatriate to Somalia. Of the 1,746, approximately 1,720 were facilitated from Dadaab, and another 26 from Kakuma. These numbers are based on figures as at 23 July 2018, shared with the author. Somalis have cited a wide range of reasons for returning back to Kenya, including insecurity. For more discussion on repatriation and to view the returns back to Kenya in their overall context, see the last section of this case study.

<sup>16</sup> But see e.g. literature highlighted in footnote 2. See also Abuya, “Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective”, *International Journal of Refugee Law*, Vol. 19, Issue 1, 2007, pp. 51–95.

<sup>17</sup> Physical protection and security-related activities remained within the responsibilities of the government.

<sup>18</sup> See e.g. Garlick et al., “Building on the Foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya”, UNHCR, 2015, available at: <http://www.unhcr.org/5551f3c49.pdf>, accessed: September 2018.

<sup>19</sup> The Kenya Gazette, Vol. CXVIII-No. 46, Gazette Notice No. 3017, Nairobi, 29 April 2016, available at: [http://kenyalaw.org/kenya\\_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46](http://kenyalaw.org/kenya_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46), accessed: September 2018.

As explained by others, Kenya's acceptance to grant territorial access to hundreds of thousands of refugees has come at the expense of rights, manifested through a long-standing strategy of containment.<sup>20</sup> With freedom of movement and employment opportunities circumscribed, even in the face of extraordinary resilience and agency, opportunities for a dignified existence for Somalis in the arid, desolate Dadaab landscape have been severely curtailed.<sup>21</sup> Lindley summarizes that "[c]amps breed forms of separation and control that are inimical to the realisation of refugee rights and broader societal participation."<sup>22</sup> Shifting episodes of violence and insecurity; donor fatigue and dwindling funding; reductions in rations, assistance and services; and limited scope for resettlement and integration have added to these dynamics.<sup>23</sup>

Compounding these circumstances are recent changes in Kenya's engagement on refugee affairs, evidenced most prominently in a marked shift towards security-driven policy interventions. Tensions and fear fomented by terrorist and violent incidents,<sup>24</sup> and perhaps also other underlying political dynamics,<sup>25</sup> coincide, arguably with a heavier-handed approach to refuge in the country, particularly as it relates to Somalis.

Although Kenya continues to permit territorial access, with policy interventions that have effectively limited protection and a focus on facilitating voluntary repatriation, choices for Somalis are limited. These can arguably be reduced to remaining in limbo within the camps; returning to Somalia with or without the available packages of assistance; or undertaking secondary movements elsewhere. That said, in October 2017, Kenya committed to craft a Comprehensive Refugee Response Framework (CRRF) for the country, including an action plan that reflects commitments Kenya has made in international forums. Informants indicated that new funding mechanisms also seek to address socio-economic inclusion of refugees.<sup>26</sup>

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<sup>20</sup> See e.g. Betts and other literature cited in supra note 2.

<sup>21</sup> Note, however, a system whereby travel documents and movement passes were issued under circumscribed conditions; see e.g. Lindley, supra note 2.

<sup>22</sup> *Ibid.*, p. 37.

<sup>23</sup> See e.g. Lindley and other literature cited in supra note 2.

<sup>24</sup> Among the most prominent include an attack on the Westgate Shopping mall in Nairobi in 2013, Garissa University College attack in 2015, as well as many incidents in the Dadaab camps.

<sup>25</sup> Informants discussed their perceptions regarding concerns around economic wealth and political agency of Somalis in a context underpinned by increasing population growth within the Somali constituency.

<sup>26</sup> On the Comprehensive Refugee Response Framework (CRRF) and socio-economic inclusion, see e.g. UNHCR, "CRRF Global Digital Portal: Kenya", available at: [http://www.globalcrrf.org/crrf\\_country/kenya-2/](http://www.globalcrrf.org/crrf_country/kenya-2/), accessed: September 2018. In March 2017, Kenya also hosted the Intergovernmental Authority on Development's (IGAD) special summit on the protection of and durable solutions for Somali refugees and reintegration of returnees in Somalia, where IGAD member States adopted the so-called "Nairobi Declaration".

Others have noted the tension between security concerns and a powerful public discourse of moral duty and pan-African hospitality as well as a desire to uphold Kenya's international reputation.<sup>27</sup> Whether these sentiments continue to mediate Kenya's refugee regime in the heightened and charged security-focused contemporary setting remains to be seen. How such sentiments inspire responses towards Somali claimants in particular, including those fleeing in the context of nexus dynamics, is also a separate question, given the interventions and policy changes of the recent past.

With this background in mind, this case study describes Kenya's response to Somali movements into its territory. The next section provides an overview of pertinent aspects of the legal and institutional landscape in Kenya. Section III discusses Kenya's response to Somali arrivals in 2011 and 2012, including the mechanisms used to provide international protection and how informants characterized the responses. Section IV highlights contemporary changes.

## II. LEGAL AND INSTITUTIONAL LANDSCAPE

Kenya is a party to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees (together, Refugee Convention), as well as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).<sup>28</sup> Up until 1991, there were fewer than 15,000 refugees in Kenya, and the government, specifically the Special Programme of Refugees and an Eligibility Committee housed under the then Ministry of Home Affairs and National Heritage, was responsible for refugee issues.<sup>29</sup> The Eligibility Committee, which comprised a range of actors, including UNHCR as an observer and advisor, conducted RSD based on an individual approach. The Aliens Restriction Act of 1973 and the Immigration Act of 1967 (both now repealed) underpinned this framework, with the latter incorporating key elements of the definition in the Refugee Convention. Some suggest that in practice the Eligibility Committee also applied the OAU Convention's broader refugee criteria, notwithstanding the fact that Kenya would not ratify that treaty until 1992, incidentally around the same time it started receiving large-scale influxes.<sup>30</sup>

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<sup>27</sup> See e.g. Lindley, *supra* note 2.

<sup>28</sup> Kenya acceded to the Convention in 1966 and the Protocol in 1981.

<sup>29</sup> UNHCR, *supra* note 1. Mostly from Ethiopia and Uganda; on these historical aspects, see generally Abuya, *supra* note 16; Garlick et al., *supra* note 18.

<sup>30</sup> See Abuya, *ibid.*

By the end of 1991, Kenya's refugee population surpassed 120,000, and 402,000 the following year.<sup>31</sup> Somalis accounted for most of this influx with over 95,000 in 1991 and more than 265,000 in 1992.<sup>32</sup> The Somali influx was the first time Kenya had experienced movements of such a magnitude and with the Eligibility Committee overburdened, the individual approach to RSD became untenable.<sup>33</sup> In 1991, UNHCR, which had set up operations in Kenya in the 1960s but had maintained a relatively small presence, was handed responsibility for refugee protection. This came with the expectation that UNHCR set up and manage refugee camps in the border regions of Kenya.<sup>34</sup> The government handover meant UNHCR also became responsible for status determination, which it carried out pursuant to its mandate, using both individual and group-based approaches. This *status quo* stood for over 20 years.<sup>35</sup>

### **Kenya's 2006 Refugees Act**

Although UNHCR has remained the key institutional actor on refugee affairs, including during key phases of Somali influxes, in the past decade or so Kenya has witnessed formative changes in the legal, policy and institutional landscape. In 2006, following almost two decades of advocacy aimed at promoting greater government responsibility, Kenya adopted specific legislation, the Refugees Act.<sup>36</sup> Accompanying Regulations were adopted in 2009.<sup>37</sup> With the passage of the Act, there were expectations for robust government engagement, but this was still some years away and arguably began in earnest in the context of the Somali movements of 2011. Since then, aspects of the framework envisaged under the Act developed incrementally and the Kenyan government has increasingly exercised authority over refugee affairs.<sup>38</sup>

The Refugees Act established a legal and institutional framework, set out powers and functions, and formalized many of the policies that had existed in practice, including encampment. The Act established the Department of Refugee Affairs (DRA).<sup>39</sup> It was

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<sup>31</sup> UNHCR, supra note 1.

<sup>32</sup> Ibid.

<sup>33</sup> Abuya, supra note 16.

<sup>34</sup> See e.g. Betts, supra note 2; Abuya, supra note 16.

<sup>35</sup> For more, see e.g. Garlick et al., supra note 18; See also literature cited in footnote 2, for example, on concerns related to UNHCR activities.

<sup>36</sup> The Refugees Act, 2006, available at: <http://www.refworld.org/docid/467654c52.html>, accessed: September 2018; On the legal framework, see generally, Garlick et al., *ibid*; Grant et al., "Asylum Under Threat: Assessing the Protection of Somali Refugees in Dadaab Refugee Camps and Along the Migration Corridor", Refugee Consortium of Kenya and Danish Refugee Council, 2012, available at:

[https://reliefweb.int/sites/reliefweb.int/files/resources/Asylum\\_Under\\_Threat.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Asylum_Under_Threat.pdf), accessed: September 2018.

<sup>37</sup> Kenya: Refugees (Reception, Registration and Adjudication) Regulations, 2009, available at:

<http://www.refworld.org/docid/4a1c0d782.html>, accessed: September 2018.

<sup>38</sup> See e.g. Garlick et al., supra note 18.

<sup>39</sup> The Refugees Act, 2006, supra note 36, Section 6.



housed under the Ministry of State for Immigration and Registration of Persons, and was responsible for all administrative matters relating to refugees in Kenya, including coordination and programmes. The functions of the head of the DRA, the Commissioner for Refugee Affairs, include the formulation of policy on refugee matters in accordance with international standards and to receive and process applications for refugee status.<sup>40</sup> The Act does not explicitly spell out most entitlements or obligations of refugees, but incorporates by reference the relevant frameworks contained in ratified international conventions (as well as laws in force in Kenya).<sup>41</sup> The Act specifically allows the Minister responsible for refugee affairs to designate places and areas in Kenya as transit centres or refugee camps.<sup>42</sup> It also restricts wage-earning employment, subjecting refugees to the same restrictions as those imposed on other non-citizens in the country.<sup>43</sup>

Sections 10 and 11 of the Refugees Act (as well as its implementing Regulations) establish a regime for registration, RSD and appeal. A Refugee Affairs Committee established under Section 8 and comprising representatives of a range of different government ministries and departments is charged with assisting the Commissioner on matters concerning the recognition of persons as refugees.<sup>44</sup> Section 9 discusses the establishment of a Refugee Appeals Board. Implementation of many of these institutional and functional aspects remained outstanding for years. Efforts for the government to take over registration and RSD and to institute an appeal mechanism have made headway more recently with key provisions of the Act implemented and operationalized. On 1 July 2014, the Kenyan Commissioner for Refugee Affairs assumed responsibility for recognizing refugees and issuing decisions.<sup>45</sup> The Refugee Appeal Board was constituted in 2015 and started undertaking appeal functions in November 2017, while a Technical Advisory Committee comprising government and UNHCR personnel was constituted in 2014 to improve the quality of decisions.<sup>46</sup>

### **Definition of a Refugee and Declaration of *Prima Facie* Status**

A “refugee” is defined in Section 3 of the Act, which differentiates between so-called “statutory refugees” and so-called “*prima facie* refugees”. Section 3(1) on statutory

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<sup>40</sup> Ibid., section 7.

<sup>41</sup> Ibid., Section 16(1).

<sup>42</sup> Ibid., Section 16(2) and 16(3); See also Garlick, *supra* note 18, explaining issues around the status of camps as well as responsibilities of DRA camp coordinators, including as they are set out in the Refugees (Reception, Registration and Adjudication) Regulations, *supra* note 37.

<sup>43</sup> Ibid., Section 16(4).

<sup>44</sup> In practice, the Refugee Affairs Committee also has a role with regard to policy-related matters beyond its engagement on the RSD process.

<sup>45</sup> For more, see e.g. Garlick, *supra* note 18.

<sup>46</sup> Ibid.

refugees essentially follows the criteria for inclusion under the Refugee Convention, but also adds sex as a ground for persecution. Section 3(2) incorporates the regional refugee definition under Article I(2) of the OAU Convention, defining a *prima facie* refugee as follows:

A person shall be a *prima facie* refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or 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.

Section 3(3) empowers the Minister to declare a group as *prima facie* refugees, “[i]f the Minister considers that any class of persons are *prima facie* refugees as defined in subsection (2), ... and may at any time amend or revoke such declaration.”<sup>47</sup> If the Minister expressly exempts or excludes persons as *prima facie* refugees, they can apply individually under 3(2),<sup>48</sup> and also under 3(1).

The Refugees Act envisages that only claimants satisfying the broader refugee criteria in the OAU Convention may be eligible for group declarations. Only if the Minister expressly exempts or excludes persons in a declaration can they be considered individually for recognition as *prima facie* refugees pursuant to the OAU Convention’s broader refugee criteria. Otherwise, strictly speaking, claimants cannot be regarded as satisfying that definition under an individual approach. The 2009 Regulation includes guidance on registration and adjudication, but it does not explicitly refer to recognition of *prima facie* refugees under Section 3(3) of the Refugees Act. Much of the content relates to recognition of statutory refugees. In fact, it seems neither the Act nor the Regulations include explicit procedural or substantive guidance related to *prima facie* refugees.

## Recent Changes

Efforts to repeal the 2006 Refugees Act and adopt new legislation have been ongoing for years.<sup>49</sup> The most recent bill to repeal and replace the Act had received parliamentary

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<sup>47</sup> The Minister responsible for refugee affairs; Refugees Act, 2006, *supra* note 36, Section 2.

<sup>48</sup> *Ibid.*, Section 3(4), which indicates that if the Minister expressly excludes or exempts persons from a declaration that a class of persons to which that person is a member are refugees, such exclusion or exemption shall not preclude the person concerned from applying under subsection (2) for recognition of their status.

<sup>49</sup> See e.g. Lindley, *supra* note 2; see also, 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*, Vol. 26, No. 4, 2014, pp. 555–580.

approval, but failed to receive Presidential assent in August 2017.<sup>50</sup> Public participation was cited as a key stumbling block. Informants indicated that a taskforce of actors was reviewing the failed bill and engaging in wider sensitization and participatory efforts. The failed bill would have deleted the definition of a *prima facie* refugee (in Section 3(2) of the Refugees Act) and instead included the broader refugee criteria under the umbrella of a statutory refugee as is the case for the criteria under the Refugee Convention. It would have allowed declaration of a class of persons as *prima facie* refugees to benefit individuals who satisfy the Refugee Convention criteria or the broader refugee criteria. And, it would have clarified that the amendment or revocation of a declaration of a class of persons as *prima facie* refugees is limited to the processing approach (and is not a revocation of status or legal rights).

On 6 May 2016, the Kenyan government announced the disbandment of the DRA.<sup>51</sup> The move created a gap in expertise and institutional knowledge as many senior staff scattered. A year later, its successor, the Refugee Affairs Secretariat (RAS), housed under the Ministry of Interior and Coordination of National Government, was formally established as a legal entity,<sup>52</sup> although it had existed and undertaken activities since mid-2016. And in July 2017, a new acting Commissioner for Refugee Affairs was appointed. The RAS and the new acting Commissioner are continuing to assume management and authority over refugee affairs, including RSD in Kenya.

### III. RESPONSE TO SOMALI MOVEMENTS IN 2011 and 2012

With the above background in mind, this section discusses the response to Somali cross-border movements in 2011 and 2012 (and also very briefly, more recently). At the beginning of 2011, notwithstanding the Refugees Act, in practice UNHCR was responsible for recognizing refugees throughout Kenya, including in Dadaab, pursuant

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<sup>50</sup> See also Norwegian Refugee Council (NRC) and International Human Rights Clinic at Harvard Law School (IHRC), “Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Proving Identity and Status”, NRC and IHRC, 2017, available at: <https://www.nrc.no/globalassets/pdf/reports/refugees-in-nairobi/recognising-nairobis-refugees.pdf>, accessed: September 2018.

<sup>51</sup> Republic of Kenya, “Government Statement on Refugees and Closure of Camps”, signed by the Principal Secretary of the Interior, 6 May 2016, available at: <https://minbane.wordpress.com/2016/05/06/httpwp-mep1xtjg-2ed/>, accessed: September 2018. The disbandment of the DRA was successfully challenged in legal proceedings, which found that the directive was *ultra vires* and therefore, null and void. See *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others*, Petition No. 227 of 2016, Kenya: High Court, 9 February 2017, available at: [http://www.refworld.org/cases,KEN\\_HC.58a19f244.html](http://www.refworld.org/cases,KEN_HC.58a19f244.html), accessed: September 2018. This decision appears to have been superseded by the establishment of the Refugee Affairs Secretariat (RAS). See e.g. NRC and IHRC, *supra* note 50, p. 9.

<sup>52</sup> NRC and IHRC, *ibid.*

to its mandate and against the background of its own guidelines and advisories, including on the eligibility and/or non-return of claimants fleeing specific situations.

## **Recognition of Somalis**

During their protracted refuge in Kenya, Somali refugees have been recognized on the basis of a group-based approach and through an individual approach, the latter approach particularly relevant to urban settings. UNHCR's data indicate that prior to 2011, the vast majority of Somali refugees in Dadaab were recognized under the OAU Convention's broader refugee criteria (close to 346,000), while close to 1,000 were recognized under the Refugee Convention's criteria, and a little over 500 were recognized under UNHCR's mandate definitions.<sup>53</sup>

At the time of the escalation in movements of Somali asylum-seekers in early 2011, Somalis from southern or central Somalia were eligible to be recognized through a group-based approach.<sup>54</sup> In Dadaab, as a procedural matter, this meant that Somalis arriving in Dadaab were first "screened" by the DRA, which included the collection of photographs, fingerprints and basic bio data and then referred to UNHCR for registration. It appears that the DRA process included efforts to identify Kenyan Somalis and individuals who presented security threats. UNHCR was unable to register without a government referral slip.

Following the DRA screening, UNHCR conducted a separate registration, at level two, which included gathering information on reasons for flight and fear of return.<sup>55</sup> Absent the need for an individual approach, Somalis were recognized as refugees and provided with a ration card, which entitled them to the assistance and protection available in the camps. Access to rations and other services provided in Dadaab was conditional upon UNHCR registration. Until then, asylum-seekers could obtain temporary food and assistance. Recognized refugees also received a Proof of Registration document, which included photos and bio data.

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<sup>53</sup> As discussed in Subsection 2.5 of this report, UNHCR's broader mandate criteria draw from broader refugee criteria in the regional refugee instruments, but are to some extent textually distinct. Also as discussed in the introduction to this case study, until July 2014, UNHCR was responsible for conducting RSD. In this sense, although UNHCR's database records the OAU Convention's broader refugee criteria as the basis for recognition (and indeed, Kenya was a party to that Convention, and a domestic refugee law which incorporated the broader refugee criteria had been in force since 2006), perhaps UNHCR's database should have recorded the basis for recognition as UNHCR's mandate rather than the OAU Convention's broader refugee criteria. For more on this, see e.g. Wood, *supra* note 49. See also data caveats expressed in footnote 134 below.

<sup>54</sup> Exactly when this geographic demarcation was introduced is unclear. Some informants surmised that it may have been in place even in 2005/2006.

<sup>55</sup> UNHCR has three levels of registration through which progressively detailed information is obtained as the registration level increases.

Based on UNHCR’s data, it appears that more than 121,000 Somalis who arrived in Dadaab in 2011 were recognized on the basis of broader refugee criteria, through a group-based approach. Similarly, over 50 Somalis were recognized on the basis of the Refugee Convention and fewer than 10 on the basis of UNHCR's mandate definitions. With respect to Somalis who arrived in 2012 in Dadaab, more than 18,000 were recognized on the basis of broader refugee criteria, through a group-based approach, while over 70 were recognized on the basis of the Refugee Convention and fewer than 5 under UNHCR's mandate definitions.<sup>56</sup>

In Dadaab, some Somalis also underwent an individual approach to RSD. The data suggest that almost 130 Somalis who arrived in the Dadaab camps in 2011 were recognized on the basis of broader refugee criteria, following an individual approach to status determination. Similarly, over 40 Somalis were recognized on the basis of the Refugee Convention and about 10 on the basis of UNHCR's mandate definitions. With respect to Somalis who arrived in 2012 in Dadaab, approximately 10 were recognized on the basis of broader refugee criteria through an individual approach, while over 20 were recognized on the basis of the Refugee Convention and about 6 under UNHCR's mandate definitions. This information is summarized in the table below.

**Table 1: Legal Bases Recorded for Recognition of Somalis (Arrived in Dadaab in 2011 and 2012)**

<b>Legal Basis for Refugee Status</b>	<b>2011<sup>57</sup></b>	<b>2012<sup>58</sup></b>
Broader refugee criteria (group-based)	121,345	18,621
Refugee Convention criteria (group-based)	52	72
UNHCR mandate definitions (group-based)	7	4
Broader refugee criteria (individual)	129	10
Refugee Convention criteria (individual)	42	23
UNHCR mandate definitions (individual)	10	6

Data collected by UNHCR during registration processes suggest that for 2011, the four primary reasons recorded regarding reasons for flight of Somalis related to the

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<sup>56</sup> The statistics included in this paragraph, the below paragraph and the below table were taken in 2018 rather than in 2011 or 2012. Since that time, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture of the numbers for 2011 or 2012. Nonetheless, these statistics are included to highlight, in broad terms, the way recognition was referenced in 2011 and 2012 in UNHCR’s data and provide a sense of the differences in numbers.

<sup>57</sup> Figures do not include Somalis who were provided legal status on other grounds.

<sup>58</sup> Figures do not include Somalis who were provided legal status on other grounds.

following: (1) access to food/assistance (over 23,000 individuals); (2) general insecurity (over 23,000 individuals); (3) livelihood problems (environmental) (over 14,000 individuals); and livelihood problems (security) (over 6,000 individuals).<sup>59</sup>

Somalis who presented with potential exclusion triggers and those who were from areas outside southern or central Somalia were, as a matter of policy, subject to an individual approach to RSD. Whether these procedures worked seamlessly in practice has not been ascertained.

In practical terms, at least as it related to assistance within Dadaab, the legal basis under which Somalis were recognized as refugees made little difference. It became relevant, however, for resettlement; in order to qualify, refugees had to show a claim that satisfied the criteria under the Refugee Convention.<sup>60</sup>

Even though the Refugees Act was in force, in general, it was not applied with respect to status determination since the DRA did not assume responsibility for recognizing refugees until July 2014. In 2011, the DRA was operational and active, undertaking managerial and coordination roles within the camps as well as screening, but its engagement on RSD and registration was limited. In this context, it appears that a public Ministerial declaration pursuant to Subsection 3(3) of the Act was never issued in 2011, or indeed at any preceding time since the Act came into force, notwithstanding the scale of Somali cross-border movements into Kenya.

Although a Ministerial declaration to recognize Somalis as *prima facie* refugees under the Act has not surfaced, it appears that in 2011, at least in Nairobi, the continuation of such status was discussed among a small group of senior stakeholders, including the DRA.<sup>61</sup> In March 2011, in the context of a noticeable increase in Somali arrivals in Dadaab, and well before the UN declaration of famine in July, it seems that senior staff from UNHCR, the then Commissioner for Refugee Affairs, and representatives from the World Food Programme (WFP) and donors had a meeting in which a consensus was

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<sup>59</sup> These numbers capture *only* the four main reasons recorded, by quantity. Again, similar caveats to those noted in footnote 134 may apply.

<sup>60</sup> A key informant suggested, however, that with respect to Somali refugees recognized under broader refugee criteria, in practice this impediment to resettlement does not present a significant hurdle, as the vast majority are also able to satisfy a claim based on the Refugee Convention.

<sup>61</sup> Although the Department of Refugee Affairs (DRA) was established when Somali movements resurged during the mid-late 2000s, the existence and breadth of discussions between UNHCR and the DRA on recognizing Somalis from southern or central Somalia through a *prima facie* approach is unclear. Pre-2011 discussions on the extent to which the Kenyan government and UNHCR conferred on UNHCR's mandate recognition of Somali refugees, has not been examined in any depth. See Garlick et al., *supra* note 18, which summarizes two characterizations of how the Kenyan government viewed UNHCR's mandate recognition of refugee status.

reached: the participants at the meeting agreed that the Somalis arriving in conditions of worsening food insecurity, soon to be classified as a famine, should continue to be considered as refugees.<sup>62</sup> The underlying reasons for this consensus are highlighted further below.

### **Policy Changes on Registration of Somalis in Dadaab**

In October 2011, with Somali arrival numbers mounting in an underlying environment of growing insecurity in the camps and elsewhere in the country, the Kenyan government stopped the registration of new asylum-seekers in Dadaab. Some informants surmised that this edict might have been influenced at least in part by concerns that existing systems were inadequate to identify individuals presenting security threats. Another concern conjectured by informants was that registration (and the services that flow from it) was seen as an incentive that created a pull factor, without which Somalis may not have come or may have been more inclined to return.

With registration stopped, to keep account of numbers and identify acute vulnerabilities, UNHCR maintained lists of new arrivals (names, general profiles, locations in camps). In this context, tacit permission was provided for unregistered asylum-seekers to remain in the camps and among their outskirts, with the international community continuing to be responsible for many aspects of protection. After that time, the government opened a number of limited time periods or ‘windows’, lasting for a week or more, to register backlogs of asylum-seekers awaiting registration in Dadaab. As time passed, increasingly sophisticated methods of data collection and biometrics were implemented, which also enabled better verification exercises in Dadaab.

As of mid-2015, opportunities for registration have completely stopped in Dadaab.<sup>63</sup> While this policy change applies to all new arrivals, the context means that it predominantly affects Somalis. UNHCR and Kenyan authorities have continued to gather basic profile information, but without registration, Somalis who have arrived since mid-2015 are unable to access procedures that would assess their claim for refugee status. As noted above, as at July 2018, about 9,738 profiled Somali and 345 profiled individuals of other nationalities remain unregistered.<sup>64</sup>

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<sup>62</sup> The discussion here (and in other parts of this annex) on the March 2011 meeting is based on an interview with an informant who was present at the meeting.

<sup>63</sup> Except for limited exceptional and *ad hoc* registration; UNHCR Kenya, Timeline of Registration Activities in Dadaab: 2013–July 2018, on file with author.

<sup>64</sup> These numbers are based on figures as at 23 July 2018, shared with the author.

## Registration and Recognition in Nairobi

Although RSD outside Dadaab is not discussed in any depth in this case study, it should be noted that since the end of 2012, at various times and for extended periods, the government has also suspended the registration of asylum-seekers in urban areas, hindering access to RSD.<sup>65</sup> In Nairobi, UNHCR and the DRA conducted registration in a staggered process that began with the DRA.<sup>66</sup> Somalis from southern or central Somalia were also eligible for recognition of status through a group-based approach. In Nairobi, however, unlike in Dadaab, Somalis would go through a combined and more elaborate registration process, where applicants were required to fill out the level-two registration form and a more detailed RSD application form.

Since February 2017, Somalis (and other nationalities of asylum-seekers) have been registered in Nairobi, but are no longer permitted residence in urban areas, unless an exemption is granted.<sup>67</sup> Once registered, Somalis are issued a movement pass with the address stated as Dadaab, and are expected to present themselves. For all other nationalities, the address is stated as Kakuma. Since this change in policy and as at end of July 2018, almost 2,500 Somali asylum-seekers have been granted movement passes in Nairobi and only about 23 are known to have moved to the camps in Dadaab.<sup>68</sup>

## Revocation of Group-based Approach to Recognition of Somalis

On 1 July 2014, the DRA took over accountability for RSD and the Commissioner for Refugee Affairs became the authority responsible for taking decisions. This change meant status was granted pursuant to the legal bases articulated in the Refugees Act. Between July 2014 and July 2015, the time at which registration was stopped in Dadaab, it appears two windows were provided to register claimants.<sup>69</sup>

In April 2016, the Kenyan government ended recognition of refugee status through a group-based approach for all Somalis. The gazettal declaration, dated 29 April 2016, states:

IN EXERCISE of the powers conferred by section 3(3) of the Refugees Act, 2006, the Cabinet Secretary for Interior and Co-ordination of National Government revokes the prima facie refugee status of asylum seekers from Somalia with effect

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<sup>65</sup> For more on RSD in urban areas in Kenya, see e.g. Garlick et al., *supra* note 18.

<sup>66</sup> *Ibid.*

<sup>67</sup> In this context, access to RSD in urban areas is also affected, meaning that following registration, Somalis are required to move to Dadaab.

<sup>68</sup> These numbers are based on figures as at 31 July 2018, shared with the author.

<sup>69</sup> UNHCR Kenya, *Timeline of Registration Activities in Dadaab: 2013–July 2018*, on file with author.



from 1st April, 2016, and all asylum seekers from Somalia shall be required to undergo the Refugee Status Determination process as prescribed in the Regulations.<sup>70</sup>

This exercise of authority arguably reflects at least a tacit acknowledgement and recognition by the Kenyan authorities that up until that time, Somalis were obtaining recognition through a group-based approach pursuant to Section 3(3) of the Refugees Act, which incorporated the broader refugee criteria in the OAU Convention.<sup>71</sup> Kenya's decision to end the group-based approach to recognition for Somalis was taken well after the Tripartite Agreement.<sup>72</sup> In the course of informant interviews, it emerged that government actors may have perceived facilitating large-scale voluntary repatriation, particularly through a formal agreement, as incompatible with the continuation of a group-based approach to recognition. A UNHCR Position on Returns to southern and central Somalia issued in May 2016 specifically states that there is no internal incompatibility with continuing to recognize refugees, while undertaking voluntary repatriation efforts.<sup>73</sup>

### **Dadaab 'Closure'**

Then in May 2016, the government announced the closure of Dadaab "within the shortest possible period".<sup>74</sup> The statement explained that as a result of housing over 600,000 refugees in the camps for almost a quarter century, "the Government of Kenya has continued to shoulder very heavy economic, security and environmental burden on behalf of the region and the international community." It noted that efforts had been undertaken to address repatriation through a Tripartite Agreement, which laid the groundwork for the eventual closure of refugee camps, but due to the "immense security challenges... hosting refugees has continued to pose to Kenya and due to the

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<sup>70</sup> The Kenya Gazette, Vol. CXVIII-No. 46, Gazette Notice No. 3017, Nairobi, 29 April 2016, available at: [http://kenyalaw.org/kenya\\_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46](http://kenyalaw.org/kenya_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46), accessed: September 2018.

<sup>71</sup> One informant noted that Article 11 of the Letter of Intent on the RSD transition provided for the acceptance by DRA of UNHCR decisions prior to 1 July 2014. In 2014, Kenya also used section 3(3) of the Refugees Act to declare South Sudanese as *prima facie* refugees owing explicitly to events disturbing public order. The Kenya Gazette, Vol. CXVI-No. 91, Gazette Notice No. 5274, Nairobi, 1 August 2014, available at: [http://kenyalaw.org/kenya\\_gazette/gazette/notice/164302](http://kenyalaw.org/kenya_gazette/gazette/notice/164302), accessed: September 2018.

<sup>72</sup> *Supra* note 12. See also later discussion in this case study on the Agreement and repatriation.

<sup>73</sup> UNHCR, "Position on Returns to Southern and Central Somalia (Update 1)", May 2016, available at: <http://www.refworld.org/docid/573de9fe4.html>, accessed: September 2018, paragraph 23.

<sup>74</sup> Republic of Kenya, *supra* note 51. This statement announced the closure of both Dadaab and Kakuma. However, a further statement issued on 11 May 2016, clarified that the closure was limited to Dadaab. Ministry of Interior and Coordination of National Government, "Government Statement and Update on the Repatriation of Refugees and Scheduled Closure of Dadaab Refugee Camp", signed by the Cabinet Secretary, 11 May 2016, available at: <http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/98-government-statement-and-update-on-the-repatriation-of-refugees-and-scheduled-closure-of-dadaab-refugee-camp>, accessed: September 2018.

slow nature of repatriation” Kenya has been forced to reconsider the circumstances. Having taken into account “its national security interests”, “hosting refugees has to come to an end” and therefore the “international community must collectively take responsibility on the humanitarian needs that will arise out of this action.”

In February 2017, the Kenyan High Court held that the proposed closure of Dadaab was unconstitutional.<sup>75</sup> No overt policy interventions appear to have been taken as at April 2018, although the Tripartite Agreement (discussed later) remains afoot, even as the government tacitly permits access to territory, but not access to RSD in Dadaab.

### **Views on the Reasons and Basis for Recognition of Somalis**

With the preceding discussions in mind, including the prevailing landscape and practice in 2011–2012, it is worth noting the ways in which informants, including government actors, characterized the dynamics that prompted Somali flight in 2011, Kenya’s responses and any relationship between them. Although earlier influxes of Somalis had fled multiple root causes, including the impacts of drought, and had been granted refugee status in Kenya, with respect to the 2011–2012 movements, the consequences of drought were a prominent trigger.<sup>76</sup>

In general, two broad views emerged. One group appears to have viewed the extraordinary influx as driven by drought and its consequences for livelihoods and food security. Under this view, Somalis were seeking food and basic assistance and the response was purely humanitarian, in the sense that Somalis were registered as ‘refugees’ for humanitarian reasons rather than on the basis that they qualified for refugee status under the Refugee Convention. This position is reflected in a statement that the then Commissioner for Refugee Affairs made during the 2015 Global Consultation of the Nansen Initiative Protection Agenda.

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 them as refugees they did not meet the definition of refugees’ [sic] per

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<sup>75</sup> *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others*, supra note 51.

<sup>76</sup> This is certainly not to say that the conditions that arose in Somali in 2011, including food insecurity and then famine, did not have human-made causes. On these aspects, see e.g. Maxwell and Majid, “Famine in Somalia: Competing Imperatives, Collective Failures, 2011–12”, Oxford University Press, 2016, for a fuller account of factors.

se as defined by the 1951 Geneva Convention on refugees. Despite this, the government of Kenya recognized them as refugees on humanitarian grounds.<sup>77</sup>

Even though the Refugees Act also incorporated the broader refugee criteria under the OAU Convention, it was not mentioned in the above statement. There may have been other reasons that motivated this characterization as a humanitarian response.

In contrast, and as highlighted earlier by the consensus reached during a March 2011 meeting in which the then Commissioner for Refugee Affairs was present, another group appears to have acknowledged that Somalis arriving in the context of drought and food insecurity were refugees. They surmised that the proximate trigger prompting flight in many cases was lack of access to humanitarian assistance. However, they considered that the underlying reasons which inhibited humanitarian access stemmed from, *inter alia*, security threats and a breakdown in law and order, influenced by the presence and activities of Al-Shabaab, as well as a vacuum of governance due to limited State control and institutional capacity.<sup>78</sup> What emerges is that there was a general recognition that Somalis were fleeing underlying conflict, generalized insecurity or disruption to public order that potentially brought them within the broader legal notion of a refugee in the region.

Many informants noted that Somali flight must have been impacted by factors beyond the drought, since the drought had also affected Kenya, Ethiopia and other countries in the region, without creating similarly substantial cross-border movements. Informants reflected less on the applicability of the Refugee Convention to Somalis arriving in 2011, with many noting that the risks were prevalent. Informants, including from UNHCR, explained that in general, people came because of three reasons (insecurity, drought and lack of humanitarian assistance). Informants perceived that each factor played a different role in the decisions underlying individual movements. Although many Somalis first emphasized depleted livelihoods and humanitarian needs stemming from the drought as the immediate reasons for flight, ongoing discussions during registration highlighted the relevance of conflict, persecution and insecurity, including in relation to the fear of return. Informants recognized that these underlying root causes were interrelated and could not be easily disentangled. Informants noted that drought had been a cyclical factor affecting the region for years and that Somali movements across borders had been prompted by interactions between persecution, conflict and

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<sup>77</sup> The Nansen Initiative, "The Nansen Initiative Global Consultation: Conference Report", 2015, pp. 134–135, available at: <https://www.nanseninitiative.org/global-consultations/>, accessed: September 2018.

<sup>78</sup> See Maxwell and Majid, *supra* note 76.

environmental change. In other words, multiple factors had also influenced past movements of Somalis into Kenya, as they had in 2011 and 2012.

Some informants noted contentious political discussions between the two broad sets of views. However, in practice, the sets of views converged at least to a sufficient extent to address the overall humanitarian imperative by permitting a continuation of the prevailing *status quo*: access to territory and Dadaab, UNHCR registration and available humanitarian assistance. It seems that territorial access was largely unrestricted, even if no real leeway was given on reopening an official border entry point in Liboi, which had been closed in 2007, or permitting regular organized transport assistance between the border and the Dadaab camps for starved and malnourished Somalis.<sup>79</sup> Around March 2011, a UNHCR-run transit centre in Liboi, which had been closed in 2008, was permitted to reopen solely for the purposes of emergency medical and health interventions and to assess acute vulnerabilities and needs.<sup>80</sup> Views also converged on curtailing incentives that would create expectations of permanence and thereby inhibit return. The clearest manifestation of this, as suggested by informants, related to government refusal to permit sustainable, brick shelters to be built at the Ifo 2 camp, which eventually housed the ‘newer’ Somali arrivals.

From a purely practical sense, however, and particularly in terms of the form of international protection, it seems that Somali asylum-seekers who arrived until October 2011 were essentially treated as those that had arrived in the past. Although, even prior to the 2011 influx, informants noted a reluctance to accept new refugees, growing resentment towards Somalis, and interest in consolidating and reducing the size of Dadaab camps, against a background of funding gaps.<sup>81</sup>

Since late 2011, real and perceived security concerns appear to have prompted greater government interest in and engagement on refugee affairs and played a prominent role in Kenya’s responses towards refugees, including Somalis. This lens appears to have informed legislative and policy interventions, creating notable changes in the protection landscape.

#### IV. CONTEMPORARY LANDSCAPE

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<sup>79</sup> See also, Betts, *supra* note 2; Grant et al., *supra* note 36.

<sup>80</sup> Although note contrary view in Grant, *ibid*.

<sup>81</sup> Key informants also surmised other dimensions which may have influenced decisions, including elections at local and national levels, fraudulent access to Kenyan identity documents, environmental impacts and costs of encampment and pressure from local leaders, including Kenyan Somalis.

The preceding discussion demonstrates that some of the legal and policy interventions taken by the government have made it more difficult for asylum-seekers, including Somalis, to obtain refugee status and have further reinforced encampment.<sup>82</sup> Restricting and stopping registration in Dadaab is the starkest example of constraints placed on recognition of refugee status, notwithstanding the particular form that the institution of asylum has taken in Kenya. Another is the attempt to close Dadaab. Other legal and policy interventions include attempts to stop registration in urban areas and to cap the total number of refugees permitted into Kenya, which have been successfully challenged in Kenyan courts.<sup>83</sup> In March 2014, the government had officially designated Dadaab and Kakuma as refugee camps, making refugees criminally liable for residing outside camps without official permission.<sup>84</sup> All refugees residing outside camps were directed to them and Kenyans were called upon to report refugees. In April, so-called operation “Usalama Watch” was launched as part of a larger effort under which Kenyan authorities were required to remove adherents of Al-Shabaab and to search for weapons in Eastleigh, Nairobi, an area primarily inhabited by Somalis.<sup>85</sup>

These changes reflect the level of political sensitivity and perceptions of threats surrounding the presence of urban refugees, particularly Somalis. With a spate of high-profile security and terrorist incidents beginning towards the latter half of 2011,<sup>86</sup> informants reflected on a noticeable shift in political and public discourse and waning sensitivity and sympathy towards ethnic Somalis, if not downright hostility.<sup>87</sup>

It was in this climate that the government of Kenya, in November 2013, signed the Tripartite Agreement, which created a framework for organized voluntary return of

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<sup>82</sup> Note, however, that this study and report’s focus is on understanding how refugee law frameworks have been used to provide international protection in the context of nexus dynamics. Comprehensively documenting changes in the legal and policy landscape since 2011 is not a focus; however, certain aspects have been highlighted to provide some context and reference for further research and reading.

<sup>83</sup> See e.g. Garlick et al., *supra* note 18; NRC and IHRC, *supra* note 50.

<sup>84</sup> NRC and IHRC, *ibid.* Prior to this change, although the criminal offense was articulated in the Refugees Act, 2006, areas had not been officially designated.

<sup>85</sup> See e.g. Garlick et al., *supra* note 18. Others have written of violations, complaints and impacts of this policy and its implementation. See e.g. Lind et al., “‘Killing a Mosquito with a Hammer’: Al-Shabaab Violence and State Security Responses in Kenya”, *Peacebuilding*, Vol. 5, Issue 2, 2017, pp. 118–135, available at: <https://www.tandfonline.com/doi/full/10.1080/21647259.2016.1277010>, accessed: September 2018.

<sup>86</sup> Lind et al., *ibid.*

<sup>87</sup> Some informants suggested that negative sentiment towards ethnic Somalis (of Kenyan or Somali origin) is influenced by perceptions of their political significance, demographic growth and economic power. For example, informants noted that there were many Somali members of Parliament, that the Somali province is the third largest in the country in terms of population and projections suggested significant growth, and that Somalis hold significant land in urban centres and are perceived as successful and wealthy business owners and entrepreneurs. These aspects have not been further examined.

Somali refugees.<sup>88</sup> Voluntary repatriation has become a key priority for the Kenyan government.<sup>89</sup> Table 1 provides a summary of the scale of returns from Dadaab since 2014, when implementation began through a pilot programme and returns were limited to three areas of Somalia, designated as safe. As apparent from the numbers, most Somalis returned in 2016 and 2017 against the backdrop of the May 2016 announcement to close Dadaab. At the same time, those years also saw the number of areas designated as safe for return increased first to six and then 12, and increases to the available packages of assistance.

**Table 2: Total Departures from Dadaab Camps by Year<sup>90</sup>**

2014	485
2015	5,616
2016	33,213
2017	33,398
2018 (6 April)	2,947

As at the beginning of April 2018, close to 79,000 Somalis have returned under the umbrella of the Tripartite Agreement, with over 75,000 Somalis from Dadaab.<sup>91</sup> Figures suggest that close to 35,000 of the total returnees had arrived in Kenya in 2011 and over 5,000 had arrived in 2012.<sup>92</sup> Indeed over 48,500 of the total of almost 79,000 returnees had arrived in Kenya between 2010 and 2012.<sup>93</sup>

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<sup>88</sup> Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, *supra* note 12. For more on the Tripartite Agreement and its implementation, including safeguards and criticisms levelled against it, see e.g. IOM and UNHCR, “Joint Return Intention Survey Report 2014”, n.d., available at: <http://www.unhcr.org/55facdccc6.pdf>, accessed: September 2018; NRC, “Dadaab’s Broken Promises: A Call to Reinstate Voluntary, Safe and Dignified Returns for the Dadaab Refugee Community”, 2016, available at: <https://www.nrc.no/globalassets/dadaabs-broken-promise-an-nrc-report-10.10.16.pdf>, accessed: September 2018; Thomas Reuters Foundation, “A Review of the Legal Framework Relating to the Proposed Closure of Dadaab Refugee Camp and Repatriation of Somali Refugees”, 2017, available at: <https://www.nrc.no/globalassets/pdf/reports/a-review-of-the-legal-framework-relating-to-the-proposed-closure-of-the-dadaab-refugee-camp-and-repatriation-of-somali-refugees/2017-dadaab-camp-closure-report.pdf>, accessed: September 2018; See also Garlick, *supra* note 42.

<sup>89</sup> See e.g. Government Statements made in the context of the closure of the Dadaab refugee camp, *supra* notes 51 and 74.

<sup>90</sup> UNHCR, “Weekly Update: Voluntary Repatriation of Somali Refugees from Kenya”, 6 April 2018, available at: <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/05/Voluntary-Repatriation-Analysis-06042018.pdf>, accessed: September 2018.

<sup>91</sup> *Ibid.* Repatriations from Kakuma account for approximately 3,123 people and approximately 65 from Nairobi.

<sup>92</sup> *Ibid.* About another 8,572 individuals had arrived in 2010.

<sup>93</sup> As noted earlier, a small number of the returnees to Somalia have since come back to Kenya (fewer than 1,800), citing a wide range of reasons, including insecurity. Informants also suggested that others are using the repatriation assistance provided to undertake onward movements.

The long-held promise of recognition of refugee status, albeit within the parameters of encampment, seems tenuous for Somalis in the contemporary landscape. While territorial access is still practiced, and along with it tacit acceptance of residence in camps, close to 10,000 Somalis have not been able to access RSD procedures that would assess their claims. As a consequence of being unregistered, these Somalis have limited access to the humanitarian assistance available to recognized refugees. Yet for those that arrived in 2016 and 2017, fleeing a mix of root causes that included persecution, insecurity and drought, many might have the potential to be recognized as refugees under the definitions in the Refugee Convention and/or the OAU Convention.

The present stance highlights that Kenya's response has evolved since the beginning of 2011 and appears very much tied to the 'politics of the day': a securitized environment in which the burden of hosting large numbers of refugees and concerns regarding solidarity have arguably influenced high-level government engagement, sensitivity and scrutiny of refugee affairs. Even if different views exist within the government, they have not manifested in policy and practice changes to permit registration and status determination for most Somali asylum seekers who have arrived in Dadaab in recent years. That said, in October 2017, Kenya committed to craft a CRRF for the country, including an action plan that reflects commitments Kenya has made in international forums. Informants indicated that new funding mechanisms also seek to address socio-economic inclusion of refugees.<sup>94</sup>

Contemporary government informants in key positions who reflected on Kenya's response in 2011 noted that people were taken in as "refugees"; that they were given camps and allowed to settle within them, which meant 'certain' legal considerations were taken into account. Because Somalis who arrived in 2011 were fleeing insecurity, which was prevalent throughout the influx, and not *only* fleeing drought, they were refugees. In this sense the situation in Somalia at the time was regarded as unique due to the underlying insecurity and limited government control and capacity (as compared to the way that the drought affected other countries). Were people to come today under the same circumstances the response would be different. All Somalis would have to undergo an individual approach to RSD and systems would need to be in place at the border to ensure that people who present threats to Kenya are not permitted entry.

## V. INFORMANTS AND METHODS

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<sup>94</sup> On the CRRF and socio-economic inclusion, see *supra* note 26.

The description of Kenya’s response is based on informant interviews, carried out in Nairobi and Dadaab during 16–21 April 2018. The following table provides an overview of the informants interviewed while in Kenya (the vast majority through in-person meetings).

<b>Category</b>	<b>Total Number</b>
Ministry of Foreign Affairs	2
Refugee Affairs Secretariat (RAS)	1
Members of Parliament	2
State Department of Immigration, Border Control and Registration of Persons	3
Current and Former UNHCR Kenya Personnel	18*
Civil Society	13
Other UN or Intergovernmental	5

\* A few UNHCR informants were interviewed through remote interviews from locations outside Kenya.

Other activities undertaken to supplement the knowledge gathered through informant interviews included: (1) remote interviews and email correspondence with experts; (2) a questionnaire to the UNHCR operation in Kenya; and (3) desk review of grey and academic literature, online resources, UNHCR documents and data. UNHCR colleagues in Kenya reviewed drafts of this case study. A draft was also shared with government informants in October 2018.

In general, when relevant, efforts were undertaken to obtain data that is current between February and September 2018.



## 6.2. Ethiopia

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## I. INTRODUCTION

Ethiopia has hosted large populations of Somali refugees since the late 1980s, when amid clan warfare and armed opposition to Siad Barre's regime, hundreds of thousands fled to Ethiopia's Somali region.<sup>1</sup> Most were sheltered in eight camps and supported by the government of Ethiopia and the United Nations High Commissioner for Refugees (UNHCR). Repatriations and spontaneous returns in the intervening years saw the numbers diminish from a peak of almost 514,000 in 1991 to fewer than 20,000 between 2004 and 2006, when resurgence in conflict, insecurity and other causes, including drought, began to prompt new substantial movements.<sup>2</sup> In 2011, the Somali refugee population in Ethiopia grew by more than 100,000, a scale unprecedented in the millennium.<sup>3</sup> Recent years, particularly 2017, have also seen Somalis arrive in Ethiopia in the context of multiple root causes, including renewed conflict and drought, although in relative terms the numbers are much more muted.<sup>4</sup>

At the end of April 2018, Ethiopia was second only to Kenya as a host of Somali refugees, with a population of almost 256,000.<sup>5</sup> They are hosted within eight camps in two separate areas in the Somali region of Ethiopia, a fragile environment, sensitive to drought, soaring temperatures and decreasing rains, which have also severely affected Ethiopian Somalis. A small number (a little over 1,000) live in Addis Ababa, benefiting from a time-bound urban residence status through an Urban Assistance Programme that targets refugees with medical, protection and humanitarian concerns.<sup>6</sup> Hundreds of

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<sup>1</sup> UNHCR, "UNHCR Population Statistics Database", available at: [http://popstats.unhcr.org/en/persons\\_of\\_concern](http://popstats.unhcr.org/en/persons_of_concern), accessed between February and September 2018. For further reading see e.g. Hammond, "History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region", *New Issues in Refugee Research*, UNHCR, 2014, available at: <http://www.refworld.org/docid/53301a444.html>, accessed: September 2018; Ambroso, "Pastoral Society and Transnational Refugees: Population Movements in Somaliland and Eastern Ethiopia: 1988–2000", *New Issues in Refugee Research*, UNHCR, 2002, available at: <http://www.refworld.org/docid/4ff3fa8b2.html>, accessed: September 2018; Moret et al., "The Path of Somali Refugees into Exile: A Comparative Analysis of Secondary Movements and Policy Responses", *Swiss Forum for Migration and Population Studies*, 2006, available at: <http://www.unhcr.org/50aa0d6f9.pdf>, accessed: September 2018.

<sup>2</sup> UNHCR, *ibid.*

<sup>3</sup> *Ibid.* Relates to refugees and persons in refugee-like situations.

<sup>4</sup> See e.g. UNHCR Ethiopia Updates, including Briefing Notes on the Somali Situation, such as the one dated April 2017; UNHCR and ARRA, "Briefing Note: Melkadida, 30 September 2017 (draft)", on file with author.

<sup>5</sup> UNHCR, "UNHCR Data Portal, Horn of Africa: Somalia Situation", available at: <https://data2.unhcr.org/en/situations/horn>, accessed: September 2018. See Ethiopia and Kenya pages.

<sup>6</sup> UNHCR, "Data Portal, Horn of Africa: Somalia Situation, Ethiopia", available at: <https://data2.unhcr.org/en/situations/horn/location/169>, accessed: September 2018. Urban residence is also possible through a so-called "Out of Camp" policy, a framework that at least until Ethiopia's pledges at the Leaders' Summit in New York in 2016, was only applicable to Eritrean refugees. For more on the Out of Camp policy, see e.g. Samuel Hall Consulting, "Living Out of Camp: Alternatives to Camp-Based Assistance for Eritrean Refugees in Ethiopia", Samuel Hall and NRC, 2014, available at: <http://samuelhall.org/wp-content/uploads/2014/05/Living-Out-of-Camp-Alternative-to-Camp-based-Assistance-in-Ethiopia.pdf>, accessed: September 2018.

thousands of Somalis are also known to live and work informally under *de facto* structures and systems established within clan enclaves in urban areas.<sup>7</sup> Adding to this mix and the complexity are Somali refugees and asylum-seekers who have arrived in Ethiopia from Yemen since the outbreak of conflict in that country.<sup>8</sup>

Somalis in the Jijiga refugee camps make up close to 37,000 of the total population of Somali refugees.<sup>9</sup> They live in three camps, Aw Barre, Kebreibeyah and Shedar, and predominantly comprise populations that arrived before 2009. Since then, reception and screening facilities have largely been unavailable, meaning new asylum-seekers were unable to register, except on an *ad hoc* basis, when registration was permitted for time-bound periods. As at 31 August 2018, more than 4,200 Somalis are awaiting registration in the Jijiga camps. The unregistered are individuals who claim kinship with pre-existing refugees in Jijiga and are generally the only new arrivals permitted to stay. From about the end of 2008, as the Jijiga camps reached capacity, the government's policy and general practice involved relocation of new Somali arrivals to the Dollo Ado refugee camps. While most of the unregistered Somalis in the Jijiga camps do not include individuals who came in 2011 or 2012, they do include Somalis who arrived in late 2016 and 2017. As an unregistered population, their reasons for flight are unknown.

Located in an arid, rural and desolate landscape, subject to severe environmental pressures and close to Ethiopia's military operations, the five camps in Dollo Ado shelter Somalis who predominantly arrived in Ethiopia since 2009.<sup>10</sup> Bokolmanyo and the Melkadida camps, the two oldest, were opened in 2009, but Kobe, Hilaweyn and Buramino were opened in 2011 to accommodate contemporaneous movements.<sup>11</sup> Together the Dollo Ado camps host almost 218,000 Somali refugees. Somalis continued to arrive into these camps during 2015 and 2017, but in much smaller numbers compared to 2011 and 2012. They have continued to be registered and recognized as refugees.<sup>12</sup>

Ethiopia has provided Somalis, including populations that arrived in 2011 and 2012, with refugee status. Indeed, Ethiopia has a long-standing history of hosting refugees,

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<sup>7</sup> See also, Hammond, *supra* note 1.

<sup>8</sup> For more on the background and origins of Somali refugees who have arrived in Ethiopia from Yemen, see e.g. UNHCR, "Comprehensive Response and Solutions Strategy for Somali Refugees in Ethiopia", September 2016, on file with the author.

<sup>9</sup> As at 30 April 2018; UNHCR, *supra* note 6.

<sup>10</sup> This camp complex is sometimes referred to as "Melkadida"; it appears that the two names are used inconsistently, including by UNHCR. For the purposes of this report, the term "Dollo Ado" is used, as this is the name used in UNHCR's data portal. The UNHCR sub-office in that area may have more recently been renamed Melkadida.

<sup>11</sup> UNHCR and ARRA, *supra* note 4.

<sup>12</sup> Over 5,600 in 2015, 3,000 in 2016, and 6,500 as at 30 September 2017. *Ibid.*

especially from neighbouring countries. Many have arrived in large-scale influxes, driven by conflict, insecurity and human rights violations, in some instances in combination with impacts of environmental change or disasters. At 30 April 2018, over 915,000 refugees lived in Ethiopia, primarily from South Sudan, Somalia, Eritrea and Sudan.<sup>13</sup> Hosted largely within 27 camps along border regions, Ethiopia was Africa's second-largest host of refugees.

The Refugee Status Determination (RSD) processes used by Ethiopia to address large-scale influxes have not been mapped comprehensively.<sup>14</sup> In general, Ethiopia has opted for recognition of refugee status through a group-based approach (sometimes used synonymously with a so-called "*prima facie* approach") due to limited capacity to undertake an individual approach to RSD. As at 30 April 2018, recognition of status through a group-based approach benefited South Sudanese, Sudanese (from the Blue Nile and South Kordofan regions), Somalis (from southern or central Somalia), Eritreans and most recently, Yemenis, who arrived in the country after 1 January 2015. All other nationalities, as well as claimants outside the specific regions noted, must undergo an individual approach to RSD.

These numbers and processes reflect the often-mentioned "open-door" policy of the Ethiopian government, a stance and practice venerated by national and international stakeholders. Providing refuge was sometimes explained as a form of "solidarity" or "brotherhood" by informants, particularly towards its neighbours. With many, including Somalis, sharing ethnic, cultural and clan ties with Ethiopians in border regions, pastoralist and agro-pastoralist movements across post-colonial borders in the context of crises are in tune with well-worn, traditional movements. In fact, Ethiopian Somali communities in the Somali region of Ethiopia include former refugees who were hosted in Somalia and returned in the early 1990s, amidst political changes in each country, arriving sometimes together with their Somali hosts, who in turn became refugees in Ethiopia or assimilated into the local landscape.<sup>15</sup>

Given the sheer numbers, the generous practice of providing territorial access and refuge has come at the expense of rights, as it has in other countries in the region and elsewhere. Rights restrictions are most prominently manifested in Ethiopia's policy of encampment, with freedom of movement only permitted under specific conditions and

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<sup>13</sup> UNHCR, "Ethiopia: Refugees and Asylum Seekers", April 2018, available at: <https://data2.unhcr.org/en/documents/details/63712>, accessed: September 2018. There are also another 15-odd nationalities represented in these numbers.

<sup>14</sup> UNHCR Ethiopia internal memo, 2017, on file with author; the memo notes it is difficult to gauge the different practices, challenges and opportunities presented in conducting RSD in different parts of Ethiopia.

<sup>15</sup> See e.g. Ambroso, *supra* note 1.

with limited scope for local integration.<sup>16</sup> The small number of resettlement slots has fallen foul to recent policy changes, affecting Somalis in particular, as well as other refugees in Ethiopia.<sup>17</sup> Unable to enjoy many human rights and with limited prospects for durable solutions, opportunities for Somali refugees in Ethiopia have been limited.

With its nine pledges at the Leaders' Summit in New York in September 2016, which are to be implemented through the Comprehensive Refugee Response Framework (CRRF) process, Ethiopia is arguably chartering a new way forward.<sup>18</sup> The government's roadmap suggests Ethiopia may be poised to improve the realization and enjoyment of some human rights for its refugee populations.<sup>19</sup>

Keeping this background in mind, this case study describes Ethiopia's response to Somali movements into its territory. The next section provides an overview of pertinent aspects of the legal and institutional landscape in Ethiopia. Section III discusses Ethiopia's response to Somali arrivals in 2011 and 2012, including the mechanisms used to provide international protection and how informants characterized the response. Section IV highlights contemporary changes.

## II. LEGAL AND INSTITUTIONAL LANDSCAPE

### Ethiopia's 2004 Refugee Proclamation

Ethiopia acceded to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, (together, Refugee Convention) with some reservations.<sup>20</sup> Ethiopia is also a party to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention). Ethiopia's 1995 Constitution makes "all international agreements ratified by Ethiopia ... an integral part of the law of the land".<sup>21</sup> With regard to refugees, a

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<sup>16</sup> See earlier reference to Out of Camp policy. As noted elsewhere, it is not within the scope of this study to examine the rights landscape for Somali refugees in Ethiopia.

<sup>17</sup> UNHCR and ARRA, *supra* note 4.

<sup>18</sup> ARRA, "Roadmap: For the Implementation of the Federal Democratic Republic of Ethiopia Government Pledges and the Practical Application of the CRRF in Ethiopia", available at: [www.globalcrrf.org/wp-content/uploads/2018/04/f0dd7e3ac884a63e0026e16bf442caa430781de1.pdf](http://www.globalcrrf.org/wp-content/uploads/2018/04/f0dd7e3ac884a63e0026e16bf442caa430781de1.pdf), accessed: September 2018.

<sup>19</sup> *Ibid.*

<sup>20</sup> Ethiopia made reservations to Articles 8, 9, 17(2) and 22(1) of the Convention, recognizing these only as recommendations and not as legally binding obligations.

<sup>21</sup> Proclamation No. 1/1995, Constitution of the Federal Democratic Republic of Ethiopia, available at: <http://www.refworld.org/docid/3ae6b5a84.html>, accessed: September 2018, Article 9(4).

national Refugee Proclamation to implement the international and regional treaties has existed since 2004.<sup>22</sup>

The Refugee Proclamation outlines the legal and institutional framework for refugee reception, protection and durable solutions. Part four discusses the rights and obligations of refugees. Most are incorporated by reference to international and regional frameworks.<sup>23</sup> The Proclamation permits restrictions on freedom of movement and on wage-earning employment, providing the imprimatur for the critiqued practices of encampment and limits on work.<sup>24</sup> A new draft Refugee Proclamation, which in May 2018 was endorsed by Ethiopia's Council of Ministers, seeks to address limitations and gaps in the 2004 law.<sup>25</sup>

### **Definition of a Refugee, Group Declaration and Status Determination**

A refugee is defined to include any person or group of persons who fulfills the criteria under the provisions of Article 4 or Article 19 of the Proclamation. Article 4 contains three sub-provisions. The first two incorporate the inclusion criteria in the Refugee Convention definition. Article 4(3) incorporates the broader refugee criteria in the OAU Convention, albeit with a modification, limiting application to refugees coming from Africa.

Any person shall be considered as [sic] refugee where: 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, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, in case of refugees coming from Africa.

Article 19 allows the "Head of the Authority", in this case the head of the National Intelligence and Security Service (NISS), to declare a class of persons as refugees: "[i]f ... [the Head of the Authority] ... considers that any class of persons met the criteria under

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<sup>22</sup> Refugee Proclamation No. 409/2004, available at: <http://www.refworld.org/docid/44e04ed14.html>, accessed: September 2018.

<sup>23</sup> As international instruments ratified by Ethiopia are regarded as an integral part of the law of the land under the Constitution, refugees are, in principle, entitled to the rights and subject to the obligations in the ratified treaties, which are equally enforceable as those explicitly stated in the Refugee Proclamation. It seems, however, that there may be practical challenges to directly citing and implementing international instruments, as some regard domestication (including official translation to Amharic) as a prerequisite.

<sup>24</sup> Refugee Proclamation No. 409/2004, supra note 22, Articles 21(2) and 21(3).

<sup>25</sup> See: <https://arra.et/revise-refugee-law-got-cabinet-approval/>, accessed: September 2018. The new draft proclamation is discussed in more detail below.

Article 4(3)".<sup>26</sup> This framework provides scope to grant refugee status on the basis of an individual approach and a group-based approach. However, the latter is only explicitly provided for pursuant to the OAU Convention's broader refugee criteria. A declaration to recognize that a group of persons may, on its face, satisfy the Refugee Convention definition is not explicitly referenced.

The Refugee Proclamation does not dictate how to make declarations under Article 19. Nor does it include a corresponding provision on revoking recognition of a class of persons as refugees. And, because an implementing regulation or directive supplementing the Proclamation does not exist, there is little clarity on the procedural and substantive requirements associated with the grant (or revocation) of status pursuant to a declaration. For instance, it appears that a declaration need not be publicly announced (e.g. through a Gazette). Certainly, this is not the practice. In this regard, even though refugee status has been granted to most refugees in Ethiopia under a group-based approach, such recognition has occurred outside formalized and public processes.<sup>27</sup>

Part three of the Proclamation deals with applications for recognition, and procedures for determining, refugee status. UNHCR is explicitly invited to participate as an observer.<sup>28</sup> In practice, and as further discussed below, UNHCR plays a more substantive role and is directly engaged in status determination, among other operational roles. An appeal hearing council is established under Article 15 of the Proclamation, and its members and functions are detailed in Articles 16–17, but it has not been formally constituted as at April 2018.<sup>29</sup>

### **UNHCR and the Administration for Refugee and Returnee Affairs**

UNHCR plays a prominent role within the legal, institutional and operational frameworks relevant to refugees in Ethiopia. The Office began operations in 1966, three years after the formation of the Organization of African Unity (OAU) in Addis Ababa, with a focus on developing relations with the regional entity and other key actors.<sup>30</sup> The late 1960s saw UNHCR become operational, as Sudanese fleeing civil war arrived in

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<sup>26</sup> The Refugee Proclamation defines the "Authority" in Article 2 to mean: "the Security, Immigration and Refugee Affairs Authority established by Article 6(1) of Proclamation No. 6/1995". The Security, Immigration and Refugee Affairs Authority (SIRRA) was re-established as the National Intelligence and Security Service (NISS) by virtue of Proclamation No. 804/2013.

<sup>27</sup> The draft proclamation (as at May 2018) seeks to address some of the limitations discussed in this paragraph.

<sup>28</sup> Refugee Proclamation No. 409/2004, *supra* note 22, Article 14(2)(e).

<sup>29</sup> In May 2008, the Council adopted internal guidelines further specifying procedures.

<sup>30</sup> UNHCR Ethiopia contribution to UN publication during the UN's 70<sup>th</sup> Anniversary commemorations, "UNHCR in Ethiopia: More than 50 Years of Protecting Refugees", published in One UN Newsletter. Article on file with author.

Gambella.<sup>31</sup> Since that time, through the establishment of multiple offices, UNHCR's presence and activities have grown, but it has maintained this dual focus on regional and strategic engagement, as well as directly funding and supporting the government of Ethiopia in protection, assistance and durable solutions for refugees. In contemporary practice, including with regard to Somalis, together with its government counterpart, the Administration for Refugee and Returnee Affairs (ARRA), UNHCR directly manages and coordinates interventions, often working side-by-side with ARRA. Indeed, UNHCR *de facto* undertakes RSD and makes recommendations to ARRA. Final decisions are co-signed by the Head of the Legal and Protection Unit of ARRA and the UNHCR Assistant Representative (Protection).

While a government authority tasked with emergency response and management of refugee situations has existed in Ethiopia since at least the 1960s, ARRA, the present incarnation, was established in 1992.<sup>32</sup> ARRA has a mandate and responsibility for the reception, protection, assistance and overall coordination and management of refugee interventions in Ethiopia.<sup>33</sup> Notably, ARRA's mission includes an explicit reference to "[h]osting asylum-seekers seeking a safe-haven into Ethiopia as a result of man-made and *natural disasters* [and] protecting their physical safety through providing asylum and protection".<sup>34</sup> ARRA is a subordinate department that sits under the umbrella government organ, the NISS. Accordingly, NISS plays a central role with regard to refugees in Ethiopia. As noted above, it is the head of NISS and not ARRA that has the authority to declare a class of persons as refugees. Indeed, it is the head of NISS, and not ARRA, who is the responsible authority for the purposes of decisions and interventions under the 2004 Refugee Proclamation.

### III. RESPONSE TO SOMALI FLOWS IN 2011 and 2012

#### Policy of Group-based Approach to Recognition for Somalis

With the above background in mind, this section turns to a discussion of Ethiopia's response to the cross-border movements of Somalis in 2011–2012 (and also very briefly, more recently). Unraveling the story and timing of Ethiopia's policy to begin recognizing Somalis through a group-based approach has proved elusive.<sup>35</sup> ARRA and

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<sup>31</sup> Ibid.

<sup>32</sup> See: <https://arra.et/about-us/>, accessed: September 2018.

<sup>33</sup> See: <https://arra.et/>, accessed: September 2018. ARRA notes that its operation is mainly driven by three basic principles: maintaining Ethiopia's long-standing tradition of hosting refugees; meeting the government's international obligations; and achieving the government's foreign policy goals relating to building sustainable peace with all of its neighbours through strengthening people-to-people relations.

<sup>34</sup> See: <https://arra.et/about-us/our-mission/>, accessed: September 2018. Emphasis added.

<sup>35</sup> An email request to ARRA on when recognition through a group-based approach began did not receive a response.



UNHCR informants surmise that the policy and practice must have begun well over 20 years ago with the first large-scale influx of Somalis into Ethiopia in the late 1980s.<sup>36</sup>

What is clear, however, is that in 2011, when Somalis began arriving in substantial numbers, the established policy and practice was to recognize Somalis from southern or central Somalia through a group-based approach. Recognition was granted under the authority of the Refugee Proclamation, primarily under the broader refugee criteria, but sometimes also based on the Refugee Convention's criteria. Somalis from other parts of Somalia were, in principle, subject to an individual approach to RSD.<sup>37</sup>

As at the end of 2010, UNHCR's data indicate that there were over 67,000 Somali refugees in Ethiopia who were recognized under the broader refugee criteria (more than 45,000 in the Dollo Ado camps and more than 21,000 in the Jijiga camps). Fewer than 30 Somali refugees had been recognized based on the Refugee Convention's criteria and fewer than 5 Somalis based on UNHCR mandate definitions, with all of them based in the Jijiga camps.<sup>38</sup>

Exactly when the geographical distinction was introduced into practice is unclear. Some informants suggested that it was in play well—possibly years—before the 2011 cross-border movements. Certainly, as at April 2018, this policy and practice remained unchanged. At no point in the intervening period, including in the context of more recent cross-border movements, has this policy been revised or revoked. Importantly, the declaration of famine in parts of Somalia in July 2011 does not appear to have been a key marker with regard to the recognition of Somalis.

As alluded to earlier, while Article 19 of the Refugee Proclamation allows the NISS to declare a class of persons as refugees, public documents evincing such declarations do not appear to exist. It seems that detailed, authoritative pronouncements on the grant of recognition using a group-based approach for different “classes” of refugees, including Somalis from southern or central Somalia, have never been issued. Fear of creating a

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<sup>36</sup> Even if recognition through a group-based approach began at that time, the legal basis under which Somalis were recognized at that time is not known. While Ethiopia was already a party to the Refugee Convention and the OAU Convention, Ethiopia did not have a national legal framework. In this context, RSD was likely conducted under UNHCR's mandate.

<sup>37</sup> Whether this system worked seamlessly in practice is unclear. When this geographic limitation began does not seem to be documented. See also United States Committee for Refugees and Immigrants, “World Refugee Survey 2009 – Ethiopia”, 2009, available at: <http://www.refworld.org/docid/4a40d2a594.html>, accessed: September 2018.

<sup>38</sup> The statistics included in this paragraph were taken in 2018 rather than at the end of 2010. Since that time, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture of the numbers. Nonetheless, they are included to highlight, in broad terms, the way recognition was referenced in UNHCR's data and provide a sense of the differences in numbers.

“pull factor” was highlighted as one reason that has grounded the reluctance to go public.

### **Deliberations on Group-based Approach to Recognition in 2011**

Nonetheless, *deliberations* on instituting a group-based approach to classes of refugees have grounded contemporary practice, at least between ARRA and UNHCR. Systematically documenting these key decision points, however, has not necessarily been part of the culture. Indeed, some informants noted that official policies in Ethiopia are generally unwritten. Nevertheless, the relationship, engagement and interactions between UNHCR and ARRA on these matters, as briefly elaborated below, suggest that UNHCR may have scope to provide advice and inform decisions.

Both UNHCR and ARRA have the capacity to initiate a discussion on providing recognition through a group-based approach. While it is unclear whether standard questions guide the decision-making process, beyond taking account of the scale and projections of cross-border movements and national response capacity, it appears that ARRA assesses country-of-origin situations in continuous consultation with UNHCR and notifies UNHCR of its decision through written or oral communication. Presumably, these discussions and interaction draw on available UNHCR guidance, including in relation to eligibility and non-return.

Although not directly on Somalis, Ethiopia’s decision to allow Yemenis to benefit from a group-based approach was subject to discussions between ARRA and UNHCR and provides some insights on practice. A decision by ARRA to recognize Yemenis who had arrived in Ethiopia from 1 March 2015, using a group-based approach, was subsequently revised to begin from 1 January 2015, based on UNHCR advocacy. Notably, protection for Yemenis through a group-based approach goes beyond the scope of the Refugee Proclamation because Article 4(3) is limited to refugees coming from Africa.

With respect to Somalis, the *status quo* in 2011 (at least in terms of policy) was to recognize persons from southern or central Somalia using a group-based approach, while all others were subject to an individual approach to RSD. With this policy long established, whether or not it worked seamlessly in practice, it appears that a specific decision point between UNHCR and ARRA on whether to *continue* this form of international protection with respect to new arrivals, may not have occurred, certainly not in any formal sense. A written exchange on the matter has not surfaced.

UNHCR protection personnel do not recall Ethiopian authorities expressing concerns about maintaining the *status quo*. If questions were raised at different levels of government, they did not find footing at the technical and operational levels. At these levels, exchanges were predominantly focused on responding to the acute emergency. As the number of arrivals started growing in the first months of 2011, and hitting heights of 2,000 per day around July 2011,<sup>39</sup> much of the focus was on managing the critical emergency response. While not directly within the scope of this study, it is worth noting that the timeliness and robustness of the response to the Somali influx in 2011 was the subject of an independent and somewhat critical evaluation.<sup>40</sup>

### More Recent Arrivals

Somalis have continued to arrive in Ethiopia since the large-scale movements in 2011–2012, but in dramatically reduced numbers. In 2015 and 2016, approximately 5,664 and 3,087 Somalis arrived in Ethiopia, respectively. In the nine months to the end of September 2017, roughly 6,549 Somalis fled to Ethiopia in a context where Somalia had again experienced severe drought and near-famine in an underlying environment of insecurity.<sup>41</sup>

Somalis from southern or central Somalia who arrived in Dollo Ado or were relocated to the group of camps in that location have continued to be recognized through a group-based approach. While there may have been discussions on whether the same policies should continue to underpin status determination for Somalis, exchanges with UNHCR counterparts in Somalia as well as a UNHCR advisory on non-return issued in 2016, highlighted the potential for claimants to satisfy applicable refugee definitions.<sup>42</sup>

That said, it is also worth noting that sometime between 2013 and 2016, as conditions in Somalia deteriorated and fears of another famine loomed, Ethiopia appears to have entered into discussions on instituting a cross-border initiative in an effort to provide humanitarian assistance within Somalia and limit potential cross-border movements.

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<sup>39</sup> IRIN, “Ethiopia-Somalia: The Cost of Being a Good Neighbour”, 2012, available at: <http://www.refworld.org/docid/50a229382.html>, accessed: September 2018.

<sup>40</sup> Nutrition Works, “An Independent Review of UNHCR’s Response to the Somali Refugee Influx in Dollo Ado, Ethiopia, 2011”, 2013, available at: <http://www.unhcr.org/51bec18a9.pdf>, accessed: September 2018. Some informants also indicated that Non Governmental Organizations (NGOs) had written an open letter regarding the delays in response and the limited access that NGOs initially had to assist and support Somalis with specific needs.

<sup>41</sup> See e.g. Yarnell and Thomas, “On the Edge of Disaster: Somalis Forced to Flee Drought and Near-Famine Conditions”, Field Report, Refugees International, 2017, available at: <https://www.refugeesinternational.org/reports/somaliadroughtandfaminereport>, accessed: September 2018.

<sup>42</sup> UNHCR, “UNHCR Position on Returns to Southern and Central Somalia (Update 1)”, May 2016, available at: <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/05/UNHCR-Somalia>Returns-Advisory-May-20162.pdf>, accessed: September 2018.

Informants suggested that the government had engaged in discussions with multiple actors on implementing a mechanism that could provide *in situ* aid, including food and water, within ‘safe zones’ just inside the border within Somalia, where humanitarian actors could use Ethiopian territory to transport and deliver assistance. Further information on this initiative has not materialized.

### **Pre-registration, Registration, Screening and Recognition**

Some insights can also be gained from better understanding the ways in which the above-mentioned policy framework was implemented on the ground. For this reason, implementation is discussed very briefly here.

At the time of the 2011–influx, Somali asylum-seekers from southern or central Somalia were subject to a three-step process on their path to recognition through a group-based approach. The first step, and a key hurdle, involved “pre-registration” at border posts, carried out solely by ARRA officials. Statistics and reasons concerning those who failed to pass this step were not shared with UNHCR. In general, UNHCR could not undertake registration (step two below) if ARRA had not conducted pre-registration. Although the process was, to a large extent, a mechanism to obtain biographic and family composition data and unearth Ethiopian Somalis, some informants referred to this hurdle as a “security screening”, in which asylum-seekers who were suspected as posing security threats were identified for further scrutiny.

Notably, it seems that cases of exclusion have not been identified in the Dollo Ado camps, or for that matter, in the Jijiga camps, the two primary areas where Somalis are hosted in Ethiopia.<sup>43</sup> Questions arise as to whether Somalis representing national security threats were identified early in the process and before they were able to access UNHCR’s registration process, potentially hindering access to international protection.

Following transfer to the transit and registration centre in Dollo Ado, and once pressing needs were assessed and addressed, the second step involved UNHCR registration, carried out in conjunction with photographs and increasingly sophisticated biometric data collection. UNHCR’s registration process drew heavily on the pre-registration information provided by ARRA. Throughout the emergency, UNHCR carried out level-two registration, and personnel were boosted to maintain this level of information gathering even at the height of the crisis.<sup>44</sup> The third step, immediately following UNHCR registration and often on the same day, was a so-called “protection” or

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<sup>43</sup> UNHCR Ethiopia 2017 memo, *supra* note 14.

<sup>44</sup> UNHCR has three levels of registration through which progressively detailed information is obtained as the registration level increases.

“screening” interview conducted by a so-called “eligibility team”, composed of one staff person from ARRA and one from UNHCR. A specific and brief RSD questionnaire dictated the format of the interview, which primarily focused on ascertaining whether individuals were, in fact, Somali nationals who originated from southern or central Somalia and ostensibly, on identifying exclusion triggers. Informants indicated that the individuals who failed to surmount this hurdle were largely Ethiopians of Somali ethnicity.<sup>45</sup>

Interestingly, an internal review conducted in 2017 suggests that an individual approach to RSD has not been conducted in the history of the existence of the Dollo Ado camps.<sup>46</sup> This finding arguably suggests that individuals from outside southern or central Somalia did not arrive in the camps, or if they did, they were also subject to the same procedures as the former group.

Based on UNHCR’s data related to the Dollo Ado camps, during 2011 and 2012, Somalis were recognized overwhelmingly pursuant to broader refugee criteria, as shown in Table 1. In 2012, it appears that Somali refugees were not recognized on the basis of Refugee Convention’s criteria.

**Table 1: Legal Bases Recorded for Recognition of Somalis (Dollo Ado Camps: 2011 and 2012)<sup>47</sup>**

<b>Legal Basis for Refugee Status</b>	<b>2011<sup>48</sup></b>	<b>2012<sup>49</sup></b>
Broader refugee criteria	98,650	34,816
Refugee Convention criteria	17	0
UNHCR mandate definitions	35	12

The following Table 2 shows the legal bases for recognition of Somalis during 2016 and 2017 in the Dollo Ado camps. With regard to accessing assistance and protection within the camps, the legal basis pursuant to which Somalis were recognized made little

<sup>45</sup> On paper at least, certain individuals could be referred to a so-called “litigation desk” for reasons related to exclusion triggers, doubts regarding nationality or for other reasons, where a more detailed status determination interview by relatively experienced officers could be undertaken. It was suggested that this process may not have been used during the height of the crisis.

<sup>46</sup> UNHCR Ethiopia 2017 memo, supra note 14.

<sup>47</sup> The statistics included in this table (and the table further below) were taken in 2018. In the elapsed time periods, there may have been changes related to deaths, births, returns, possible data errors and other factors. Therefore, these statistics may not reflect a completely accurate picture of the numbers. Nonetheless, they are included to highlight, in broad terms, the way recognition was referenced in UNHCR’s data and provide a sense of the differences in numbers.

<sup>48</sup> Figures provided included approximately 579 others who did not fall within the three categories listed in the table.

<sup>49</sup> Figures provided included approximately 65 others who did not fall within the three categories listed in the table.

difference. The legal basis for recognition was, however, relevant for resettlement opportunities; to qualify for resettlement, refugees had to show a claim that satisfied the criteria in the Refugee Convention.<sup>50</sup>

**Table 2: Legal Bases Recorded for Recognition of Somalis (Dollo Ado Camps: 2016 and 2017)**

<b>Legal Basis for Refugee Status</b>	<b>2016<sup>51</sup></b>	<b>2017<sup>52</sup></b>
Broader refugee criteria	3,088	6,494
Refugee Convention criteria	0	189
UNHCR mandate definitions	0	0

### **Views on Reasons for Response**

In Ethiopia, where a group-based approach to recognition of refugee status has continued for Somalis from southern or central Somalia for years and where recognition has been underpinned by broader refugee criteria, informants rarely considered Somalis arriving in 2011 and 2012 as anything other than refugees. Informants discussed the applicability of the “events seriously disturbing public order” ground to the situation in Somalia in 2011.

Among the factors highlighted as possible indicators of “events seriously disturbing public order were”: (1) serious restrictions on mobility that prevented distribution of humanitarian assistance or prevented access to humanitarian assistance available within the country, and (2) lack of access to basic services including water, emergency healthcare and subsistence for an ‘unreasonable’ duration. Some informants also seemed to appreciate that recognition of refugee status, using a group-based approach, such as for Somalis from southern or central Somalia, could be based on the Refugee Convention definition, not only broader refugee criteria.

Many informants, including those from ARRA, indicated that the underlying insecurity in Somalia in 2011 stemming from conflict, the presence and activities of Al-Shabaab and severely constrained governance capacity, were sufficient to regard Somalis as refugees. Informants suggested that Somalis were fleeing areas affected by relatively regular conflict or insecurity or that these aspects contributed to their fear of return.

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<sup>50</sup> An informant suggested that with respect to Somali refugees recognized under broader refugee criteria, in practice, this impediment does not present a significant hurdle, as many Somalis are also able to satisfy a claim based on the Refugee Convention.

<sup>51</sup> Figures provided included approximately two others who did not fall within the three categories listed in the table.

<sup>52</sup> Figures provided included approximately 20 others who did not fall within the three categories listed in the table.

Informants appeared to recognize that multiple root causes prompted Somali flight, as they reflected on interactions between the impacts of drought, livelihood depletion, lack of access to basic subsistence, violence and conflict. These discussions highlighted the complexity of identifying a sole or dominant cause.

Three broad characterizations relevant to the grant of refugee status in 2011–2012 emerged:

1. Some Somalis faced targeted persecution.
2. For many Somalis, although the proximate cause prompting flight may have been lack of access to food and subsistence resulting from the impacts of the drought (and later, famine), and this framing was often the first ‘reason’ articulated, the underlying insecurity and conflict also affected claimants. In many instances, claimants discussed both causes in articulating their fear and reasons for flight. For others, minimal probing brought out the conflict and insecurity dimensions that imbued their existence.
3. In the rare cases where Somalis claimed they fled due to the impact of the drought (and later, famine) and the inability to access humanitarian assistance, some informants highlighted that in many parts of southern and central Somalia, Al-Shabaab was denying or restricting access to humanitarian assistance or denying humanitarians’ access to affected populations. In essence, while the impacts of the drought may have had a direct effect on the need for humanitarian assistance, the conflict and insecurity influenced the inability to access assistance within the country and compelled flight across borders.

In discussions on how to characterize and consider cross-border movements arising in the context of nexus dynamics, an ARRA informant in particular highlighted that too much emphasis has been placed on human-made causes, noting that ‘natural’ events can also result in disturbances to public order. On this view, the “serious” criterion should provide the necessary flexibility to ensure every ‘natural’ disaster does not reach the threshold required to satisfy the regional refugee definition.

In this context, it is worth highlighting Ethiopia’s statement during the Nansen Initiative Global Consultation in October 2015:

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 natural disasters, 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.<sup>53</sup>

This statement, which arguably reflects Ethiopia's interpretation of the application of the regional refugee definition, suggests that Ethiopia may view the impacts of 'natural' disasters as potentially giving rise to claims that could satisfy broader refugee criteria. The prevalence of nexus dynamics, then, arguably reinforces this potential. ARRA's mission statement evinces an intention to provide "asylum" to persons fleeing as a result of human-made and 'natural' disasters. Ethiopia's practice in relation to Somalis further bolsters this conclusion.

#### IV. CONTEMPORARY LANDSCAPE

As foreshadowed above, the outlook for refugees in general is arguably improving in Ethiopia. At the Leaders' Summit on 20 September 2016 in New York, Ethiopia made nine pledges on six thematic areas, which are summarized in Ethiopia's Roadmap for Implementation.<sup>54</sup> The government agreed to become a roll-out country and adopt the CRRF annexed to the 2016 New York Declaration as the vehicle to implement the nine pledges. More generally, Ethiopia's Roadmap commits the government to maintaining asylum space and its open-door policy. It indicates that Ethiopia's policies for refugee response management will be based on three general strategies: (1) encampment; (2) out-of-camp; and (3) local integration opportunities. Structural and policy reforms have

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<sup>53</sup> The Nansen Initiative, "The Nansen Initiative Global Consultation: Conference Report", 2015, p. 107, available at: <https://www.nanseninitiative.org/global-consultations/>, accessed: September 2018.

<sup>54</sup> ARRA, *supra* note 18. Out of Camp Pledge: (1) Expansion of the "Out-of-Camp" policy to benefit 10% of the current total refugee population. Education Pledge: (2) Increase of enrolment in primary, secondary and tertiary education to all qualified refugees without discrimination and within the available resources. Work and Livelihoods Pledges: (3) Provision of work permits to refugees and to those with permanent residence ID, within the bounds of domestic law. (4) Provision of work permits to refugees in the areas permitted for foreign workers, by giving priority to qualified refugees. (5) Making available irrigable land to allow 100,000 people (among them refugees and local communities) to engage in crop production. (6) Building industrial parks where a percentage of jobs will be committed to refugees. Documentation Pledges: (7) Provision of other benefits such as issuance of birth certificates to refugee children born in Ethiopia, possibility of opening bank accounts and obtaining driving licenses. Social and Basic Services Pledge: (8) Enhance the provision of basic and essential social services. Local Integration Pledge: (9) Allowing for local integration for those protracted refugees who have lived for 20 years or more in Ethiopia.



begun to support refugee inclusion in national systems and are likely to hinge on continuing momentum and donor support.<sup>55</sup>

In this context, a process to repeal and enact a revised “Refugees Proclamation” began in July 2016 with consultations between UNHCR and ARRA on prevailing gaps, many of which had been identified in the context of implementing the 2004 Refugee Proclamation. The impetus included the need to create an enabling framework that would account for the nine pledges made at the Leaders’ Summit. The draft Refugee Proclamation was endorsed by Ethiopia’s Council of Ministers in May 2018 and has since been submitted to the House of People’s Representative for promulgation.<sup>56</sup>

The draft Refugees Proclamation removes the geographical restriction in Article 4(3), relating only to refugees coming from Africa, thus bringing the definition in line with the OAU Convention, and indeed, Ethiopian practice. Another draft also articulates the modalities applicable to declaring and revoking declarations related to group-based approaches to RSD. The draft provision requires a public directive to be issued that explains the background and conditions in the country of origin, the reasons and justification for a group-based approach to RSD, persons eligible to benefit from such recognition and applicable dates. Under the draft, a similar process must be followed for ending a group-based approach to RSD, indicating the reasons underlying the decision. These processes are to be conducted in consultation with UNHCR. The directives do not need to pass through parliament, and thus provide scope for timely instructions and actions in the context of mass influx situations.<sup>57</sup>

For decades, Ethiopia has granted Somalis refugee status, albeit predominantly within the parameters of an encampment policy. In essence, Ethiopia’s policy towards Somalis seeking refuge has remained largely the same, at least since 2011. Somalis who arrived in 2011 and 2012 in substantial numbers and in the context of nexus dynamics, and those who arrived in more muted numbers in 2016 and 2017, have essentially received the same response: Ethiopia has maintained its open-door policy and Somalis from southern or central Somalia continue to be recognized through a group-based approach, overwhelmingly under broader refugee criteria.

Within ARRA at least, recent discussions on whether to continue to recognize Somalis under the same framework have taken place. At April 2018, the *status quo* stands.

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<sup>55</sup> See e.g. Atrafi, “Working Towards Inclusion – Refugees Within the National Systems of Ethiopia”, New Issues in Refugee Research, UNHCR, 2017, available at: <http://www.unhcr.org/5a74815f7.pdf>, accessed: September 2018.

<sup>56</sup> See <https://arra.et/revised-refugee-law-got-cabinet-approval/>, accessed: September 2018. In late June 2018, the House sent the draft proclamation to its legal standing committee for further scrutiny.

<sup>57</sup> Based also on exchanges with, and documents shared by, UNHCR Ethiopia.

However, efforts to monitor the landscape in Somalia and take note of evidence reflecting improvements in conditions and ongoing stabilization continue. With its pledges and engagement with the CRRF process, Ethiopia is arguably charting a new way forward. How these new intentions and frameworks affect Somalis and other refugees including those fleeing in the context of nexus dynamics remains to be seen.

## V. INFORMANTS AND METHODS

The description of Ethiopia’s response is based on informant interviews, carried out in Addis Ababa during 23–26 April 2018. Interviews were also carried out with informants from the African Union. The following table provides an overview of the informants interviewed while in Ethiopia (the vast majority through in-person meetings).

<b>Category</b>	<b>Total Number</b>
ARRA	2
Current and Former UNHCR Ethiopia Personnel	20*
Civil Society	5
African Union	3
Other UN or Intergovernmental	2

\* A few informants were interviewed through remote interviews from locations outside Ethiopia.

Other activities undertaken to supplement the knowledge gathered through informant interviews included: (1) remote interviews and email correspondence with experts; (2) a questionnaire to the UNHCR operation in Ethiopia; and (3) desk review of grey and academic literature, online resources, UNHCR documents and data. UNHCR staff in Ethiopia reviewed drafts of this case study. A draft was also shared with government informants in October 2018.

In general, when relevant, efforts were undertaken to obtain data that is current between February and September 2018.

## 6.3. Brazil

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## I. INTRODUCTION

Despite Brazil's history as a recipient of diverse groups of immigrants, prior to 2010, the Haitian population in Brazil was small, numbering a few dozen people, with a total of three refugees and four asylum-seekers.<sup>1</sup> Indeed at the end of 2009, Brazil had fewer than 4,500 refugees and asylum-seekers.<sup>2</sup> This changed dramatically in the aftermath of the 2010 earthquake in Haiti. Beginning with small groups entering via the north Amazon border through the city of Tabatinga in the state of Amazonas, and expanding to routes that traversed Brasiléia in the state of Acre, the numbers grew steadily.<sup>3</sup> Between 2010 and 2015, more than 72,000 Haitians crossed into Brazil.<sup>4</sup>

Others have opined on why Haitians chose Brazil as a destination. They highlight positive perceptions of Brazil created by the presence of the United Nations Stabilization Mission in Haiti (MINUSTAH), social and humanitarian projects implemented in Haiti by Brazilian non-governmental organizations (NGOs), Brazil's economic growth and outlook and openness towards Haitians.<sup>5</sup> Equally, it seems that some of the first Haitians who arrived in Brazil intended to pass through Brazil into French Guiana, and from there to France and other destinations, but in time found these paths blocked.<sup>6</sup>

Regardless of the motivations that prompted Haitian flight and subsequent stay in Brazil, the discretionary, humanitarian response Brazil implemented to address the

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<sup>1</sup> Cavalcanti et al., "Haitian Immigrants in the Brazilian Labor Market", *Revista de Estudos e Pesquisas Sobre as Américas*, Vol. 11, No. 1, 2017, p. 192.

<sup>2</sup> UNHCR, "UNHCR Population Statistics Database", available at: [http://popstats.unhcr.org/en/persons\\_of\\_concern](http://popstats.unhcr.org/en/persons_of_concern), accessed between February and September 2018.

<sup>3</sup> For more on routes, paths and Haitian movements to Brazil more generally, see e.g. Cavalcanti and Tonhati, "Haitian Flow to Brazil and New Policies", forthcoming in *Patterns of Rebordering*, Edinburgh University Press; IOM, "Haitian Migration to Brazil: Characteristics, Opportunities and Challenges", Migration Notebook No. 6, 2014, available at: [http://publications.iom.int/system/files/pdf/cuaderno\\_migratorio\\_no6\\_en.pdf](http://publications.iom.int/system/files/pdf/cuaderno_migratorio_no6_en.pdf), accessed: September 2018; Godoy, "El Caso de los Haitianos en Brasil y la vía de la Protección Humanitaria Complementaria" in Lettieri (ed.), *Protección Internacional de Refugiados en el Sur de Sudamérica*, Universidad Nacional de Lanús, 2012, pp. 309–329, available at: [http://209.177.156.169/libreria\\_cm/archivos/pdf\\_1543.pdf](http://209.177.156.169/libreria_cm/archivos/pdf_1543.pdf), accessed: September 2018; Fagen, "Receiving Haitian Migrants in the Context of the 2010 Earthquake", Nansen Initiative Discussion Paper, 2013, available at: [https://www2.nanseninitiative.org/wp-content/uploads/2015/03/DP\\_Receiving\\_Haitian\\_Migrants\\_in\\_the\\_Context\\_of\\_the\\_2010\\_earthquake.pdf](https://www2.nanseninitiative.org/wp-content/uploads/2015/03/DP_Receiving_Haitian_Migrants_in_the_Context_of_the_2010_earthquake.pdf), accessed: September 2018.

<sup>4</sup> Cavalcanti et al., supra note 1, p. 193. See also, Cavalcanti and Tonhati, supra note 3.

<sup>5</sup> See e.g. Cavalcanti et al., supra note 1; Pacifico et al., "The Migration of Haitians within Latin America: Significance for Brazilian Law and Policy on Asylum and Migration", in Cantor et al. (eds.), *A Liberal Tide? Immigration and Asylum Law and Policies in Latin America*, University of London, 2015, pp. 139–151; Seitenfus, "Brazilian and South American Political and Military Engagement in Haiti", in Maguire and Freeman (eds.), *Who Owns Haiti? People, Power and Sovereignty*, University Press Florida, 2017; Fagen, supra note 3.

<sup>6</sup> See e.g. Cavalcanti et al., supra note 1.

movement of Haitians into its territory was exceptional. This response was not based on Brazil's refugee law or its then-prevailing migration law. Rather, with these laws found to be deficient to address the plight of Haitians, Brazil created a special administrative framework, which essentially entailed two key dimensions: (1) facilitating Haitians who arrived irregularly to regularize their stay; and (2) providing entry visas and rights to stay.

These mechanisms benefited tens of thousands of Haitians, who found work and made homes in Brazil. Between 2011 and 2015, the number of Haitians in the formal labour market in Brazil grew from a little over 500 to more than 33,000,<sup>7</sup> suggesting that when the informal market is considered, the numbers are likely to be much higher. In 2015, of all immigrants in the Brazilian labour market, Haitians accounted for more than 26 per cent.<sup>8</sup>

Notably, however, between 2010 and 2015 Haitians were not recognized as refugees in Brazil, even though thousands applied.<sup>9</sup>

With this background in mind, this case study describes Brazil's response to Haitian movements into its territory in the aftermath of the 2010 earthquake in Haiti. Section II provides an overview of the relevant legal and institutional landscape. Section III identifies how refugee law was considered and featured in Brazil's response with an emphasis on 2010–2012. Section IV highlights contemporary changes.

## II. LEGAL AND INSTITUTIONAL LANDSCAPE

### Brazil's Refugee Law

Brazil ratified the 1951 Convention relating to the Status of Refugees and acceded to the 1967 Protocol relating to the Status of Refugees (together, Refugee Convention), but maintained reservations and the geographic limitation for many years.<sup>10</sup> Roughly a decade before the turn of the century, with changes spurred by a return to civilian government, including the adoption of the prevailing Federal Constitution in 1988,

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<sup>7</sup> Cavalcanti et al., *supra* note 1, p. 196.

<sup>8</sup> *Ibid.*, p. 193. See also for detailed demographic breakdowns, qualification levels, work contracts and dismissals, geographic locations of Haitians employed, economic activities and average salaries.

<sup>9</sup> Secretaria Nacional de Justiça, "Refúgio em Números, 2010–2016", available at: [http://www.justica.gov.br/news/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017\\_refugio-em-numeros-2010-2016.pdf/view](http://www.justica.gov.br/news/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017_refugio-em-numeros-2010-2016.pdf/view), accessed: September 2018.

<sup>10</sup> 1960 and 1972, respectively; Jubilut and Apolinário, "Refugee Status Determination in Brazil: A Tripartite Enterprise", *Refuge*, Vol. 25, No. 2, 2008.

these limitations were lifted.<sup>11</sup> The Constitution articulates 10 key principles that must guide Brazil in its international relations, among which are granting political asylum, cooperation among peoples for the progress of humanity and prevalence of human rights.<sup>12</sup> In this context, and in the face of a relative increase in refugee movements and advocacy efforts, in 1997 Brazil became the first country in South America to adopt specific legislation on refugees.<sup>13</sup>

The domestic refugee law (Law No. 9.474/1997) establishes an institutional actor, the National Committee for Refugees (CONARE), and sets out the general framework for the application, grant and end of refugee status, as well as status, rights and obligations, and solutions.<sup>14</sup> The law explicitly states that its provisions must be interpreted in accordance with the Universal Declaration of Human Rights, the Refugee Convention and all provisions of applicable international instruments on the protection of human rights to which the Brazilian government is bound.<sup>15</sup>

### **Definition of a Refugee and Rights and Obligations**

Article 1 defines a “refugee”. Article 1(I) and 1(II) incorporate in general terms the inclusion criteria in the Refugee Convention. Article 1(III) draws on the regional refugee definition in the 1984 Cartagena Declaration (Cartagena Declaration), but has significantly amended the original wording and incorporates only one of the five objective situations contemplated:

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<sup>11</sup> Jubilut and Apolinário, *ibid.* See also, Andrade and Marcolini, “Brazil’s Refugee Act: Model Refugee Law for Latin America?”, *Forced Migration Review*, Issue 12, 2002, available at: <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/development-induced-displacement.pdf>, accessed: September 2018.

<sup>12</sup> Constituição da República Federativa do Brasil of 1988, available at: [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm), accessed: September 2018, Article 4. Note however that in Brazil, as in other Latin American countries, “asylum” and “refuge” are regarded as two distinct concepts and institutions. For a more detailed discussion of these aspects, including how the institutions are understood, practiced and their similarities and differences, see e.g. Jubilut, “Refugee Law and Protection in Brazil: A Model in South America”, *Journal of Refugee Studies*, Vol. 19, No. 1, 2006. On Constitutional aspects, see also, Pacifico and Ramos, “Humanitarian Asylum for Forced Migrants: The Case of Haitians’ Arrival in Brazil”, in Gacci et al. (eds.), *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Brill, 2015, pp. 218–239.

<sup>13</sup> Andrade, “Refugee Protection in Brazil (1921–2014): An Analytical Narrative of Changing Policies”, in Cantor et al. (eds.), *A Liberal Tide? Immigration and Asylum Law and Policies in Latin America*, University of London, 2015, pp. 153–183, 174. Jubilut, *supra* note 12.

<sup>14</sup> Lei No. 9.474 of 22 July 1997, available at: [http://www.planalto.gov.br/ccivil\\_03/leis/l9474.htm](http://www.planalto.gov.br/ccivil_03/leis/l9474.htm), accessed: September 2018. See translation available on Refworld: <http://www.refworld.org/pdfid/3f4dfb134.pdf>, accessed: September 2018.

<sup>15</sup> *Ibid.*, Article 48.

An individual shall be recognized as a refugee if due to severe and generalized violations of human rights, he or she is compelled to leave his or her country of nationality to seek refuge in a different country.<sup>16</sup>

A 1996 draft of the refugee law had included a more comprehensive regional refugee definition that captured the other objective situations contemplated by the Cartagena Declaration, but the Ministry of Justice had deleted this broader provision.<sup>17</sup> Intensive lobbying by a range of actors had been necessary to secure the narrower framing.<sup>18</sup>

An explicit basis for granting refugee status through a group-based (sometimes used synonymously with a so-called “*prima facie* approach”) is not provided in the refugee law. Therefore, a mechanism that mitigates the burden of refugee status determination (RSD) in the context of a mass influx does not exist.<sup>19</sup> In practice, status determination is carried out through an individual approach, although it appears that simplified interviews and lower evidentiary thresholds have been used.<sup>20</sup>

Article 2 of the refugee law provides that refugee status shall extend to the refugee’s spouse, ascendants and descendants, in addition to other family members who are economically dependent on the refugee, provided such family members are within Brazil’s territory. This does mean that all family members must be in Brazil at the time of the initial application. Status can also be extended where relevant family members arrive in Brazil following recognition of the principle applicant.<sup>21</sup> Indeed, it is also

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<sup>16</sup> Note that some academic literature translates “severe” as “gross” and “compelled” as “forced”.

<sup>17</sup> Andrade, *supra* note 13, p. 167.

<sup>18</sup> *Ibid.* See also historical narrative on arrival of Angolans in 1993, which had prompted need to take account of broader refugee criteria. 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”, Legal and Protection Policy Research Series, UNHCR, 2013, available at: <http://www.unhcr.org/protection/globalconsult/51c800fe9/32-cartagena-declaration-refugees-protection-people-fleeing-armed-conflict.html>, accessed: September 2018, discussing on p. 17, how unlike the Cartagena Declaration’s definition, which only requires that flight be as a consequence of the generic threat to life, safety or freedom generated by the objective situation, that this modified framing adds an element of compulsion, duress or obligation to the impetus for flight.

<sup>19</sup> See also Jubilut and Apolinário, *supra* note 10.

<sup>20</sup> For example, there may have been a period between May 2014 and March 2015, when Syrians who arrived in Brazil with humanitarian visas granted by Brazilian diplomatic missions in the region were not interviewed by CONARE before being recognized as refugees. Since March 2015, however, an informant indicated that all Syrians are also individually interviewed by CONARE.

<sup>21</sup> See also, Comitê Nacional para os Refugiados, “Resolução Normativa No. 16 of 20 September 2013”, available at: [http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22131016/Resolu%C3%A7%C3%A3o-Normativa-n-16-do-CONARE.pdf#\\_ga=2.40920546.198544864.1536138793-233521994.1497214613](http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22131016/Resolu%C3%A7%C3%A3o-Normativa-n-16-do-CONARE.pdf#_ga=2.40920546.198544864.1536138793-233521994.1497214613), accessed: September 2018; Jubilut and Apolinário, *supra* note 10; UNHCR, “UNHCR Help: Brazil - Refugees and Asylum Seekers Rights”, available at: <http://help.unhcr.org/brazil/en/rights-and-duties/refugees-and- eekers-rights/>, accessed: September 2018.

possible to request Brazil's assistance in facilitating the issuance of travel documents to family members.<sup>22</sup>

Rights and obligations of recognized refugees are incorporated by reference.<sup>23</sup> In general, recognized refugees have many of the same rights as nationals, and in some situations are entitled to have their circumstances as refugees taken into account.<sup>24</sup> Recognized refugees are entitled to a range of identity and other documents, including a work permit and a Brazilian passport for foreigners,<sup>25</sup> but can lose their refugee status if they travel to the country of origin or use a travel document from their country of nationality without previous authorization from the Brazilian government.<sup>26</sup> Four years after the date of recognition, refugees in Brazil are permitted to apply for permanent residence, which also provides a path to naturalization.<sup>27</sup> Whether all these entitlements are accessed seamlessly in practice has not been examined.

### **UNHCR and Historical Practice**

Prior to the establishment of CONARE in 1997, which is responsible for status determination at first instance (discussed in the next section), the United Nations High Commissioner for Refugees (UNHCR) played an important role in recognizing refugees in Brazil. It was not until 1982 that Brazil recognized UNHCR's status as an international organization, although UNHCR had been allowed to set up in Brazil in 1977.<sup>28</sup> During these early years, with the geographic limitation still in force, UNHCR engaged in resettlement and assistance activities.<sup>29</sup> Following the end of the military dictatorship, UNHCR determined status pursuant to its mandate, applying the criteria under the Refugee Convention in the assessment of the small number of claimants seeking recognition of status in Brazil.<sup>30</sup>

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<sup>22</sup> UNHCR, *ibid.*

<sup>23</sup> Lei No. 9.474 of 22 July 1997, *supra* note 14, Article 5; See also Articles 4 and 6.

<sup>24</sup> *Ibid.*, Articles 43 and 44.

<sup>25</sup> *Ibid.*, Lei No. 9.474 of 22 July 1997, Article 6; See also, UNHCR, *supra* note 21.

<sup>26</sup> *Ibid.*, Article 39(IV); See also, Comitê Nacional para os Refugiados, "Resolução Normativa No. 12 of 29 April 2005", available at: [http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22130959/Resolu%C3%A7%C3%A3o-Normativa-n.-12-do-CONARE-Revogada-pela-Resolu%C3%A7%C3%A3o-Normativa-n.-18.pdf#\\_ga=2.207201747.198544864.1536138793-233521994.1497214613](http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22130959/Resolu%C3%A7%C3%A3o-Normativa-n.-12-do-CONARE-Revogada-pela-Resolu%C3%A7%C3%A3o-Normativa-n.-18.pdf#_ga=2.207201747.198544864.1536138793-233521994.1497214613), accessed: September 2018; see also, UNHCR, *supra* note 21.

<sup>27</sup> UNHCR, *ibid.*

<sup>28</sup> See e.g. Andrade, *supra* note 13. Interestingly, Brazil had been a member of UNHCR's Executive Committee since 1958; Jubilut, *supra* note 12. See also, Andrade and Marcolini, *supra* note 11.

<sup>29</sup> *Ibid.*

<sup>30</sup> Andrade, *supra* note 13.



In 1991, following the adoption of an Interministerial Rule and service instruction which, *inter alia*, regulated the RSD process,<sup>31</sup> UNHCR interviewed, analysed and formulated a legal opinion on the grant of refugee status, while the Brazilian government, first through the Ministry of Foreign Affairs and finally through the Ministry of Justice, decided the matter.<sup>32</sup> In 1992, with the arrival of a relatively substantial number of African asylum-seekers (primarily Angolans fleeing civil war) it appears that UNHCR began to apply broader refugee criteria to recognize status, and in this context used the regional refugee definition in the Cartagena Declaration.<sup>33</sup> Jubilut and Apolinário indicate that the Brazilian government always followed the legal opinion provided by UNHCR.<sup>34</sup> Importantly, it seems that this period marked the first time Brazil used broader refugee criteria.<sup>35</sup>

### **CONARE and Contemporary Status Determination**

In contemporary practice, first instance RSD falls under the competence of CONARE, a collective decision-making body housed under the Ministry of Justice.<sup>36</sup> CONARE's competence also extends to guiding and coordinating actions necessary for effective protection, assistance and legal support for refugees, and to approving clarifying regulations to implement the refugee law. All of this must be in line with the Refugee Convention and other sources of refugee rights in international law.<sup>37</sup> CONARE has adopted resolutions to provide guidance on different aspects of the refugee law.<sup>38</sup>

CONARE is constituted by a representative of: (1) the Ministry of Justice (also president/chairperson); (2) the Ministry of Foreign Affairs; (3) the Ministry of Labour, Employment and Social Security;<sup>39</sup> (4) the Ministry of Health; (5) the Ministry of Education and Sport; (6) the Federal Police; and (7) a representative of an NGO engaged in refugee assistance and protection activities in the country. UNHCR is also a member of CONARE meetings and has the right to provide advice and guidance and voice opinions, but not to vote.<sup>40</sup> Appeals from a negative first instance decision go directly to

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<sup>31</sup> Andrade, *ibid.*; Jubilut, *supra* note 12.

<sup>32</sup> *Ibid.*

<sup>33</sup> Andrade, *ibid.*

<sup>34</sup> Jubilut and Apolinário, *supra* note 10.

<sup>35</sup> Jubilut, *supra* note 12. With the adoption of the refugee law and the establishment of CONARE, it seems there was a period between 1998 and 2004 when UNHCR did not have an office in Brazil.

<sup>36</sup> Lei No. 9.474 of 22 July 1997, *supra* note 14, Article 11.

<sup>37</sup> *Ibid.*, Articles 11 and 12.

<sup>38</sup> UNHCR, "UNHCR Help: Brazil - Legislation", available at: <http://help.unhcr.org/brazil/en/2525-2/>, accessed: September 2018.

<sup>39</sup> Formerly known as the Ministry of Labour and Employment.

<sup>40</sup> Lei No. 9.474 of 22 July 1997, *supra* note 14, Article 14.

the Minister of Justice.<sup>41</sup> The entire process is administrative. The refugee law does not explicitly provide recourse to the judicial system, but this option may be regarded as implied under Brazil's Constitution.<sup>42</sup>

In principle, the application process involves (and involved at the time) a number of steps. They include a request for refugee protection (filed at a Federal Police station through the completion of a refugee request form that captures personal and family bio data and a description of the reasons for flight); registration of the complete request in the Federal Police database; and the sharing of the registration information with CONARE by the Federal Police. CONARE is then responsible for contacting asylum-seekers for an interview, which is a mandatory step in the process.<sup>43</sup>

Registered asylum-seekers are entitled to receive a so-called "Provisional Protocol", which is valid for one year and renewable, pending the resolution of the claim.<sup>44</sup> Asylum-seekers are entitled to a temporary work permit and certain other documents.<sup>45</sup> They can also access specific services, including health, education and banking.<sup>46</sup> Again, whether these entitlements are available and accessible to asylum-seekers in practice has not been examined, but it is worth noting that informants highlighted gaps in practice.

CONARE members take first-instance decisions on refugee status at regular plenary meetings. Quorum requires four voting members and a majority, with the chairperson holding the deciding vote. Prior to plenary meetings, a preliminary analysis group convenes to analyse the relevant material on a given case, assess its merits and prepare a recommendation on the recognition of refugee status. These recommendations form the basis of discussions on the grant or refusal of status during plenary meetings.

### III. RESPONSE TO HAITIAN MOVEMENTS AFTER EARTHQUAKE

With the above background in mind, this section turns to Brazil's response to the movement of Haitians into its territory in the aftermath of the 2010 earthquake. Brazil's response was not based on its refugee law. Nor was the response based on the then-applicable migration law. Having found these frameworks deficient to address the

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<sup>41</sup> *Ibid.*, Articles 29–32. For more on procedural aspects, see also Andrade, *supra* note 13; Jubilut, *supra* note 12.

<sup>42</sup> Constituição da República Federativa do Brasil of 1988, *supra* note 12, Article 5(XXXV); see also Andrade, *supra* note 13; Jubilut, *supra* note 12.

<sup>43</sup> For more information about the process, see also, UNHCR, *supra* note 14.

<sup>44</sup> *Ibid.*

<sup>45</sup> Lei No. 9.474 of 22 July 1997, *supra* note 14, Article 21; see also, *ibid.*

<sup>46</sup> UNHCR, *supra* note 14.

plight of Haitians, Brazil instituted a discretionary, humanitarian response that entailed two important dimensions:

1. Authorization to stay: an administrative practice, beginning in early 2011, of facilitating Haitians to regularize their stay through the grant of a conditional, so-called “permanent residence for humanitarian reasons”, valid initially for five years; and
2. Entry and stay: the creation of a legal pathway to Brazil through a resolution adopted in January 2012, which authorized the grant of a so-called “permanent” visa and then the option to obtain a conditional “permanent residence for humanitarian reasons” upon registration with the Brazilian Federal Police, and valid for five years.

This case study, and indeed this research, does not concern itself with reviewing responses that are unrelated to refugee law frameworks. Nonetheless, an overview of the specific administrative framework implemented is highlighted here to provide context for the later discussion on how the domestic refugee law framework was considered.<sup>47</sup>

The administrative mechanisms employed by Brazil were based on authority granted to Brazil’s National Immigration Council (CNIg). Established under the then-prevailing migration law (the so-called “Statute of the Foreigner” or “Aliens Statute” (Law No. 6.815/1980)),<sup>48</sup> CNIg was composed of representatives from government Ministries and non-government actors and housed under the Ministry of Labour, Employment and Social Security. CNIg’s Normative Resolution 27 of 1998 (NR 27/1998) specified the approach for “special cases” and “omissions”, identified as, respectively, situations not defined expressly in CNIg resolutions but which “possess elements that make them suitable to be considered for a visa or for residence” and those “unforeseen cases not provided for by [CNIg] resolutions”.<sup>49</sup>

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<sup>47</sup> For more on Brazil’s response, including process, discussions and limitations in existing frameworks, see e.g. Zamur and Andrade, “Os Aspectos Jurídicos da Migração Haitiana para o Brasil” in Allgayer et al. (eds.), *Refugiados Ambientais*, Universidade Federal de Roraima, 2018, pp. 902–930, available at: <https://ufr.br/editora/index.php/ebook>, accessed: September 2018; Godoy, supra note 3; Pacifico and Ramos, supra note 12; Pacifico et al., supra note 5; Cantor, “Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters”, Nansen Initiative Background Paper, 2015, available at: [https://disasterdisplacement.org/wp-content/uploads/2015/07/150715\\_FINAL\\_BACKGROUND\\_PAPER\\_LATIN\\_AMERICA\\_screen.pdf](https://disasterdisplacement.org/wp-content/uploads/2015/07/150715_FINAL_BACKGROUND_PAPER_LATIN_AMERICA_screen.pdf), accessed: September 2018.

<sup>48</sup> Lei No. 6.815 of 19 August 1980, previously available at: [http://www.planalto.gov.br/ccivil\\_03/LEIS/L6815.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L6815.htm), accessed: September 2018. See discussion in Section IV on the adoption of a new migration law in 2017.

<sup>49</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 27 of 25 November 1998”, Articles 1–3, available at: <http://portal.mj.gov.br/Estrangeiros/tmp/Resolu%C3%A7%C3%B5es%20Normativas%20do%20Conselho%20Nacional%20de%20Imigra%C3%A7%C3%A3o/Resolu%C3%A7%C3%A3o%20Normativa%20n%C2%BA%2027.pdf>, accessed: September 2018. This summary, which is consistent with interviews, is drawn from Cantor, supra note 47; see also,

Cantor notes that:

this framework [under NR 27/1998] is sometimes applied on an individual basis. However, its most frequent application is to categories of aliens. It is thus used in response to flows of migrants who do not fulfil the relevant criteria of the dated [and now repealed] Brazilian migration law but still show some exceptional ground on which stay or a visa may be granted. The most innovative application of this provision has been to the flow of Haitians who began arriving in increasing numbers in Brazil in the aftermath of the 2010 earthquake. In this case, the CNIg took the view that this migration flow was not composed of refugees, but neither was it a typical form of economic migration, since: ‘...the majority of Haitian immigrants had specific losses as a result of the earthquake: whether their house, family, their means of survival, the school where they studied, etc. With the country paralysed, many decided to emigrate.’<sup>50</sup>

In 2006, CNIg had recommended that CONARE refer ineligible applications for refugee status where “humanitarian reasons” may warrant stay, so CNIg could consider them under the framework of NR 27/1998.<sup>51</sup> In this context, since 2007, CONARE had resolved to suspend its consideration of any refugee claims related to “humanitarian questions” and instead refer them for consideration to CNIg.<sup>52</sup> And indeed, this is what happened with respect to the Haitians.<sup>53</sup>

### **Authorization to Stay**

Before a specific administrative instrument was adopted in January 2012 to create a legal pathway for Haitians to travel regularly to Brazil, but certainly also since then,

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Immigration and Refugee Board of Canada (IRB Canada), “Brazil: Resident Status of Haitian Citizens in Haiti, Including Their Rights and Responsibilities (2010–September 2017)”, 2017, available at: <http://www.refworld.org/docid/59ef10f34.html>, accessed: September 2018.

<sup>50</sup> Cantor, supra note 47, p. 47, quoting Almeida, “La Política de Migraciones Brasileña y la Migración Haitiana a Brasil”, *Migration Policy Practice*, Vol. 2, No. 5, 2012, pp. 15–16, p. 15.

<sup>51</sup> Conselho Nacional de Imigração, “Resolução Recomendada No. 08 of 19 December 2006”, Article 1, and first paragraph, available at: <http://www.acnur.org/fileadmin/Documentos/BDL/2014/9720.pdf>, accessed: September 2018; see also, IRB Canada, supra note 49.

<sup>52</sup> Comitê Nacional para os Refugiados, “Resolução Normativa No. 13 of 23 March 2007”, Articles 1 and 2, available at: [http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22131003/Resolu%C3%A7%C3%A3o-Normativa-n.-13-do-CONARE-Revogada-pela-Resolu%C3%A7%C3%A3o-Normativa-n.-18.pdf#\\_ga=2.134948017.156727722.1536527125-233521994.1497214613](http://static.help.unhcr.org/wp-content/uploads/sites/8/2017/12/22131003/Resolu%C3%A7%C3%A3o-Normativa-n.-13-do-CONARE-Revogada-pela-Resolu%C3%A7%C3%A3o-Normativa-n.-18.pdf#_ga=2.134948017.156727722.1536527125-233521994.1497214613), accessed: September 2018. This resolution has since been superseded (see <http://help.unhcr.org/brazil/en/2525-2/>). Godoy, supra note 3, indicates that this resolution essentially legitimized previous practice.

<sup>53</sup> CNIg deliberations in the lead-up to creating a response to Haitian movements and the aftermath were available online in early 2018, but at September 2018 are no longer available.

many Haitians entered Brazil irregularly and applied for refugee status. As noted earlier, asylum-seekers who lodge a request for refugee status are permitted to work in Brazil, and in principle, to access a range of services. As CONARE became apprised of the matter, deliberations ensued on how to respond. Insights on these aspects are discussed later in this Section III, but for present purposes, there was a general perception that Haitian claimants would not satisfy the applicable refugee definitions in domestic law.

Beginning in late 2010 or early 2011 CONARE referred to CNIg the details of hundreds of Haitians who had applied for refugee status, so CNIg could consider them under NR 27/1998. In mid-March 2011, a group of 199 Haitians, the first group referred by CONARE, were granted so-called “permanent residence for humanitarian reasons” by CNIg.<sup>54</sup> During the rest of that year and the following years, CONARE referred thousands of Haitians to CNIg for consideration pursuant to NR 27/1998. With assistance from relevant actors, CNIg reviewed criminal history, identity and other documents prior to granting permanent residence for humanitarian reasons.

In November 2015, a joint Ministerial act by the Ministry of Labour, Employment and Social Security and the Ministry of Justice, listed 43,871 Haitians who had received permanent residence for humanitarian reasons through CNIg, following the transfer of their cases from CONARE.<sup>55</sup> The act, which was published in Portuguese, also highlighted the process for renewing or obtaining permanent residence.<sup>56</sup> Haitians interested in continuing their requests for refugee status were instructed to make requests directly to CONARE or the Federal Police within 30 days.

Sometime during this period, CONARE closed and archived many of its files on Haitian claimants. In the course of these processes, informants also suggested that the files and details of somewhere around 6,000–8,000 Haitians who claimed refugee status have fallen through the ‘cracks’, and were never transferred to CNIg nor analysed by

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<sup>54</sup> Zamur and Andrade, *supra* note 47, indicate that 197 of the 199 were approved.

<sup>55</sup> This joint Ministerial act listing the names of the Haitians is on file with the author. The act is also referenced and discussed in Immigration and Refugee Board of Canada, “Brazil and Haiti: Situation of Haitians in Brazil, Including Rights and Obligations; Permanent Resident Status; Documents Issued to Haitians, Including Foreigner Identity Cards (Cédula de Identidade de Estrangeiro, CIE); Treatment of Haitians in Brazil, Including Access to Employment and Education, State Protection and Support Services (2010–June 2018)”, 2018, available at: <http://www.refworld.org/docid/5b615cfe4.html>, accessed: September 2018.

<sup>56</sup> The initial grant of “permanent” residence for five years was regarded as temporary and for humanitarian reasons. This process permitted application for other forms of permanent residence. See e.g. Immigration and Refugee Board of Canada, *ibid.*

CONARE. Informants indicated that verification exercises are underway to address this oversight.<sup>57</sup>

## Entry and Stay

As the number of Haitian arrivals continued to increase, and applications for refugee status began to escalate, growing to over 3,000 by the end of 2011, discussions began on creating a legal pathway as a means to address irregular movements and the dangers and exploitation encountered by Haitians *en route*. The creation of a legal pathway, through the grant of visas, was authorized in January 2012, following the adoption by CNIg of Normative Resolution 97 (NR 97/2012).<sup>58</sup> The resolution indicated that the visas were issued for “humanitarian reasons” being those “resulting from the deterioration of the living conditions due to the earthquake that occurred in Haiti on 12 January 2010.” Once in Brazil, the visas permitted Haitians to register with the Federal Police and obtain so-called “permanent residence for humanitarian reasons”, with an initial validity of five years. With demand exceeding supply and irregular movements enduring, in April 2013 a modification revoked an annual cap of 1,200 visas and eliminated the requirement that they be issued solely by the Brazilian embassy in Port-au-Prince.<sup>59</sup>

Subsequent CNIg Resolutions extended the validity of NR 97/2012 through to October 2017, pending the entry into force of a new migration law.<sup>60</sup> Under the framework created by the new migration law, the issuance of temporary visas and resident permits to Haitians for humanitarian reasons is authorized through an Interministerial Ordinance.<sup>61</sup> At the end of July 2018, approximately 57,664 Haitians had received protection based on NR 97/2012 and its extensions.<sup>62</sup>

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<sup>57</sup> Additionally, the number of Haitians who were refused protection by CNIg following a referral from CONARE has not been ascertained.

<sup>58</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 97 of 12 January 2012”, available at: <https://www.legisweb.com.br/legislacao/?id=116083>, accessed: September 2018.

<sup>59</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 106 of 24 October 2013”, available at: <https://www.legisweb.com.br/legislacao/?id=261070>, accessed: September 2018. See also, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Vol. II, 2015, p. 45, available at: <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf>, accessed: September 2018.

<sup>60</sup> Conselho Nacional de Imigração, “Resolução Normativa No. 113 of 09 December 2014”; Conselho Nacional de Imigração, “Resolução Normativa No. 117 of 12 August 2015”; Conselho Nacional de Imigração, “Resolução Normativa No. 123 of 13 September 2016”, available at: <https://www.legisweb.com.br/legislacao/?id=116083>, accessed: September 2018. The issuance of family reunification visas, however, was not suspended.

<sup>61</sup> Ministério da Justiça e Segurança Pública/Gabinete do Ministro, “Portaria Interministerial No. 10 of 6 April 2018”, available at: <https://sistemas.mre.gov.br/kitweb/datafiles/Cingapura/en-us/file/Portaria%2010-2018.pdf>, accessed: September 2018.

<sup>62</sup> UNHCR internal request to Brazil’s Federal Police; details shared with author. Figures as at 27 July 2018.

The following tables provide data on the total number of permanent and family reunification visas issued to Haitians by Brazilian embassies from 2012 to May 2016, pursuant to NR 97/2012. In late September 2015, the International Organization for Migration (IOM) began providing administrative and support services to the Brazilian embassy in Port-au-Prince to enhance processing capacity.<sup>63</sup>

**Table 1: Total Number of Visas Issued by the Ministry of Foreign Affairs (2012–2016)**

Type of Visa	2012	2013	2014	2015	2016*	Total
<b>Permanent</b>	1,201	5,296	8,494	15,468	11,940	<b>42,399</b>
<b>Family Reunion</b>	186	1,000	1,694	2,039	1,043	<b>5,962</b>
<b>Total</b>	<b>1,387</b>	<b>6,296</b>	<b>10,188</b>	<b>17,507</b>	<b>12,983</b>	<b>48,361</b>

Source: Cavalcanti et al., “A Imigração Haitiana no Brasil: Características Sócio-Demográficas e Laborais na Região Sul e no Distrito Federal”, with the source of data stated as the Ministry of Foreign Affairs, 2016.<sup>64</sup>

\*For 2016, data relates to the period up until May.

**Table 2: Total Number of Visas Issued by Ministry of Foreign Affairs by Post (2012–2016)**

Post	2012	2013	2014	2015	2016*	Total
<b>Embassy of Brazil in Port-au-Prince</b>	1,387	5,045	7,020	13,923	12,975	<b>40,350</b>
<b>Embassy of Brazil in Quito</b>	-	1,139	3,138	3,536	2	<b>7,815</b>
<b>Embassy of Brazil in Santo Domingo</b>	-	112	2	32	6	<b>152</b>
<b>Embassy of Brazil in Lima</b>	-	-	24	16	-	<b>40</b>
<b>Consular General of Brazil in Buenos Aires</b>	-	-	3	-	-	<b>3</b>
<b>Ministry of Foreign Affairs Representation Office in São Paulo</b>	-	-	1	-	-	<b>1</b>
<b>Total</b>	<b>1,387</b>	<b>6,296</b>	<b>10,188</b>	<b>17,507</b>	<b>12,983</b>	<b>48,361</b>

<sup>63</sup> By the end of 2017, IOM had received over 42,000 applications (email correspondence on file with author). For more information on IOM activities, see <https://haiti.iom.int/bvac/>, accessed: September 2018.

<sup>64</sup> See p. 26. Available at: [https://laemiceppac.files.wordpress.com/2017/12/livro\\_v3\\_sumario\\_atualizado.pdf](https://laemiceppac.files.wordpress.com/2017/12/livro_v3_sumario_atualizado.pdf), accessed: September 2018.

Source: Cavalcanti et al., “A Imigração Haitiana no Brasil: Características Sócio-Demográficas e Laborais na Região Sul e no Distrito Federal”, n.d., with the source of data stated as Ministry of Foreign Affairs, 2016.<sup>65</sup>

\*For 2016, data relates to the period up until May.

## Entitlements

Those who arrived with a visa and then obtained permanent residence for humanitarian reasons and those who received permanent residence for humanitarian reasons following irregular arrival or stay, were entitled to the same rights. These Haitians were permitted to work, to study and to access the services available to Brazilian nationals, including public health services and basic education. Whether these services were available and accessible in practice has not been a focus of this research. Informants noted lack of planning, funding and coordination at different levels of government, as well as lack of programmes to facilitate integration and access to services, as drawbacks of the response, and highlighted their perceptions of the difficulties Haitians faced in terms of integration. Upon the expiration of the five-year validity period of their residence permits for humanitarian reasons, Haitians were required to provide information on employment status and were eligible to obtain permanent residence, a status that provides a potential path to naturalization, provided they registered again with the Federal Police and furnished relevant information and documents.<sup>66</sup>

Unlike refugee status, permanent residence for humanitarian reasons did not entitle protection against *refoulement* or extradition.<sup>67</sup> Recognized refugees can maintain the rights that flow from that status, even if they obtain permanent residence or become naturalized. According to informants, Haitians were not eligible for humanitarian assistance services provided by UNHCR’s implementing partners. Nor were they able to get specific assistance in terms of family reunification or obtain a Brazilian travel document.<sup>68</sup> That said, Haitians did not need to obtain prior authorization to travel back to Haiti, whereas recognized refugees can lose their status if they fail to do so.<sup>69</sup> As discussed in the next section, however, not a single Haitian was recognized as a refugee between 2010 and 2015.

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<sup>65</sup> Ibid.

<sup>66</sup> See e.g. Conselho Nacional de Imigração, *supra* note 58.

<sup>67</sup> The new migration law is discussed in Section IV on the Contemporary Landscape. For obligations and duties of recognized refugees, in addition to the refugee law and its associated decrees, see e.g. UNHCR, *supra* note 21.

<sup>68</sup> See earlier discussion in Section II.

<sup>69</sup> Ibid.



## Refugee Status, Deliberations and Perceptions of Haitian Claims

When Haitians started arriving in Brazil in 2010, through Tabatinga and Manaus in the state of Amazonas and Brasília and Etipaciolândia in the state of Acre, Brazil had fewer than 4,500 refugees and asylum-seekers.<sup>70</sup> At the end of 2009, CONARE had a backlog of over 350 asylum claims.<sup>71</sup> In principle, status determination was conducted in accordance with the process noted in Section II. CONARE had a staff of fewer than five, and claims took at least two years to process. It appears that CONARE had limited capacity to scale up and UNHCR was largely responsible for providing compilations of country-of-origin information.

By March 2011, a decision was made that Haitians would not receive refugee status. This is when the first group of Haitians whose details had been transferred to CNIg by CONARE were granted permanent residence for humanitarian reasons. Nonetheless, there was interest and political will to provide a timely, expedient, group-based, humanitarian response in a context where the disaster in Haiti, and its ensuing impacts, were internationally recognized and had been the subject of a specific communication on non-return by UNHCR and Office of the United Nations High Commissioner for Human Rights (OHCHR).<sup>72</sup> Certainly a range of other factors, including solidarity, international standing, pragmatism, the domestic economic context, as well as CONARE's limited capacity and individual approach to RSD, may have played a part.<sup>73</sup> As early as November 2010, a working group was created inside CNIg, being a representative body composed of personnel from government ministries and non-government actors, to assess Haitian arrivals and needs.

Refugee status was certainly considered as an option to respond to Haitian movements. However, it appears there was a general perception, among members of CONARE and more generally, that refugee status was unsuitable or inapplicable, as Haitians did not face a well-founded fear of persecution on Refugee Convention grounds. If Haitians were refused recognition as refugees by CONARE, a scenario that was perceived as likely, it was thought that Haitians might remain in Brazil without timely recourse to regularize their status.

The extent to which the earthquake and the ensuing disaster, the most prominent and proximate factor prompting flight, played into these perceptions, and overshadowed other underlying conditions in Haiti cannot be dismissed. Recognition or

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<sup>70</sup> UNHCR, *supra* note 2. Numbers are as at the end of 2009.

<sup>71</sup> Based on Federal Police records, there were 524 pending claims; exchange with UNHCR on file with author.

<sup>72</sup> See Subsection 3.2.2 of the report.

<sup>73</sup> See e.g. references listed in footnote 5.

acknowledgement of the mixed nature of Haitian movements seems to have been limited. The possibility that serious harms relating to the ongoing consequences of the disaster, potentially compounded by the underlying State fragility in Haiti, could found claims in refugee status may not have been adequately considered.

Perceptions that Haitians would not satisfy the Refugee Convention's criteria were based at least partly on reviews and discussions of early requests for refugee status. Some informants noted the requests referenced the earthquake primarily; particularly its destructive impacts on property and consequences for livelihood and basic subsistence. Informants indicated, sometimes based on indirect information, that many Haitians expressed a desire to return home as soon as possible and to provide for relatives left behind. Others perceived Haitians were solely interested in employment and income and eventual return to Haiti. In this context, some informants noted that the ultimate response was appropriately tailored to Haitian desires and circumstances.

Questions remain around whether any Haitians were interviewed pursuant to the RSD process prior to CONARE's decision to refer Haitian cases to CNIg. Or indeed, whether the decision to transfer to CNIg was made on the basis of a preliminary review of some of the early requests for refugee status submitted to the Federal Police and forwarded to CONARE. Informant interviews suggest the latter. Relevant information may have also been gathered in January 2011, when in the context of a broader mission, a tripartite group of actors, including representatives of UNHCR, CONARE and civil society, travelled to Acre and met Haitian asylum-seekers and other key stakeholders. Definitively confirming these dimensions has proved difficult since unlike CNIg, whose deliberations were publicly available, CONARE's are not.

While CONARE members appear to have taken some note in March 2011 of the "difficult and volatile" situation in Haiti, and acknowledged that access to the RSD system should remain open to Haitians since some may potentially satisfy the requisite criteria, there are no indications that a single Haitian was interviewed by CONARE at any time between 2010 and 2015. Once the decision was made to transfer Haitian requests to CNIg, it appears CONARE did not revisit them in any level of detail, except as necessary to transfer batches of names and details of Haitians to CNIg. Even if discussions occurred within CONARE or other levels of government on whether Haitian requests should revert to CONARE to be assessed under refugee law, the *status quo* did not change in the intervening years.

These circumstances raise questions of effective access to information and the RSD system in practice, even if in principle no restrictions were imposed. Beginning most likely at the start of 2012, it appears there was also a period of some months when

CONARE stopped accepting Haitian claims for refugee status on the basis that such claims were “manifestly unfounded”. This shift coincided with the creation of the legal pathway to Brazil in January 2012 and appears to have influenced the change. During the relevant months, irregular entrants were unable to lodge claims for refugee status. Others have highlighted border restrictions that may have coincided with these policy changes.<sup>74</sup> Sometime towards the middle of 2012, CONARE’s policy was reversed and Haitians were again able to lodge refugee claims.

### **Consideration of the Broader Refugee Criteria**

A comprehensive review of the extent to which the application of the broader refugee criteria in Brazil’s refugee law was considered has proved challenging, given the inability to review CONARE’s deliberations. Informants suggested that the applicability of the broader refugee criteria to the Haitian movements was quickly dismissed. CONARE’s past practice indicates that circumstances in which Article 1(III) has grounded individual claims for refugee status related only to situations of conflict, and interviews confirm this understanding. For example, claimants from Syria, Libya, Nigeria, the Democratic Republic of the Congo, Ukraine and Sudan are among those who have been recognized on the basis of the broader refugee criteria. CONARE has not developed specific guidance on how to apply the broader refugee criteria in the domestic refugee law, although internal discussions on the necessity for such guidance have taken root very recently and informants indicated that efforts are underway to develop guidance.

Some insight on the consideration of the broader refugee criteria is also available from a judicial decision related to the Haitian movements. Around the time CONARE stopped accepting Haitian claims for refugee status, in January 2012, Acre’s Federal Public Ministry filed a civil claim (‘tutela’) against the Federal government, relating to the period from mid-2010 to mid-2011.<sup>75</sup> Acre’s Federal Public Ministry requested:

- v. To recognize the refugee status of all Haitians who are in Brazil or coming to Brazil;
- vi. To cease any and all impediments to Haitians entering Brazil;
- vii. To cease any threat of deportation of Haitians who are in Brazil seeking refuge; and
- viii. To provide humanitarian aid to Haitian refugees who are in Brazil until they obtain employment and can provide livelihoods for themselves and their families.

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<sup>74</sup> See e.g. Fagen, *supra* note 3; Zamur and Andrade, *supra* note 47; Louidor, “Los Flujos Haitianos Hacia América Latina: Situación Actual y Propuestas”, Jesuit Refugee Service for Latin America and the Caribbean, 2011, available at: [https://www.entreculturas.org/files/documentos/estudios\\_e\\_informes/Flujos%20haitianos%20haciaAL.pdf](https://www.entreculturas.org/files/documentos/estudios_e_informes/Flujos%20haitianos%20haciaAL.pdf), accessed: September 2018.

<sup>75</sup> Procuradoria da República no Acre, Inquérito civil n. 1.10.00.000134/2011-90, 25 January 2012. See also discussion in Zamur and Andrade, *supra* note 47.

With respect to refugee status, Acre's Federal Public Ministry argued that Haitians should be recognized pursuant to the broader refugee criteria (i.e. Article 1(III) of the refugee law) and highlighted reasons why "gross and generalized violations of human rights" prevailed in Haiti and compelled Haitian flight.

In rejecting the requests, a single judge of the Federal Court decided, at first instance, that gross and widespread violations of human rights did not exist in Haiti.<sup>76</sup> The decision also affirmed the exclusive competence of the Federal government to decide on matters related to immigration and refugee policy. Nonetheless, the decision provides some insights into the court's understanding of when Article 1(III) may be applicable and also references CONARE's consideration of the broader refugee criteria and their applicability to the Haitian movements. The below summary is consistent with information gathered from interviews. The judge stated:

On the case, ... [a UNHCR Protection Officer] wrote: 'The National Committee for Refugees (CONARE) of the Ministry of Justice is the competent body to decide on the recognition of the refugee status in Brazil. During the specific discussion of Haitian cases, in addition to analysing the well-founded fear of persecution, it was necessary that the members of the Committee also examine the broader concept of refugee.'

On the broader definition of refugee, three aspects were considered relevant to the application of section III of Law 9.474/1997: [1] the total inability of action of the State; [2] the lack of lasting peace; and [3] recognition of the international community about the grave and widespread human rights violations in the territory or State. In addition, the applicant should demonstrate that there is a threat to his/her life, safety or freedom. Moreover, another aspect considered was that the concept of refugee from the 1951 Convention does not include the cases of victims of natural disasters, unless these have also well-founded fear of persecution for one of the reasons mentioned by the legislation on refugees. Therefore, CONARE's conclusion is that the protection of persons who cannot return to their country of origin due to natural disasters should be considered in the context of another scenario, beyond the 1951 Convention and the Brazilian Refugee Law.<sup>77</sup>

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<sup>76</sup> Justiça Federal, Autos n. 723-55.2012.4.01.3000 - Ação Civil Pública - Sentença, Rio Branco - Acre, 14 January 2013.

<sup>77</sup> *Ibid*, paragraph 38. The decision does not appear to have been appealed.

It is also worth noting here a review of the interpretation and application of the regional refugee definition in 17 Latin American countries, including with fieldwork in Brazil.<sup>78</sup> The study highlighted that the regional refugee definition is infrequently applied in RSD, and cases that could potentially be assessed under the regional refugee definition are instead assessed under complementary forms of protection.<sup>79</sup> With respect to Brazil in particular, the study observed a “practice ... of subsuming recognition according to the regional variant only if status is granted under the Convention grounds.”<sup>80</sup> Additionally:

[c]ommittee members and attorneys interviewed for this study expressed their concern over the regional refugee definition and reported that it is rarely used as an autonomous source for recognition. One senior member confirmed, ‘The expression “gross and generalized violations” is indeterminate. It is difficult to apply. It is not clear what the definition means...’. Instead of using the ambiguity of ‘gross and generalized violations’ to develop legal doctrine and guidance, the office dismissed its use.<sup>81</sup>

According to the study, the practice in Brazil and other countries demonstrates that the “task of analysing the objective situations contained in the regional refugee definition is interpreted in a way that contradicts the non-political and humanitarian nature of refugee protection, and strays far from the intention of the drafters of the Cartagena Declaration.”<sup>82</sup> Although the present study did not scrutinize Brazil’s application of the broader refugee criteria under its domestic law more generally, this earlier research is notable and relevant for identifying implications and recommendations.

Informant interviews affirm many of the conclusions noted above. For example, informants explained that in order to recognize refugee status under the broader refugee criteria in domestic law, the conditions in the country of origin needed to be “caused” by government actors, or the government needed to be responsible for the conditions, rather than it also being a victim of a particular situation. Others noted a lack of consensus, clarity and understanding on how to apply the broader refugee criteria, given that the regional definition is so rarely applied, and implied that the application of the broader refugee criteria has differed based on who has been in office in CONARE.

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<sup>78</sup> Reed-Hurtado, *supra* note 18.

<sup>79</sup> *Ibid.*, p. 20.

<sup>80</sup> *Ibid.*, p. 22.

<sup>81</sup> *Ibid.*, p. 20.

<sup>82</sup> *Ibid.*

#### IV. CONTEMPORARY LANDSCAPE

In May 2017, Brazil's President sanctioned a new migration law (Law No. 13.445/2017), which entered into force on 21 November 2017.<sup>83</sup> Many noted that the Haitian influx and its lessons created momentum for the adoption of the new law and influenced its content.<sup>84</sup> The new law replaced the so-called "Aliens Statute" (also referred to as the "Statute of the Foreigner"), which prevailed at the time of the Haitian influx and did not provide an explicit basis for granting visas or residence for humanitarian reasons.<sup>85</sup> The new law, regarded as embracing a more human rights- and humanitarian-based approach to migration, explicitly permits the grant of humanitarian visas and authorizes the provision of residence permits.<sup>86</sup> Article 14, § 3<sup>o</sup> states:

Temporary visas for humanitarian assistance may be granted to stateless persons or to the national of any country in situation of serious or imminent institutional instability, armed conflict, disaster of major proportions, environmental disaster, severe violations of human rights or international humanitarian law, or otherwise noted in form of a regulation.<sup>87</sup>

Article 30 authorizes the provision of residence permits upon registration, based on the purpose of residence (which includes humanitarian reception), to certain categories of persons (including refugees) and as a catch all, when defined by regulation. Deadlines and procedures related to the grant of residence permits are to be dictated by specific regulations, in line with the law.<sup>88</sup>

On their face, these mechanisms—the option to grant humanitarian visas for a wide range of reasons and to grant residence—provide a legal pathway to Brazil and access to rights and entitlements for people who may qualify for international protection as refugees, as well as those who may not. A deeper analysis of the pertinent provisions of the new migration law, its regulating decree and interministerial ordinances is necessary to understand opportunities and limitations. This includes the ways in which

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<sup>83</sup> Lei No. 13.445 of 24 May 2017, available at: [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2017/Lei/L13445.htm](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2017/Lei/L13445.htm), accessed: September 2018. On entry into force, see e.g. Library of Congress, "Brazil: New Immigration Law Enacted", Global Legal Monitor, available at: <http://www.loc.gov/law/foreign-news/article/brazil-new-immigration-law-enacted/>, accessed: September 2018.

<sup>84</sup> According to informants in São Paulo, experience and lessons from the Haitian influx has led to changes in policies and practice at the municipal level.

<sup>85</sup> For more on the so-called "Statute of the Foreigner" and its limitations see e.g. Zamur and Andrade, *supra* note 47; Godoy, *supra* note 3; Pacifico and Ramos, *supra* note 12;

<sup>86</sup> Lei No. 13.445 of 24 May 2017, *supra* note 83, Articles 14 and 30.

<sup>87</sup> Translation taken from UNHCR note for file, on file with the author.

<sup>88</sup> The Law requires implementing regulations through a Presidential Decree.

the governance of migration envisaged under the new law also supports and complements, rather than detracts from, the grant of refugee law-based international protection. Informants noted that the new law provides greater scope for addressing situations of mass influx and greater scope for irregular entrants to regularize their status, and thus has the potential to lessen the burden on the refugee system in Brazil.<sup>89</sup> Equally, discretion will continue to mediate decisions on humanitarian visas, which require approval from three ministries.

In light of this new framework and its broad scope, it will be important to ensure effective and informed access to RSD systems once on Brazilian territory, including where pre-existing and evolving nexus dynamics and other conditions in countries of origin have the potential to ground claims in refugee status. Ultimately, discretionary humanitarian mechanisms should complement the possibility of claiming refugee status, for those who may prefer that status and its attendant benefits. This is particularly so during mixed movements. At the time of the Haitian influx, in contrast to permanent residence for humanitarian reasons, refugee status would have provided, in principle, stronger protection against *refoulement*, access to some humanitarian assistance and certain family reunification benefits, among other things. At the same time, it would have entailed certain restrictions on travel, particularly to Haiti.

As the preceding discussion demonstrates, by mid-2018, over 100,000 Haitians had received protection through ‘permanent’ residence for humanitarian reasons.<sup>90</sup> Even though the refugee population in Brazil has grown over that period, too, from about 4,200 at the end of 2009 to over 10,000 at the end of 2017, only eight refugees were Haitian, and none had been recognized between 2010 and 2015.<sup>91</sup>

In 2015 and 2016, as Brazil experienced an economic downturn, many Haitians left Brazil, transiting and undertaking onward movements within and outside the region to countries such as the United States of America, Mexico, Chile and others in the Americas. These movements and their regional dynamics and repercussions made headlines around the world, sparking various debates, including on the merits and implications of different forms of protection. In the context of arrests, detention and

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<sup>89</sup> For more on the framework of the new migration law, procedures for temporary visas and residence permits, see e.g. Immigration and Refugee Board of Canada, *supra* note 55.

<sup>90</sup> As noted above, at the end of 2015, approximately 43,871 Haitians had received protection based on the first mechanism (authorization to stay) and as at 27 July 2018, approximately 57,664 Haitians had received protection based on the second mechanism (entry and stay) under the older framework. The total number of Haitians protected under both mechanisms is likely to be higher when figures for 2016–2018 under the first mechanism are also counted.

<sup>91</sup> UNHCR, *supra* note 2.

deportation of Haitians holding Brazilian permanent residence documents, Brazil has evinced an intention to accept their return, provided it is informed and voluntary.

## V. INFORMANTS AND METHODS

The description of Brazil’s response is based on informant interviews, carried out in Brasília during 26–28 February 2018 and in São Paulo during 1–3 March 2018. The following table provides an overview of the informants interviewed while in Brazil (the vast majority through in-person meetings). A number of the people captured in the below table are, or were, also representatives of the collective decision-making body, CONARE.

Category	Total Number
Ministry of Foreign Affairs	1
Current and Former Ministry of Justice, including CONARE	4*
Current and Former Ministry of Labour, Employment and Social Security, including CNIg	3*
Municipality of São Paulo	2
Federal Prosecutor’s Office	1
Current and Former UNHCR Brazil Personnel	11**
Current and Former Civil Society	7
Other UN or Intergovernmental	2

\* One person also counted in the “Current and Former UNHCR Brazil Personnel” category.

\*\* Two UNHCR informants were interviewed at in-person meetings while on field visit in Mexico in March 2018.

Other activities undertaken to supplement the knowledge gathered through informant interviews included: (1) remote interviews and email correspondence with experts; (2) a questionnaire to the UNHCR operation in Brazil; and (3) desk review of grey and academic literature, online resources, UNHCR documents and data. UNHCR staff in Brazil reviewed drafts of this case study. A draft was also shared with government informants in October 2018.

In general, when relevant, efforts were undertaken to obtain data that is current between February and September 2018.



## 6.4. Mexico

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## I. INTRODUCTION

Mexico is sometimes characterized as a country of origin, transit and destination for refugees and migrants, but prior to the 2010 earthquake, Haitians had largely used Mexico as a transit point.<sup>1</sup> A census conducted between 2009 and 2010, for the period up until the end of 2009, indicated 733 Haitian residents in Mexico.<sup>2</sup> This figure included Haitians with immigrant documents (such as for economic or familial reasons) and Haitians with non-immigrant documents (such as students, visitors and refugees).<sup>3</sup> Based on the census, 126 of the 733 Haitians were categorized as refugees, a figure that represented 26 per cent of total refugees (490) in the country and the highest of any nationality.<sup>4</sup> The United Nations High Commissioner for Refugees (UNHCR) holds conflicting estimates for the end of 2009, suggesting a total of over 1,200 refugees.<sup>5</sup> Haitians comprised the fourth-highest nationality, with 175 refugees and 10 asylum-seekers. The difference is perhaps explained by the possibility that the census figures include only refugees who applied for and received residence permits, through a post-recognition administrative process.<sup>6</sup>

Following the 2010 earthquake and resulting disaster in Haiti, a new group of Haitians arrived in Mexico.<sup>7</sup> During each of 2010, 2011 and 2012, between 2,300 and 2,400 Haitians arrived in Mexico by air alone,<sup>8</sup> whereas in each of the previous three years,

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<sup>1</sup> For more background on Mexico's response to Haitian movements in the aftermath of the earthquake, see e.g. Fagen, "Receiving Haitian Migrants in the Context of the 2010 Earthquake", Nansen Initiative Discussion Paper, 2013, available at: [https://www2.nanseninitiative.org/wp-content/uploads/2015/03/DP\\_Receiving\\_Haitian\\_Migrants\\_in\\_the\\_Context\\_of\\_the\\_2010\\_earthquake.pdf](https://www2.nanseninitiative.org/wp-content/uploads/2015/03/DP_Receiving_Haitian_Migrants_in_the_Context_of_the_2010_earthquake.pdf), accessed: September 2018.

<sup>2</sup> Cháves and Cobo, "Extranjeros Residentes en México: Una Aproximación Cuantitativa con Base en los Registros Administrativos del INM", INM, 2012, available at: [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Poblacion\\_Extranjera/ExtranjerosResMex.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Poblacion_Extranjera/ExtranjerosResMex.pdf), accessed: September 2018, pp. 8 and 35.

<sup>3</sup> *Ibid.*, p. 39.

<sup>4</sup> *Ibid.*

<sup>5</sup> UNHCR, "UNHCR Population Statistics Database", available at: [http://popstats.unhcr.org/en/persons\\_of\\_concern](http://popstats.unhcr.org/en/persons_of_concern), accessed between February and September 2018.

<sup>6</sup> For more background on refugees in Mexico, see e.g. Cobo and Fuerte, "Refugiados en México: Perfiles Sociodemográficos e Integración Social", 2012, available at: <http://www.acnur.org/fileadmin/Documentos/Publicaciones/2013/9167.pdf>, accessed: September 2018.

<sup>7</sup> Statistics from the Mexican government are available at: [http://www.politicamigratoria.gob.mx/es\\_mx/SEGOB/Boletines\\_Estadisticos](http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Boletines_Estadisticos), accessed: September 2018.

<sup>8</sup> In 2010, there were 2,316 Haitian arrivals to Mexico by air; in 2011, 2,312; and in 2012, 2,386. See [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2010/BoletinEst2010.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2010/BoletinEst2010.pdf), accessed: September 2018, p. 57; [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2011/BoletinEst2011.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/BoletinEst2011.pdf), accessed: September 2018, p. 57, and [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2012/BoletinEst2012.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/BoletinEst2012.pdf), accessed: September 2018, p. 71, respectively.

Haitian arrivals by air had averaged around 1,440 persons.<sup>9</sup> Information on arrivals by land, disaggregated by nationality, does not appear to be available.

Within the legal architecture in effect at the time, in February 2010, through an instruction issued by Mexico's National Institute for Migration (INM), Mexico specifically authorized entry and stay for Haitians based on humanitarian reasons.<sup>10</sup> The instruction indicated, *inter alia*, that both Haitians without relevant migratory documents or authorization to enter Mexico (in other words, those arriving irregularly), as well as those who possessed documents and authorization to enter due to family links, had the potential to be granted entry and issued with a non-immigrant (so-called "FM3") document as a visitor for humanitarian reasons. The instruction also permitted specific humanitarian interventions for the benefit of other groups, such as Haitians already in Mexico at the time of the earthquake, including students and detainees, foreigners in Mexico and Mexicans with family in Haiti.

An official press release issued by INM in April 2013 stated that as a response to the earthquake in Haiti, INM had implemented temporary measures for the entry and stay of Haitian nationals in coordination with the Ministry of Foreign Affairs (SRE), the Mexican Commission for Aid to Refugees (COMAR) and the Secretariats of the Navy and National Defense.<sup>11</sup> These measures, which lasted for a period of 90 days ending on 10 May 2010, benefited 1,123 Haitians, and included the following:

- The facilitation of entry and stay for relatives of Haitian nationals residing in Mexico;
- Priority attention in migration procedures; and
- Work permits for students.<sup>12</sup>

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<sup>9</sup> In 2007, there were 1,325 Haitian arrivals to Mexico by air; in 2008, 1,645; and in 2009, 1,337. See [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2007/BoletinEst2007.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2007/BoletinEst2007.pdf), accessed: September 2018, p. 57; [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2008/BoletinEst\\_2008.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2008/BoletinEst_2008.pdf), accessed: September 2018, p. 57; [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2009/BoletinEst\\_09.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2009/BoletinEst_09.pdf), accessed: September 2018, p. 57, respectively.

<sup>10</sup> INM, "Oficio Instrucción INM/045/10, Asunto: Medidas Temporales Aplicables para la Internación y Estancia en el País de Extranjeros de Nacionalidad Haitiana", 8 February 2010.

<sup>11</sup> INM, "Reitera INM Apoyo a Extranjeros Haitianos Que Cuenten con Requisitos Legales para Ingresar a México", Boletín No. 023/13, 21 April 2013, available at: <https://www.gob.mx/inm/prensa/reitera-inm-apoyo-a-extranjeros-haitianos-que-cuenten-con-requisitos-legales-para-ingresar-a-mexico>, accessed: September 2018.

<sup>12</sup> For more information on these migration pathways, see e.g. Fagen, *supra* note 1. See also, Cantor, "Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters", Nansen Initiative Background Paper, 2015, available at: [https://disasterdisplacement.org/wp-content/uploads/2015/07/150715\\_FINAL\\_BACKGROUND\\_PAPER\\_LATIN\\_AMERICA\\_screen.pdf](https://disasterdisplacement.org/wp-content/uploads/2015/07/150715_FINAL_BACKGROUND_PAPER_LATIN_AMERICA_screen.pdf), accessed: September 2018.

The press release also refers to Haitians sent back upon arrival by air, including because of identity theft or false statements or documents.<sup>13</sup> Rejection rates were at their lowest in the year of the earthquake (12 of 2,316 arrivals in 2010) compared to 2011 (47 of 2,312) and 2012 (212 of 2,386).<sup>14</sup>

The following table shows the number of Haitians who received an FM3 non-immigrant document between 2010 and 2012, as well as the number of Haitians who obtained renewals. These numbers may include Haitians who received such a status for reasons unrelated to the earthquake.

**Table 1: FM3 Non-immigrant doc. to Haitians with ‘Humanitarian Reasons’ Annotation**

2010	2011	2012
637 (338 renewals) <sup>15</sup>	179 (572 renewals) <sup>16</sup>	109 (455 renewals) <sup>17</sup>

The status was valid for a period of one year and permitted work.<sup>18</sup> Informants noted that while Mexico’s response in facilitating entry for Haitians was exceptional, limited attention and resources were expended on facilitating post-entry assistance and

<sup>13</sup> INM, supra note 11.

<sup>14</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Series\\_historicas/1RechA%C3%A9reos10\\_16.xls](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Series_historicas/1RechA%C3%A9reos10_16.xls), accessed: September 2018.

<sup>15</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2010/BoletinEst2010.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2010/BoletinEst2010.pdf), pp. 69 and 77, accessed: September 2018. Presumably, any renewals in the year 2010 were for reasons unrelated to the earthquake.

<sup>16</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2011/BoletinEst2011.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/BoletinEst2011.pdf), pp. 71 and 75, accessed: September 2018.

<sup>17</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2012/Boletin2012.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/Boletin2012.pdf), pp. 89 and 95, accessed: September 2018.

<sup>18</sup> INM, supra note 10. Some were also permitted to study. Fagen, supra note 1, also states that other forms of official assistance were not provided. See also Sin Fronteras, “Haitianos en México Tras El Terremoto de 2010: Una Experiencia de Trabajo Psicosocial en Situaciones de Emergencia”, 2011, available at <https://sinfronteras.org.mx/wp-content/uploads/2017/05/Haitianos-en-Me%CC%81xico-tras-el-terremoto-de-2010.-Una-experiencia-de-trabajo-psicosocial-en-situaciones-de-emergencia.-1.pdf>, accessed: September 2018;

Sin Fronteras, “Situación de la Población Haitiana en México”, 2012, available at: <https://www.alainet.org/images/SITUACION%20DE%20LA%20POBLACION%20HAITIANA%20EN%20MEXICO%20ABR12.pdf>, accessed: September 2018; Louidor, “Los Flujos Haitianos Hacia América Latina: Situación Actual y Propuestas”, Jesuit Refugee Service for Latin America and the Caribbean, 2011, available at: [https://www.entreculturas.org/files/documentos/estudios\\_e\\_informes/Flujos%20haitianos%20haciaAL.pdf](https://www.entreculturas.org/files/documentos/estudios_e_informes/Flujos%20haitianos%20haciaAL.pdf), accessed: September 2018.

support. In principle, the status granted to Haitians could be renewed.<sup>19</sup> Nonetheless, informants noted that while some Haitians were able to obtain renewals, others reported difficulties, or were unaware of the option; and discretion and uncertainty permeated the process in different states of Mexico. Many informants expressed strong views that Haitians used their legal status to transit through Mexico to the United States of America and other countries.<sup>20</sup>

INM's 2010 instruction authorizing the execution of specific measures on humanitarian grounds also identified the process to be followed for Haitians who applied for refugee status.<sup>21</sup> The instructions noted that Haitians are required to lodge their applications within 15 days of admission and requested the relevant decision-making bodies to accelerate the refugee status determination (RSD) process for Haitians, reopen previously abandoned claims upon request and examine potential *sur place* claims. These specific measures were also to be applied for a period of 90 days.<sup>22</sup> Finally, the instructions required expeditious decisions on requests for authorization to travel to Haiti from previously-recognized Haitian refugees.

With this background in mind, this case study describes Mexico's response towards Haitian movements into its territory in the aftermath of the 2010 earthquake. Section II provides an overview of the relevant legal and institutional landscape. This sets the stage for Section III on the ways in which Mexico's refugee law framework featured in its response with an emphasis on 2010–2012. Section IV highlights pertinent contemporary dynamics.

## II. LEGAL AND INSTITUTIONAL LANDSCAPE

### Mexico's Legal and Institutional Framework Up Until 2011

Mexico acceded to the 1951 Convention relating to the Status of Refugees with reservations<sup>23</sup> and its 1967 Protocol relating to the Status of Refugees in 2000 (together,

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<sup>19</sup> Ibid.

<sup>20</sup> Fagen, *supra* note 1, suggests that at the expiration of the document, Haitians (as with other undocumented groups) became subject to deportations and were deported. These dimensions have not been explored.

<sup>21</sup> INM, *supra* note 10.

<sup>22</sup> It seems the administrative instruction stated, perhaps inaccurately, a period of application of 45 business days beginning on 12 January 2012.

<sup>23</sup> Mexico made reservations to Article 17(2)(a)–(c) related to wage-earning employment and to Articles 26 and 31(2) related to freedom of movement. Reservations made to Article 32 were withdrawn in 2014. Mexico has also made an interpretive declaration to Article 1 of the Convention. See e.g. UNHCR, "Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Mexico," July 2018, available at: <http://www.refworld.org/docid/5b57009a7.html>, accessed: September 2018.

Refugee Convention), but this framework would not be incorporated into domestic law before 2011.<sup>24</sup> Until then, internal notices and instructions issued by INM and COMAR authorized the grant of refugee status pursuant to the Refugee Convention's criteria.<sup>25</sup> Article 42 of Mexico's 1974 General Law on Population<sup>26</sup> authorized the grant of refugee status pursuant to broader refugee criteria, which had been incorporated in 1990, even before Mexico acceded to the Refugee Convention.<sup>27</sup> Article 42 provided that: "A non immigrant is a foreign citizen who enters the country temporarily with permission from the Department of the Interior under one of the following categories".<sup>28</sup> These included:

Refugee. For purposes of protecting his/her life, safety, or liberty when same have been threatened by generalized violence, foreign aggression, internal conflicts, massive human rights violations, or other circumstances that have seriously disturbed public order in his/her country of origin and forced him/her to flee to another country. Those persons who have suffered political persecution as described in the preceding paragraph shall not be included under this category. The Department of the Interior shall renew their permission to stay in the country as many times as may be deemed necessary. ...<sup>29</sup>

In essence, the 1974 General Law on Population, its implementing regulations,<sup>30</sup> and internal notices and instructions<sup>31</sup> underpinned the assessment of refugee status and other forms of international protection. For example, one circular authorized complementary protection to persons who failed to satisfy the definition under the Refugee Convention or the broader refugee criteria under Article 42.<sup>32</sup> Another set out the framework for authorizing entry or regularization of status for humanitarian or

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<sup>24</sup> UN News Service, "UN Agency Welcomes Mexico's New Refugee Law", 28 January 2011, available at: <http://www.refworld.org/docid/4d4a52bc2c.html>, accessed: September 2018.

<sup>25</sup> See e.g. INM, "Circular CRM/06/2007" and "Circular CRM/028/2007".

<sup>26</sup> Ley General de Población, available at: [https://legislacion.vlex.com.mx/vid/ley-general-poblacion-42602368?\\_ga=2.209646801.297685283.1536311993-905009517.1536311993](https://legislacion.vlex.com.mx/vid/ley-general-poblacion-42602368?_ga=2.209646801.297685283.1536311993-905009517.1536311993), accessed: September 2018.

<sup>27</sup> Reed-Hurtado, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America", Legal and Protection Policy Research Series, UNHCR, 2013, available at: <http://www.unhcr.org/protection/globalconsult/51c800fe9/32-cartagena-declaration-refugees-protection-people-fleeing-armed-conflict.html>, accessed: September 2018, p. 17.

<sup>28</sup> Taken from a translation of the law in González-Murphy and Koslowski, "Understanding Mexico's Changing Immigration Laws", Woodrow Wilson International Center Scholars: Mexico Institute, 2011, available at: <https://www.wilsoncenter.org/sites/default/files/GONZALEZ%20%2526%20KOSLOWSKI.pdf>, accessed: September 2018.

<sup>29</sup> Ibid. As in other countries in Latin America, there is also a separate category for "political asylees".

<sup>30</sup> Reglamento de la Ley General de Población, available at: [https://legislacion.vlex.com.mx/vid/reglamento-ley-general-poblacion-43534261?\\_ga=2.242563905.297685283.1536311993-905009517.1536311993](https://legislacion.vlex.com.mx/vid/reglamento-ley-general-poblacion-43534261?_ga=2.242563905.297685283.1536311993-905009517.1536311993), accessed: September 2018.

<sup>31</sup> See e.g. INM, "Circular CRM/04/07, Asunto: Internación o Regularización por Razones Humanitarias", 12 April 2007; INM, "Circular CRM/016/2007, Asunto: Protección Complementaria", 3 July 2007.

<sup>32</sup> INM, "Circular CRM/016/2007", *ibid.*

public interest reasons, as distinct from, *inter alia*, the grant of refugee or complementary protection statuses.<sup>33</sup>

Some have noted that the 1974 General Law on Population was regarded “as an instrument of vigilance and control, focused on regulating the entry, stay, voluntary exit, and forced expulsion of foreigners from Mexico” and there was growing recognition of its unsuitability to address evolving mobility dynamics in Mexico.<sup>34</sup> Oversight and enforcement under this law fell under the INM, housed under the Ministry of the Interior.<sup>35</sup> COMAR, a decentralized body also housed under the Ministry of Interior, was established in 1980 to address the arrival of refugees from South and Central America.<sup>36</sup> Prior to 2003, however, UNHCR conducted RSD pursuant to its mandate. Since then, COMAR has been the government authority responsible for assessing refugee and complementary protection statuses.

In general, in the years before the 2010 earthquake in Haiti and pending the changes brought about by the adoption of a specific refugee law in 2011 (discussed in the next section), RSD involved three stages:<sup>37</sup> (1) Once an application for refugee status was filed with INM, government officers conducted an interview, researched country-of-origin information and developed a view on recognition. (2) These views were reviewed and discussed at an Eligibility Committee Working Group, which made decisions on how to proceed: to recognize, reject or request further information. Rejected applicants were able to request a new interview with a government officer, but the same Working Group would examine the case on appeal. The Eligibility Committee Working Group was composed of representatives of government organizations, including INM, the SRE, COMAR, the Human Rights unit of the Ministry of Interior, as well as UNHCR and a non-governmental organization (NGO), all with full voting rights. (3) At the decision stage, the assessments of the Eligibility Committee Working Group were submitted to a Refugee Eligibility Committee, the body that presented a recommendation to the INM, which was responsible for issuing the decision. The Refugee Eligibility Committee was a governmental body composed of high-ranking officials. In principle, appeal to the judiciary was possible.<sup>38</sup>

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<sup>33</sup> INM, “Circular CRM/04/07”, supra note 31.

<sup>34</sup> See González-Murphy and Koslowski, supra note 28; Informants also confirmed these sentiments.

<sup>35</sup> For more on the limitations and gaps in this framework, and background context on reform, see e.g. *ibid.*

<sup>36</sup> García, “International Refugee Law in Mexico”, *Forced Migration Review*, Issue 31, 2008, available at: <http://www.fmreview.org/climatechange/garcia>, accessed: September 2008.

<sup>37</sup> This summary is drawn from García, *ibid.*, and is consistent with information gathered from interviews.

<sup>38</sup> *Ibid.*, noting that few cases have been heard in Mexican courts and neither courts nor lawyers are specialized in the issues. In addition, only the administrative processes were reviewable, not the reasons behind the decision. Changes that may have occurred in the 10 years since, have not been explored in detail.

In this context, UNHCR was a directly-engaged participant, able to provide opinions, guidance and advice on eligibility of individual applicants for recognition as refugees. With the adoption of a refugee law in 2011, these practices and UNHCR's ability to engage deeply on the assessment of refugee claims stopped.

## **2011 Refugee Law, Definition of a Refugee and Institutional Set-up**

In January 2011, Mexico enacted a specific law on refugees. The Law on Refugees and Complementary Protection (LRCP) more closely aligned Mexico's domestic refugee law framework with the Refugee Convention and also incorporated INM instructions issued up to that point.<sup>39</sup> Article 13 of the LRCP provided three bases for recognition as a refugee. It incorporated, in general terms, the inclusion criteria in the Refugee Convention, but also added gender as a ground for persecution. Broader refugee criteria, drawn from the 1984 Cartagena Declaration (Cartagena Declaration), were incorporated in Article 13(II). The LRCP also explicitly referenced the possibility of being recognized as a *sur place* refugee.

Article 26 stated that recognition of refugee status should be undertaken on an individual basis, but provided scope to undertake a group-based approach in contexts where a mass influx of persons satisfying the refugee definitions in Article 13 produced a substantial increase in applications for refugee status.<sup>40</sup> In addition, the law permitted the grant of complementary protection to those who failed to satisfy the definitions in Article 13.<sup>41</sup> Beneficiaries of complementary protection were provided a status and rights under the law, including protection against *refoulement*.<sup>42</sup> A 2014 modification to the LRCP changed the title to the Law on Refugees, Complementary Protection and Political Asylum (LRCPA), but did not alter the provisions discussed in this report.<sup>43</sup>

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<sup>39</sup> Ley Sobre Refugiados y Protección Complementaria (LRCP), available at: <http://www.acnur.org/fileadmin/Documentos/BDL/2010/8150.pdf?file=fileadmin/Documentos/BDL/2010/8150>, accessed: September 2018.

<sup>40</sup> See also Cantor, *supra* note 12, for a discussion of these aspects.

<sup>41</sup> LRCP, Article 28, *supra* note 39. See also Cantor, *ibid*.

<sup>42</sup> Cantor notes that in Mexico, the practice has been to apply this protection purely for harms imposed at the hands of other humans and not to generalized risk arising from situations such as disasters caused by natural hazards. For more on complementary protection in Mexico, see e.g. Dicker and Mansfield, "Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia", *New Issues in Refugee Research*, UNHCR, 2012, available at: <http://www.refworld.org/docid/4fe02d332.html>, accessed: September 2018.

<sup>43</sup> Ley Sobre Refugiados, Protección Complementaria y Asilo Político (LRCPA), available at: [https://www.gob.mx/cms/uploads/attachment/file/211049/08\\_Ley\\_sobre\\_Refugiados\\_Proteccion\\_Complementaria\\_y\\_Asilo\\_Politico.pdf](https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados_Proteccion_Complementaria_y_Asilo_Politico.pdf), accessed: September 2018. The LRCPA largely maintained the framework under the LRCP, but added provisions related to political asylum. Other normative documents related to refugees in Mexico are available here: <https://www.gob.mx/comar/documentos/marco-juridico-en-materia-de-refugiados>, accessed: September 2018.



Specific regulations supplementing the LRCP (which continue to be applicable after the name change in 2014) were adopted in February 2012.<sup>44</sup> The regulations provide internal interpretive guidelines on specific aspects of the refugee definitions in Article 13 of the law. For example, Article 4(X) and 4(XI) of the regulations interpret particular elements of the broader refugee criteria as follows:

X. Massive violation of human rights: Behaviors violating human rights and fundamental freedoms on a large scale and according to a specific policy in the country of origin, and

XI. Other circumstances that have seriously disturbed public order: Situations 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.<sup>45</sup>

Under the prevailing system, COMAR is the key institution responsible for assessing and issuing decisions on refugee status and complementary protection.<sup>46</sup> Requests for refugee status must be submitted to COMAR (which has four offices throughout Mexico) or to INM, within 30 business days of entering Mexico. Asylum-seekers are required to stay within the state in which the refugee request is filed. Permission must be obtained from COMAR to move to another state, at risk of having the case considered abandoned. Requests can also be made from detention (so-called “migratory stations”). COMAR’s eligibility officers are responsible for conducting interviews. The procedure is in principle expected to last 45 business days, although COMAR can extend for another 45. There are two means to file an appeal. The first, an administrative appeal before COMAR must be filed within 15 business days following notification of a decision.<sup>47</sup> The second, a jurisdictional appeal before an administrative court (dependent on the Executive Branch) must be filed within 30 business days following notification of a decision.<sup>48</sup> Procedural rules allow for the first type of appeal to be an early step before the second, but not the other way around.

Since 2011, UNHCR’s direct involvement in RSD is limited and largely entails capacity-building and advisory functions with COMAR. Access to information on refugee

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<sup>44</sup> Reglamento de la Ley Sobre Refugiados y Protección Complementaria, available at: [https://www.gob.mx/cms/uploads/attachment/file/211032/19\\_Reglamento\\_de\\_la\\_Ley\\_sobre\\_Refugiados\\_y\\_Proteccion\\_Complementaria.pdf](https://www.gob.mx/cms/uploads/attachment/file/211032/19_Reglamento_de_la_Ley_sobre_Refugiados_y_Proteccion_Complementaria.pdf), accessed: September 2018.

<sup>45</sup> Translation reviewed by UNHCR Mexico Office.

<sup>46</sup> This summary is based on information provided by and through exchanges with the UNHCR Mexico Office.

<sup>47</sup> Decisions on these “Recursos de Revisión” are issued by the Legal Director of COMAR. See LRCPPA, Article 25, *supra* note 43.

<sup>48</sup> UNHCR Mexico noted that the controlling legislation for these “Juicios de Nulidad” is the Federal Law on Contentious Administrative Procedure. This information has not been explored in further detail.

applications and decisions requires a specific request to COMAR. Access to specific decisions also remains limited. UNHCR also plays a role in supporting legal assistance to asylum-seekers through its efforts to build legal aid capacity in Mexico.

With the above background in mind, the next section turns to a discussion on how Mexico’s refugee law framework featured in its response to Haitians who arrived in the aftermath of the 2010 earthquake. It begins with a brief overview of pre-earthquake practice.

### III. RESPONSE TO HAITIAN MOVEMENTS AFTER EARTHQUAKE

#### Applications for Refugee Status

In the years immediately before the 2010 earthquake, the number of Haitians applying for refugee status was relatively high. As is evident from Table 2 below, however, Haitian applications for refugee status decreased noticeably between 2010 and 2012 and have remained lower than 2009 levels up until a surge in 2016 and 2017.

**Table 2: Applications for Refugee Status and Decision Points<sup>49</sup>**

Year	Applied	Recognized	Rejected	Abandoned or Withdrawn	Complementary Protection	Pending
2008	64					
2009	65	25				
2010	39	16				
2011	20	12				
2012	8	3				
2013	14	1	8	5	0	

<sup>49</sup> Figures based on UNHCR Mexico Office’s response to questionnaire circulated by author. Figures for 2013–2017 have been corroborated and are available at:

[https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS\\_2013\\_A\\_4TO\\_TRIMESTRE\\_2017.pdf](https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf),

accessed: September 2018. Recognition figures for 2009, 2010, 2011 and 2012 are available at:

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2009/BoletinEst\\_09.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2009/BoletinEst_09.pdf), p. 79;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2010/BoletinEst2010.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2010/BoletinEst2010.pdf), p. 102;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2011/BoletinEst2011.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/BoletinEst2011.pdf), p. 100; and

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2012/BoletinEst2012.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/BoletinEst2012.pdf), p. 125, respectively, all accessed: September 2018.

2014	25	0	20	5	0	
2015	16	0	13	3	0	
2016	47	7	16	23	0	1
2017	436	0	15	48	0	373

Informants surmised a range of reasons for the fewer applications for refugee status from Haitians in the year of, and following, the earthquake in Haiti. Some noted that as the Mexican government provided alternative mechanisms to access territory and permit stay, refugee status was unnecessary. Many perceived that Haitians were largely interested in transiting through Mexico, as a means to access the United States. They suggested that substantial numbers of Haitians who received FM3 documents left Mexico. Others perceived that Haitians were privy to limited, uneven and inaccurate information about their ability and eligibility to access refugee-law based international protection. In this sense, the possibility of claiming refugee status was “invisible”, a feature which according to some also reflected the standing of key refugee institutions such as COMAR and UNHCR at the time. Yet others explained that while it was initially possible to renew the FM3 document, in time, renewals became more difficult. Moreover by the time some Haitians sought to access the refugee system, the application deadlines had passed.

### Recognition of Refugee Status

According to informants, in general, in 2010 and earlier, Haitians were recognized on the basis of the Refugee Convention definition, particularly under the grounds of “membership of a particular social group” and “political opinion”. Haitians were also recognized under broader refugee criteria as reflected in Article 42, including the “other circumstances which have seriously disturbed public disorder” ground.<sup>50</sup> It also appears that in practice, some Haitians who failed to satisfy the applicable criteria for refugee status may have been granted complementary protection status, which was authorized by an INM instruction.<sup>51</sup>

A request to COMAR for information on the grounds and reasons pursuant to which Haitians were recognized between 2006 and 2017, and particularly between 2010 and

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<sup>50</sup> See also Talsma, “Human Trafficking in Mexico and Neighbouring Countries: A Review of Protection Approaches”, *New Issues in Refugee Research*, UNHCR, 2012, available at: <http://www.refworld.org/pdfid/5142e3df2.pdf>, accessed: September 2018, p. 18. fn. 137, which confirms that COMAR had granted protection pursuant to the regional refugee definition to asylum-seekers from Haiti (as well as Colombia and Sri Lanka). The study does not disaggregate this information by year or particular circumstance. The pertinent information was based on an interview carried out with a COMAR official in March 2012.

<sup>51</sup> INM, “Circular CRM/016/2007, supra note 31.

2012, has not furnished results.<sup>52</sup> Cantor's earlier research indicates that, "Mexico ... recognized some asylum claims from Haitians fleeing zones affected by the earthquake ... [based on other circumstances which have seriously disturbed public order] due to the lack of protection and increased insecurity faced by these individuals."<sup>53</sup> This is consistent with information gathered through interviews with former COMAR officials.

### **Views on Refugee Status**

According to some informants, much of the narrative in the aftermath of the 2010 earthquake centred on humanitarian interventions and migration-related pathways for territorial access and stay; the relevance and potential of the refugee law framework was less prominent at the international and domestic levels.<sup>54</sup> At the time of the earthquake, when UNHCR was still part of the Eligibility Committee Working Group and involved directly in the RSD process, UNHCR guidance on the potential applicability of refugee law frameworks to the circumstances unravelling in Haiti, was unavailable. As noted in Subsection 3.2.2 of the report, however, together with the Office of the United Nations High Commissioner for Human Rights (OHCHR), UNHCR sent two letters, one in February 2010 and another in June 2011, requesting the suspension of returns on humanitarian grounds.

It appears that in the aftermath of the earthquake and ensuing disaster in Haiti, COMAR had discussions on how to assess Haitian claims in light of refugee-law criteria, including on how to apply the "other circumstances which have seriously disturbed public order" ground. COMAR's efforts included reaching out to key academic experts in the refugee field. Prompting these overtures was the recognition that institutions in Haiti were unable to function and to support and protect people; even if humanitarian assistance was provided by various actors, the protection and security environment for Haitians was precarious, chaotic and had certainly been negatively affected by the impacts of the earthquake.

Former COMAR officials indicated that assessing claims under the Refugee Convention's criteria was difficult, including because Haitians were suffering from

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<sup>52</sup> It appears that public requests for similar information have been effective in the past. For example, in the past COMAR has responded to a public request which sought information on the grounds upon which refugee status was recognized between 2013 and 2017. This request did not relate to a specific nationality, however.

<sup>53</sup> Cantor, *supra* note 12, p. 18. Based on correspondence with UNHCR's Mexico Office, it seems that information on file with civil society at Ibero-American University in Mexico City also suggests that at least two Haitians were recognized in 2011 on the grounds of "other circumstances which have seriously disturbed public order".

<sup>54</sup> Arguably, refugee issues have become more and more prominent in Mexico in recent years, primarily due to the growth in claims by applicants from the Northern Triangle countries. At the time of the Haitian earthquake, informants noted that changes were taking place in terms of the status and capacity of the UNHCR Mexico Office.

serious psychosocial harms and struggling to articulate coherent claims.<sup>55</sup> In this context, former COMAR officials reflected that UNHCR guidance was held in high regard and consulted regularly when conducting RSD. The suggestion was made that specific guidance and advice explaining how Haitians might have satisfied the definitions in the Refugee Convention or broader refugee criteria, in light of evolving conditions in Haiti after the earthquake, would have benefited and enhanced the technical capacity of COMAR personnel, particularly given the uncommon nature of the necessary analysis.

Informants reflected on the conditions that arose in Haiti in the aftermath of the earthquake and their relevance for grounding refugee claims.<sup>56</sup> They opined that in general, a ‘natural’ disaster *per se* could not ground claims in refugee status, but acknowledged that in principle, the impacts and consequences of a disaster may do so, including, and perhaps particularly based on the broader refugee criteria. In this context and with respect to the conditions in Haiti, informants mentioned the nature of the chaos and social disruption following the earthquake. They also referenced the significantly limited capacity of the government and key institutions in Haiti to protect Haitians from insecurity and violence, as well as to provide food and other essential services. The suggestion was that prior to the earthquake, Haitians had been recognized pursuant to the regional refugee definition’s “other circumstances which have seriously disturbed public order” ground, and arguably, the chaos, social disruption and government incapacity in the aftermath of the earthquake heightened disruptive conditions. Where decisions have the capacity to create precedent, informants also noted consistency and coherence as being fundamental to the robust implementation of the regional refugee definition.<sup>57</sup>

It is worth noting here that during the Cartagena +30 process and the adoption of the Brazil Declaration and its Plan of Action, Mexico may have made statements that reflect and reinforce the views stated above.<sup>58</sup> Efforts to identify official statements or records of the same, however, have proved unfruitful.<sup>59</sup> That said, some evidence of Mexico’s perspective could perhaps be gleaned from the Memories of the Thirtieth Anniversary of the Cartagena Declaration on Refugees.<sup>60</sup> The theme of “Climate Change, Natural Disasters and Cross-Border Movement” featured strongly in the Mesoamerica

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<sup>55</sup> On psychosocial needs of Haitians, see e.g. Sin Fronteras, “Haitianos en México Tras El Terremoto de 2010: Una Experiencia de Trabajo Psicosocial en Situaciones de Emergencia”, supra note 18.

<sup>56</sup> Discussion with former representatives of COMAR and informant from INM.

<sup>57</sup> Ibid.

<sup>58</sup> Based on discussion with INM informant.

<sup>59</sup> A request by UNHCR’s Mexico Office to Mexico’s Ministry of Foreign Affairs has not received a response.

<sup>60</sup> UNHCR, “Memories of the Thirtieth Anniversary of the Cartagena Declaration on Refugees, 2015, available at: <http://www.refworld.org/docid/568cf7e74.html>, accessed: September 2018.

subregional consultation in Managua in July 2014. In the conclusions and recommendations stemming from that meeting, the Memories state that the:

delegation of Mexico mentioned that during the regional consultation of the *Nansen Initiative* ... there was wide agreement that it is not necessary to create new legal instruments to assist persons displaced across borders due to climate change and natural disasters and that it was agreed to strengthen existing cooperation schemes in the areas of prevention, coordination and mitigation.<sup>61</sup>

More recently, a quality-assurance initiative in Mexico has resulted in the publication in 2017 of a Manual on Procedures and Criteria for Determining Refugee Status in Accordance with Mexico's LRCPPA.<sup>62</sup> This Manual has been used for training purposes but not as a tool of compulsory application for RSD procedures. One chapter focuses on recognition of refugee status pursuant to broader refugee criteria. Its four subsections discuss in turn the definition, the application of the definition, criteria for RSD, and State protection and internal flight alternative. In the subsection on criteria for RSD, the Manual references Article 4(XI) of the regulations (discussed above). In commentary, the Manual provides that:

... the notion of 'public order' does not have a universally accepted definition, but can be interpreted in the context of this definition of refugee as a reference to peace and security as well as the internal and external stability in the State and society, and the normal functioning of state institutions based on the rule of law and human dignity. This can happen in times of conflict and/or peace.

In the jurisprudence of the Inter-American Court of Human Rights, 'circumstances that have disturbed public order' has been defined in part, with reference to the approach of States to take measures that suspend and/or limit their human rights obligations in cases of declaration of a state of emergency. However, a declaration of a state of emergency should not be seen as a prerequisite for the existence of 'circumstances which have disturbed public order', although it would normally be indicative in such a situation.

The inclusion of the term 'other' provides some flexibility to ensure protection from circumstances that either fall below the violence threshold of the other four situations reflected in the Cartagena refugee definition or do not coincide with the nature of the other situations.

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<sup>61</sup> Ibid., p. 170.

<sup>62</sup> UNHCR Mexico has been keenly engaged in this process.

Persons forced to leave their country of origin due to natural or ecological disasters are not, strictly speaking, protected under this definition of refugee contained in section II of article 13 of the Law on Refugees, Complementary Protection and Political Asylum.<sup>63</sup>

The reference to ‘natural’ disasters in domestic commentary discussing the regional refugee definition and reflections on the need for coherent and consistent implementation of broader refugee criteria, particularly in precedent-setting situations, suggests that there is demand for better guidance and support to States on these issues.

### **Post-Arrival Support and Rights**

While measures to permit entry and stay were considered exceptional, many informants suggested limited forethought, preparedness and planning on facilitating integration through post-arrival support and services. Haitians who arrived in the aftermath of the earthquake presented with language barriers, trauma and other pressing needs. Interventions provided at state/municipal levels were perceived as *ad hoc* and unpredictable. Informants suggested that the task of addressing needs and vulnerabilities fell largely on civil society and faith-based actors, as well as ethnic, migrant and refugee networks. These actors served as intermediaries and service providers for shelter, language training, employment options, education, psychosocial needs and other services.<sup>64</sup> These views are arguably consistent with reports reflecting on the limitations in Mexico’s integration architecture for refugees.<sup>65</sup> For example, in the past, Haitian refugees (and those of other nationalities) faced significant integration challenges in Mexico, related to the labour market, access to legal systems, access to education, health and other social systems. These aspects were not examined in depth as part of this study.

## **IV. CONTEMPORARY LANDSCAPE**

In 2016 and 2017, the movement of Haitians into and through Mexico intensified. Some of these Haitians had previously travelled and lived in other countries in the Americas, including Brazil, but had since travelled onwards and northward.<sup>66</sup> Others had left in

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<sup>63</sup> Internal citations omitted.

<sup>64</sup> See also Sin Fronteras, *supra* note 18.

<sup>65</sup> See e.g. Cobo and Fuerte, *supra* note 6.

<sup>66</sup> See also e.g. Amnesty International, “Urgent Action: Hundreds Stranded on Mexico–US Border at Risk”, 10 October 2016, available at: <https://www.amnesty.org/download/Documents/AMR4149632016ENGLISH.pdf>, accessed: September 2018.

the aftermath of the devastation wreaked by so-called “hurricane Matthew”.<sup>67</sup> Many made their way through Mexico and into the United States, benefiting in some cases from the grant of an “oficio de salida” upon entering Mexican territory, which comprised a 20-day waiver period in which to leave Mexican territory. Large numbers were also detained.<sup>68</sup>

In tune with changes in United States’ policies, the number of Haitians ‘stranded’ in Tijuana and Mexicali eventually grew, overwhelming available capacity in shelters.<sup>69</sup> They became dependent, at least initially, on civil society and community actors for alleviating needs, including shelter and basic subsistence.<sup>70</sup> Mexico’s refugee law framework perhaps also experienced the reverberations of these circumstances. In 2016, as shown in Table 2, Haitian claims for refugee status grew to 47 applications, the highest number since 2009. In 2017, a record 436 applications for refugee status were lodged.<sup>71</sup>

During 2011, in addition to the adoption of a refugee law, Mexico also adopted a new migration law, which included measures relating to refugees, asylum-seekers and beneficiaries of complementary protection.<sup>72</sup> In 2013, this law was reformed and specifically included the authority to grant a temporary so-called “visitor card for humanitarian reasons” (Tarjeta de Visitante por Razones Humanitarias) to, *inter alia*,

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<sup>67</sup> Ibid.

<sup>68</sup> In 2015, 77 Haitians were detained in the context of migration. In 2016, the migratory detention numbers soared to 17,078. In 2017, they fell to 1,190. Based on government statistics, of those detained, 30, 21 and 27, respectively, returned voluntarily to Haiti. See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2015/Boletin\\_2015.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2015/Boletin_2015.pdf), pp. 134 and 147, accessed: September 2018;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2016/Boletin\\_2016.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2016/Boletin_2016.pdf), pp. 136 and 147, accessed: September 2018; and

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2017/Boletin\\_2017.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2017/Boletin_2017.pdf), pp. 136 and 146, accessed: September 2018, respectively.

<sup>69</sup> See also Amnesty International, *supra* note 66; Comisión Nacional de los Derechos Humanos (CNDH), “Solicita CNDH Más Medidas Cautelares Ante El Gran Flujo de Personas Africanas y de Haití, Que ha Rebasado la Capacidad de Albergues y Recintos Que Ofrecen Ayuda Humanitaria en Tijuana y Mexicali”, Comunicado de Prensa DGC/256/16, 8 October 2016; CNDH and El Colegio de la Frontera Norte, “Migrantes Haitianos y Centroamericanos en Tijuana, Baja California, 2016–2017: Políticas Gubernamentales y Acciones de la Sociedad Civil”, 2018, available at: <http://www.cndh.org.mx/sites/all/doc/Informes/Especiales/Informe-Migrantes-2016-2017.pdf>, accessed: September 2018.

<sup>70</sup> Ibid.

<sup>71</sup> There were also suggestions that the high number of unresolved requests at the end of 2017 for refugee status (373) stemmed from a COMAR decision to suspend procedural deadlines, influenced at least in part by the earthquake that hit Mexico in September 2017.

<sup>72</sup> Ley de Migración, available at: [https://www.gob.mx/cms/uploads/attachment/file/399326/Ley\\_de\\_Migracion.pdf](https://www.gob.mx/cms/uploads/attachment/file/399326/Ley_de_Migracion.pdf), accessed: November 2018. See also Reglamento de la Ley de Migración, available at:

[https://www.gob.mx/cms/uploads/attachment/file/211033/18\\_Reglamento\\_de\\_la\\_Ley\\_de\\_Migracion.pdf](https://www.gob.mx/cms/uploads/attachment/file/211033/18_Reglamento_de_la_Ley_de_Migracion.pdf), accessed: September 2018, which also contains provisions relevant to refugees and asylum-seekers.



asylum-seekers and persons faced with a “humanitarian or public interest reason that makes their access to Mexican territory necessary”.<sup>73</sup> The temporary visitor card allows for a 1-year renewable stay and permits work and access to free medical services from the government.<sup>74</sup> Informants suggested that some of the changes to the migration law were influenced by the Haitian experience.<sup>75</sup> With the refugee system overburdened, in 2017 INM granted 2,797 Haitians visitor cards for humanitarian reasons.<sup>76</sup> Fewer than 10 Haitians had received such cards in each of the previous three years.<sup>77</sup> In this context, it may be fruitful to better understand how the 436 applications for refugee status lodged in 2017 were handled administratively, including whether assessments were made on the merits of the claims.

Arguably, a key difference in the entitlements of refugees and beneficiaries of visitor cards for humanitarian reasons relates to medium- to longer-term certainty. Recognized refugees are able to receive permanent residence in Mexico through INM, which in turn provides a path to naturalization. Certain aspects of the naturalization exam related to language competency and Mexican history are waived for refugees. By contrast, beneficiaries of a visitor card for humanitarian reasons are required to renew their status each year, which can be subject to discretion and other procedural vagaries. Refugees are also able to access specific family reunification procedures. This is in addition to the entitlement to *non-refoulement*. That said, certain movement-related restrictions that are imposed on asylum-seekers do not affect beneficiaries of visitor cards for humanitarian reasons.<sup>78</sup>

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<sup>73</sup> Ley de Migración, *ibid.*, Article 52, fraction 5.

<sup>74</sup> Also based on UNHCR Mexico Office’s response to a questionnaire circulated by author.

<sup>75</sup> See also Cantor, *supra* note 12, for a more detailed discussion on how the migration framework ascribes the term “humanitarian” slightly different meanings under different migratory or procedural contexts and on migration law mechanisms and criteria with potential to address admission in the context of nexus dynamics.

<sup>76</sup> See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2017/Boletin\\_2017.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2017/Boletin_2017.pdf), accessed: September 2018, p. 124.

<sup>77</sup> Five Haitians in 2014, four in 2015 and six in 2016; See

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2014/Boletin\\_2014.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2014/Boletin_2014.pdf), accessed: September 2018, p.127;

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2015/Boletin\\_2015.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2015/Boletin_2015.pdf), accessed: September 2018, p. 124; and,

[http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2016/Boletin\\_2016.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2016/Boletin_2016.pdf), accessed: September 2018, p. 125; respectively.

<sup>78</sup> This summary is based on, in addition to informant interviews, UNHCR Mexico Office’s response to a questionnaire circulated by author and further communications with the Mexico Office, including material related to the UNHCR Help site, which was yet to be published online at the time. Since the author’s communication with the Mexico Office, it appears that information has been published in Spanish on UNHCR’s Help site. See: <http://help.unhcr.org/mexico/>, accessed: September 2018.

## V. INFORMANTS AND METHODS

The description of Mexico’s response is based on informant interviews, carried out in Mexico City during 5–8 March 2018. The following table provides an overview of the informants interviewed while in Mexico (the vast majority through in-person meetings).

<b>Category</b>	<b>Total Number</b>
INM	1
Former INM	4
Former COMAR	3
Current and Former UNHCR Mexico Personnel	9
Current and Former Civil Society	7*
Other UN or Intergovernmental	1

\* One person is also counted as “Former INM” and as “Former COMAR”. One civil society representative was interviewed in Geneva, Switzerland in June 2018.

Other activities undertaken to supplement the knowledge gathered through informant interviews included: (1) remote interviews and email correspondence with experts; (2) a questionnaire to the UNHCR operation in Mexico; and (3) desk review of grey and academic literature, online resources, UNHCR documents and data. UNHCR staff in Mexico reviewed drafts of this case study. A draft was also shared with government informants in October 2018.

In general, when relevant, efforts were undertaken to obtain data that is current between February and September 2018.

During the visit to Mexico, an opportunity to interview current COMAR officials did not materialize. Subsequent efforts to obtain data on the recognition of Haitians based on Mexico’s domestic refugee law framework have also failed to furnish tangible results. These aspects have necessarily constrained the depth of the information discussed in the case study.