



UNHCR

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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
Use of refugee law frameworks	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.
Access to refugee status determination (RSD) procedures	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.
Group or individual process	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'.
Recognition under the Refugee Convention's criteria	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.
Recognition under broader refugee criteria in regional refugee instruments	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
Views on relevance of refugee law frameworks	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>).
Rights and benefits	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.
UNHCR engagement	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.
UNHCR guidance relevant to Somalis/Haitians	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.
Changes in landscape including legal reform	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.”¹

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.”²

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.³

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,

¹ 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, accessed: September 2018.

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

³ 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.”⁴ 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”.⁵ 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.”⁶

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

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

⁴ 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.”

⁵ 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.

⁶ 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.

⁷ 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.⁸

⁸ 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.¹ 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.²

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[.]³

¹ 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.

² UNHCR, "UNHCR's Strategic Directions 2017–2021", 2017, available at: <http://www.unhcr.org/5894558d4.pdf>, accessed: September 2018, p. 18.

³ *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.⁴ 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.”⁵ 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.⁶

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.⁷ 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.⁸

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.

⁴ 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, 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.

⁵ *Ibid.*, paragraph 1.

⁶ *Ibid.*, paragraph 66.

⁷ 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).

⁸ For more on the global consultation, see the Nansen Initiative, *supra* note 1. 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.⁹ 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.¹⁰ As the emphasis is on destination State responses, the

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).

⁹ 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, accessed: September 2018.

¹⁰ 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.¹¹ In June 2017, UNHCR issued succinct guidance on Persons in Need of International Protection,¹² 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.¹³ 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.”¹⁴

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

¹¹ 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.

¹² UNHCR, “Persons in Need of International Protection”, 2017, available at: <http://www.refworld.org/docid/596787734.html>, accessed: September 2018.

¹³ 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.

¹⁴ UNHCR, *supra* note 12.

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.¹⁵ 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.¹⁶ Over 148 States are parties to one or both instruments.¹⁷ 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.¹⁸

¹⁵ 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, 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.

¹⁶ 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".

¹⁷ 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.

¹⁸ Article 1A(2) of the Convention as modified by its Protocol, *supra* note 16; 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.¹⁹ 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,²⁰ and 44 States have incorporated it into domestic law.²¹ 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.²²

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.”²³ 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.²⁴

¹⁹ See e.g. GIP 12, *supra* note 3.

²⁰ 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, accessed: September 2018.

²¹ Sharpe, “The Regional Law of Refugee Protection in Africa”, Oxford University Press, 2018, p. 101.

²² Emphasis added.

²³ 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.

²⁴ 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 21; 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.²⁵ 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*.²⁶

The Declaration "calls for an inclusive, evolving and flexible interpretation of the [broader] refugee definition",²⁷ since its scope is to provide "international protection to people fleeing threats resulting from 'objectively' identifiable circumstances which have seriously disturbed public order."²⁸ Fifteen States have implemented a regional refugee definition, drawn from the recommendation in the Cartagena Declaration, into their domestic law.²⁹ 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

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.

²⁵ 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 21.

²⁶ *Ibid.*, Conclusion 3. Emphasis added.

²⁷ GIP 12, *supra* note 3, paragraph 65.

²⁸ *Ibid.*, paragraph 66.

²⁹ 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.³⁰ 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.³¹

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.³² 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.³³

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

³⁰ 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.

³¹ 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.

³² 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.

³³ 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.³⁴ 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.³⁵ 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".³⁶

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,³⁷ 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.³⁸

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.³⁹ 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.⁴⁰ Registration

³⁴ See e.g. GIP 12, *supra* note 3.

³⁵ See e.g. UNHCR, *supra* note 30.

³⁶ GIP 12, *supra* note 3, paragraph 88. Internal citations omitted.

³⁷ 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.

³⁸ 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 33.

³⁹ 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).

⁴⁰ 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.⁴¹ 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.⁴² It notes that “[i]n general, *prima facie* means ‘at first appearance’, or ‘on the face of it’.”⁴³ 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.⁴⁴

Refugee status may be recognized using a *prima facie* approach pursuant to any of the applicable refugee definitions.⁴⁵ 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].⁴⁶

Notably, a *prima facie* approach operates only to recognize refugee status; decisions to reject require an individual approach.⁴⁷ Each refugee recognized through a *prima facie* approach benefits from refugee status and is entitled to the rights contained in the

⁴¹ 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 37.

⁴² GIP 11, *supra* note 39. 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.

⁴³ *Ibid.*, paragraph 4.

⁴⁴ *Ibid.*, paragraph 1. Internal citations omitted. Emphasis added.

⁴⁵ *Ibid.*, paragraph 5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, paragraph 6.

applicable instrument.⁴⁸ 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.⁴⁹

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,⁵⁰ 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.⁵¹ 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.⁵² Entitlements, their availability, accessibility and enjoyment in practice are not a focus of this research,⁵³ although, freedom of movement and work rights are mentioned in some case studies.⁵⁴

⁴⁸ Ibid., paragraph 7.

⁴⁹ Ibid., paragraph 29.

⁵⁰ Convention relating to the Status of Refugees, supra note 16. The prohibition on *refoulement* is set out in Article 33.

⁵¹ See e.g. Hathaway, “The Rights of Refugees Under International Law”, Cambridge University Press, 2005.

⁵² 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 23, 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 29, 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.

⁵³ For commentary on these aspects, see e.g. Hathaway, supra note 51; Foster, “International Refugee Law and Socio-Economic Rights: Refuge from Deprivation”, Cambridge University Press, 2007.

⁵⁴ Convention relating to the Status of Refugees, supra note 16, 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.⁵⁵ 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.⁵⁶ 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."⁵⁷ *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."⁵⁸ Other documents that fall into this 'suite' include *International Protection Considerations*, *Positions on Return*, *Return Advisories* and *Protection*

⁵⁵ Convention relating to the Status of Refugees, supra note 16, preamble; UN General Assembly, supra note 11, paragraph 8(a); See more generally, Türk, "Summary of Introductory Remarks", *International Journal of Refugee Law*, Vol. 25, No. 2, pp. 394-398.

⁵⁶ Convention relating to the Status of Refugees, supra note 16, Article 35; Protocol relating to the Status of Refugees, supra note 16, Article II(1); Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 20, Article VIII.

⁵⁷ Türk, supra note 55, 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 32.

⁵⁸ 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.⁵⁹ 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.

⁵⁹ 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.⁶⁰ On 20 July 2011, the UN declared famine in parts of Somalia and extended the declaration to cover additional areas in August 2011.⁶¹ It was the first time famine had been declared in Somalia since 1991–1992.⁶² By February 2012, famine conditions had ended, but the humanitarian emergency continued.⁶³

Multiple causes are identified as having played a part in the famine in Somalia.⁶⁴ 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.⁶⁵ 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.

⁶⁰ 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.

⁶¹ 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.

⁶² 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, accessed: September 2018.

⁶³ 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, 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.

⁶⁴ 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.*

⁶⁵ 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”.⁶⁶

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.⁶⁷ Access to alternative sources of assistance within Somalia was further reduced in September 2010, when seven other agencies were also banned.⁶⁸

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.⁶⁹ 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 2011.⁷⁰ Similarly, between January and June 2011, new Somali arrivals in Kenya averaged about 9,500 per month, but jumped to 26,000 in July 2011.⁷¹ During the course of the crisis, approximately 150,000 and 120,000 Somalis are thought to have arrived in Kenya and Ethiopia, respectively.⁷² Yemen was another key destination for Somalis, and to a lesser extent, Djibouti and Uganda.⁷³

⁶⁶ Maxwell and Majid, *ibid.*, p. 60.

⁶⁷ *Ibid.*, p. 59.

⁶⁸ *Ibid.*

⁶⁹ See e.g. *ibid.*

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

⁷¹ *Ibid.*, p. 72. Relates to Dadaab camps, which are discussed in the Subsection on Kenya’s response.

⁷² *Ibid.*, p. 70.

⁷³ See e.g. UNHCR, “UNHCR Population Statistics Database”, available at: 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.⁷⁴ 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.⁷⁵

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.⁷⁶ 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.⁷⁷ 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.⁷⁸ 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

⁷⁴ 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.

⁷⁵ See discussion on Kenya and Ethiopia’s responses to follow in Subsections 3.1.3. and 3.1.4.

⁷⁶ 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.

⁷⁷ 2010 Eligibility Guidelines, *ibid.*, p. 2. Emphasis added.

⁷⁸ *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.⁷⁹

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.⁸⁰

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.⁸¹

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.⁸² 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

⁷⁹ Ibid., p. 39. Internal citations omitted.

⁸⁰ Ibid., p. 41. Emphasis added. Internal citations omitted.

⁸¹ Ibid. Emphasis added. Internal citations omitted.

⁸² 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 2012.⁸³

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.⁸⁴ 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 2011–2012.⁸⁵ Nonetheless, the document highlights

⁸³ 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.”

⁸⁴ 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.

⁸⁵ 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.⁸⁶ 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.⁸⁷

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.⁸⁸

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

⁸⁶ 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.

⁸⁷ 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.

⁸⁸ For a discussion on historical aspects, see e.g. references listed in footnote 86.

for many aspects of refugee protection.⁸⁹ 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.⁹⁰ A domestic refugee law, which incorporates the definitions in the Refugee Convention and the OAU Convention, was not adopted until 2006 (Refugees Act).⁹¹ 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 2014.⁹² 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).⁹³

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.⁹⁴ This was certainly the case in 2011 for Somalis from southern or central Somalia.⁹⁵ In Kenya, Sudanese and South

⁸⁹ Physical protection and security-related activities remained within the responsibilities of the Kenyan government.

⁹⁰ Kenya acceded to the Convention in 1966 and the Protocol in 1981.

⁹¹ The Refugees Act, 2006, available at: <http://www.refworld.org/docid/467654c52.html>, accessed: September 2018.

⁹² 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.

⁹³ Section 3, The Refugees Act, 2006, *supra* note 91.

⁹⁴ See discussion in Subsection 2.7.

⁹⁵ 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.⁹⁶ In practical terms, however, the basis of recognition made little difference,⁹⁷ as Somali refugees were, in general, required to live in the Dadaab camps.⁹⁸

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.⁹⁹ 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.¹⁰⁰ At the meeting, the

⁹⁶ 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 31. 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.

⁹⁷ 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.

⁹⁸ 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.

⁹⁹ 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 64, for a fuller account of the factors that led to the famine.

¹⁰⁰ 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.¹⁰¹

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

¹⁰¹ 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.¹⁰² 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,

¹⁰² See also, Betts, *supra* note 86; 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, accessed: September 2018.

while over 70 were recognized on the basis of the Refugee Convention and fewer than 5 under UNHCR's mandate definitions.¹⁰³

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)

Legal Basis for Refugee Status	2011¹⁰⁴	2012¹⁰⁵
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).¹⁰⁶

¹⁰³ 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.

¹⁰⁴ These figures do not include Somalis who were provided legal status on other grounds.

¹⁰⁵ These figures do not include Somalis who were provided legal status on other grounds.

¹⁰⁶ These numbers capture *only* the four main reasons recorded, by quantity. Again, similar caveats to those noted in footnote 103 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.¹⁰⁷

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 2011.¹⁰⁸ 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.¹⁰⁹ As at July 2018, the number of unregistered new arrivals across the camps in Dadaab stood at 10,083 individuals.¹¹⁰ Of the total, approximately 9,738 are from Somalia, while 345 are of other nationalities.¹¹¹

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.

¹⁰⁷ These aspects are discussed in greater detail in the Annex on Kenya.

¹⁰⁸ Security-related dimensions, including terrorist attacks in Kenya, are highlighted in the Annex on Kenya.

¹⁰⁹ Except for limited, exceptional and *ad hoc* registration; UNHCR Kenya, "Timeline of Registration Activities in Dadaab: 2013-July 2018", on file with author.

¹¹⁰ 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.

¹¹¹ *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.¹¹² An announcement to close Dadaab in mid-2016 was subsequently held to be unconstitutional by the Kenyan High Court in February 2017.¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

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

¹¹² For further detail, see discussion in Annex.

¹¹³ 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, accessed: September 2018.

¹¹⁴ 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, 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, accessed: September 2018.

¹¹⁵ 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.

¹¹⁶ 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.¹¹⁷ 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

¹¹⁷ 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/, 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.¹¹⁸ In 2011, the Somali refugee population in Ethiopia grew by more than 100,000, a scale unprecedented in this millennium.¹¹⁹ 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.¹²⁰

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

¹¹⁸ UNHCR, *supra* note 73. For further reading see e.g. Hammond, *supra* note 86; 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 86.

¹¹⁹ UNHCR, *ibid.* Relates to refugees and persons in refugee-like situations.

¹²⁰ 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.¹²¹ 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.¹²²

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.¹²³

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

¹²¹ 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.

¹²² For a more detailed discussion on these aspects, including specific provisions, see the Annex on Ethiopia.

¹²³ Refugee Proclamation No. 409/2004, *supra* note 121, Article 19.

Ethiopia.¹²⁴ 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”.¹²⁵ 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.¹²⁶

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.

¹²⁴ 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.

¹²⁵ See <https://arra.et/about-us/our-mission/>, accessed: September 2018. Emphasis added.

¹²⁶ 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)¹²⁷

Legal Basis for Refugee Status	2011¹²⁸	2012¹²⁹
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.

¹²⁷ 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.

¹²⁸ Figures provided included approximately 579 others who did not fall within the three categories listed in the table.

¹²⁹ 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.¹³⁰

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.

¹³⁰ 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.¹³¹

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.

¹³¹ The Nansen Initiative, *supra* note 101, p. 107.

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

Legal Basis for Refugee Status	2016¹³²	2017¹³³
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.¹³⁴ 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.¹³⁵

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.¹³⁶ During

¹³² Figures provided included approximately 2 others who did not fall within the three categories listed in the table.

¹³³ Figures provided included approximately 20 others who did not fall within the three categories listed in the table.

¹³⁴ 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, accessed: September 2018.

¹³⁵ Other relevant research which discusses destination States’ responses to the cross-border movement of Somalis, includes Betts, supra note 86; Horvil, supra note 86; 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 31.

¹³⁶ 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/DECREES,,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 2017.¹³⁷

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 2011–2012.¹³⁸ 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

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

¹³⁷ 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.

¹³⁸ 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 2012.¹³⁹ 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.¹⁴⁰ In addition to hydro-meteorological threats, Haiti is in a seismically active zone.¹⁴¹ 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.¹⁴² In the aftermath of the earthquake, about 600,000 people

¹³⁹ 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.

¹⁴⁰ 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, 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.

¹⁴¹ 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.

¹⁴² 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.¹⁴³

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.¹⁴⁴ Poverty, inequality and lack of economic opportunities have been rife throughout Haiti's history, with notable divides between urban and rural communities.¹⁴⁵ Before the 2010 earthquake, about 75 per cent of the population of Haiti lived in poverty.¹⁴⁶ 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."¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

¹⁴³ 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, 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, accessed: September 2018.

¹⁴⁴ See e.g. Singh and Barton-Dock, *supra* note 140. 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.

¹⁴⁵ 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.

¹⁴⁶ United Nations, "Report of the United Nations in Haiti 2011", *supra* note 143.

¹⁴⁷ 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.

¹⁴⁸ UNDP, *supra* note 144.

¹⁴⁹ 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.¹⁵⁰ Somewhere between 20–40 per cent of Haitian civil servants are estimated to have died.¹⁵¹ 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.¹⁵² An estimated 5,000 prisoners escaped prisons following the earthquake.¹⁵³

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.¹⁵⁴ Violence and crime were reported to have increased,¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

¹⁵⁰ United Nations, "Report of the United Nations in Haiti 2010: Situation, Challenges and Outlook", supra note 143. 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, accessed: September 2018.

¹⁵¹ 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.

¹⁵² Ibid.

¹⁵³ 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.

¹⁵⁴ United Nations, "Report of the United Nations in Haiti 2010: Situation, Challenges and Outlook", supra note 143.

¹⁵⁵ See e.g. Berg, supra note 147; 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.

¹⁵⁶ 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.

¹⁵⁷ 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, 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.¹⁵⁸ 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.¹⁵⁹ 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

¹⁵⁸ 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.

¹⁵⁹ Available at: 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 2010–2012.¹⁶⁰

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.¹⁶¹ 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.¹⁶² Between 2010 and 2015, more than 72,000 Haitians crossed into Brazil.¹⁶³

Brazil’s response, implemented through its National Immigration Council (CNIg), a body housed under the Ministry of Labour, Employment and Social Security,¹⁶⁴ entailed two key dimensions:

¹⁶⁰ 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.

¹⁶¹ 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.

¹⁶² 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, 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, accessed: September 2018; Fagen, *supra* note 157.

¹⁶³ Cavalcanti et al., *supra* note 161, p. 193. See also, Cavalcanti and Tonhati, *supra* note 162.

¹⁶⁴ 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).¹⁶⁵ At the end of July 2018, approximately 57,664 Haitians had received protection based on the second mechanism (entry and stay).¹⁶⁶ 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 33,000,¹⁶⁷ 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.¹⁶⁸

Notably, however, between 2010 and 2015, not a single Haitian was recognized as a refugee in Brazil.¹⁶⁹ 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.¹⁷⁰ This number had passed 6,000 by the end of 2012.¹⁷¹ Between 2010 and the end of 2014, 34,770 Haitians

¹⁶⁵ 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.

¹⁶⁶ UNHCR request to Brazil’s Federal Police; details shared with author. Figures as at 27 July 2018.

¹⁶⁷ Cavalcanti et al., *supra* note 161, p. 196.

¹⁶⁸ *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.

¹⁶⁹ 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, accessed: September 2018.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

had applied in total,¹⁷² with the vast majority being men between the ages of 20 and 34.¹⁷³

The legal definition of a “refugee” under the domestic refugee law of 1997¹⁷⁴ 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.”¹⁷⁵ 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.¹⁷⁶ Intensive lobbying by a range of actors had been necessary to secure the narrower framing.¹⁷⁷ 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.¹⁷⁸

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

¹⁷² Ibid.

¹⁷³ Cavalcanti and Tonhati, supra note 162, 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.

¹⁷⁴ Lei No. 9.474 of 22 July 1997, available at: http://www.planalto.gov.br/ccivil_03/leis/19474.htm, accessed: September 2018. See translation available on Refworld: <http://www.refworld.org/pdfile/3f4dfb134.pdf>, accessed: September 2018.

¹⁷⁵ Note that some academic literature translates “severe” as “gross” and “compelled” as “forced”.

¹⁷⁶ 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.

¹⁷⁷ 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.

¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰ CONARE had authority to refer "ineligible" applications for refugee status where "humanitarian reasons" may warrant stay.¹⁸¹ 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.¹⁸²

¹⁷⁹ 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.

¹⁸⁰ 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.

¹⁸¹ 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, 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.

¹⁸² 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 162; 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.¹⁸³ In 2013, based on lessons learned, these procedural and quota-related restrictions were lifted.¹⁸⁴ 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.¹⁸⁵ Under the new framework, the issuance of temporary visas and residence permits to Haitians for humanitarian reasons is authorized through an Interministerial Ordinance.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸ 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.

[content/uploads/2015/07/150715_FINAL_BACKGROUND_PAPER_LATIN_AMERICA_screen.pdf](#) accessed: September 2018.

¹⁸³ 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.

¹⁸⁴ 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 7, Vol. II, p. 45.

¹⁸⁵ 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.

¹⁸⁶ 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.

¹⁸⁷ See Subsection 3.2.2.

¹⁸⁸ See e.g. Cavalcanti et al., *supra* note 161; Pacífico et al., *supra* note 182; 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 157.

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.¹⁸⁹ CONARE's limited capacity at the time (fewer than five staff members) and a backlog in

¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ It also highlighted the process and requirements for renewing or obtaining permanent residence.¹⁹² Haitians interested in continuing their requests for refugee status were instructed to make requests directly to CONARE or the Federal Police within 30 days.

¹⁹⁰ See e.g. Fagen, *supra* note 157; Zamur and Andrade, *supra* note 182; 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, accessed: September 2018.

¹⁹¹ See *supra* note 165.

¹⁹² 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 165.

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.¹⁹³

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.¹⁹⁴ 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-2011.¹⁹⁵ 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.

¹⁹³ Additionally, Haitians refused protection by CNIg following a referral from CONARE has not been ascertained.

¹⁹⁴ For more on these aspects, see e.g. Godoy, *supra* note 162; Zamur and Andrade, *supra* note 182. 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.

¹⁹⁵ 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.¹⁹⁶ 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.'¹⁹⁷

¹⁹⁶ Justiça Federal, Autos n. 723-55.2012.4.01.3000 - Ação Civil Pública - Sentença, Rio Branco - Acre, 14 January 2013.

¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰ 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.”²⁰¹ 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 2017.²⁰² Many noted that the Haitian influx and its lessons created momentum for the adoption of a new migration law and influenced its content.²⁰³ The new law replaced the so-called “Statute of the Foreigner” of 1980,²⁰⁴ which prevailed at the time of the Haitian influx and did not provide an explicit basis for granting visas or residence for humanitarian reasons.²⁰⁵ 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.²⁰⁶ 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^o states:

¹⁹⁸ Reed-Hurtado, *supra* note 177.

¹⁹⁹ *Ibid.*, p. 20.

²⁰⁰ *Ibid.*, p. 22.

²⁰¹ *Ibid.*, p. 20.

²⁰² Lei No. 13.445 of 24 May 2017, available at: 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.

²⁰³ 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.

²⁰⁴ Lei No. 6.815 of 19 August 1980, previously available at: http://www.planalto.gov.br/ccivil_03/LEIS/L6815.htm, accessed: September 2018.

²⁰⁵ For more on the Statute of the Foreigner and its limitations see e.g. Zamur and Andrade, *supra* note 182; Godoy, *supra* note 162; Pacifico and Ramos, *supra* note 182;

²⁰⁶ Lei No. 13.445 of 24 May 2017, *supra* note 202, 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.²⁰⁷

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.²⁰⁸

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.²⁰⁹

As the preceding discussion demonstrates, by mid-2018, over 100,000 Haitians had received protection through ‘permanent’ residence for humanitarian reasons.²¹⁰ 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 2015.²¹¹

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

²⁰⁷ The translation is taken from a UNHCR note for file, on file with the author.

²⁰⁸ 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 165.

²⁰⁹ For a more detailed discussion on the differences in rights and obligations, see Annex on Brazil.

²¹⁰ 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.

²¹¹ UNHCR, *supra* note 73.

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.²¹²

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.²¹³ A census conducted between 2009 and 2010, for the period up until the end of 2009, indicated 733 Haitian residents in Mexico.²¹⁴ 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.²¹⁵ 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.²¹⁶ 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.²¹⁷

Following the 2010 earthquake, a new flow of Haitians arrived in Mexico.²¹⁸ During each of 2010, 2011, and 2012, between 2,300 and 2,400 Haitians arrived in Mexico by air alone,²¹⁹ whereas in each of the previous three years, Haitian arrivals by air had

²¹² 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.

²¹³ For more background on Mexico's response to Haitian movements in the aftermath of the earthquake, see e.g. Fagen, *supra* note 157.

²¹⁴ 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, accessed: September 2018, pp. 8 and 35.

²¹⁵ *Ibid.*, p. 39.

²¹⁶ UNHCR, *supra* note 73.

²¹⁷ 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.

²¹⁸ Statistics provided by the Mexican government are available from: http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Boletines_Estadisticos, accessed: September 2018.

²¹⁹ 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, accessed: September 2018, p. 57; http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/Bole

averaged around 1,440 persons.²²⁰ 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.²²¹ 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).²²² 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.²²³

Many of these Haitians were issued a so-called "FM3" non-immigrant document with an annotation indicating it was issued for humanitarian reasons.²²⁴ The status was valid for a period of one year and permitted work.²²⁵ In principle, the status granted to

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

http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/Boletin2012.pdf, accessed: September 2018, p. 71, respectively.

²²⁰ 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, accessed: September 2018, p. 57;

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, accessed: September 2018, p. 57, respectively.

²²¹ 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.

²²² 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.

²²³ For more information on migration pathways, see e.g. Fagen, *supra* note 157. See also, Cantor, *supra* note 182.

²²⁴ INM, *supra* note 221; UNHCR Mexico Office's response to questionnaire circulated by author. See also, Fagen, *ibid*.

²²⁵ INM, *supra* note 221. 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, accessed: September 2018; Loudidor, *supra* note 190.

Haitians could be renewed.²²⁶ 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) ²²⁷	179 (572 renewals) ²²⁸	109 (455 renewals) ²²⁹

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.²³⁰ 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.²³¹ 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 2000,²³² but its framework would not be incorporated into domestic legislation until 2011.²³³ Until then, internal notices and

²²⁶ Ibid.

²²⁷

See

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.

²²⁸ See

http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2011/BoletinEst2011.pdf, pp. 71 and 75, accessed: September 2018.

²²⁹ See

http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/BoletinEst2012.pdf, pp. 89 and 95, accessed: September 2018.

²³⁰ INM, *supra* note 221.

²³¹ It seems the administrative instruction stated a period of application of 45 business days beginning on 12 January 2012, which appears to be incorrect.

²³² 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.²³⁴ Article 42 of Mexico's 1974 General Law on Population²³⁵ 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.²³⁶ In essence, the 1974 General Law on Population, its implementing regulations,²³⁷ and internal notices and instructions²³⁸ 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.²³⁹ 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.²⁴⁰

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

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.

²³³ 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.

²³⁴ See e.g. INM, "Circular CRM/06/2007" and "Circular CRM/028/2007".

²³⁵ Ley General de Población, available at: https://legislacion.vlex.com.mx/vid/ley-general-poblacion-42602368?_ga=2.209646801.297685283.1536311993-905009517.1536311993, accessed: September 2018.

²³⁶ Reed-Hurtado, supra note 177, p. 17.

²³⁷ 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, accessed: September 2018.

²³⁸ 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.

²³⁹ 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.

²⁴⁰ INM, "Circular CRM/016/2007", supra note 238. 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.²⁴¹ 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 Points²⁴²

Year	Applied	Recognized	Rejected	Abandoned or Withdrawn	Complementary Protection	Pending

²⁴¹ For more information on this process, see Annex on Mexico.

²⁴² 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, 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, p. 79;

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, p. 100; and

http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2012/Boletin2012.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)²⁴³—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 13.²⁴⁴ 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.²⁴⁵

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.²⁴⁶ Cantor’s earlier research indicates that, “Mexico

²⁴³ 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.

²⁴⁴ Ley Refugiados y Protección Complementaria, *ibid*, Article 28. For more on complementary protection in Mexico, see e.g. Dicker and Mansfield, *supra* note 240.

²⁴⁵ 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, 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.

²⁴⁶ 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.”²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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

²⁴⁷ Cantor, *supra* note 182, 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”.

²⁴⁸ 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 225.

²⁴⁹ 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.²⁵⁰

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.²⁵¹ Efforts to identify official statements or records of the same, however, have proved unfruitful.²⁵² 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.²⁵³ 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.²⁵⁴

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.²⁵⁵ 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

²⁵⁰ Ibid.

²⁵¹ Based on discussion with INM informant.

²⁵² A request by UNHCR Mexico Office to Mexico's Ministry of Foreign Affairs has not received a response.

²⁵³ 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.

²⁵⁴ Ibid., p. 170.

²⁵⁵ 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.”²⁵⁶ 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.²⁵⁷

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.

²⁵⁶ 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, accessed: September 2018. These regulations were adopted under the LRCP, but continue to be applicable under the LRCPPA.

²⁵⁷ 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.²⁵⁸ Others had left in the aftermath of the devastation wreaked by so-called “hurricane Matthew”.²⁵⁹ 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.²⁶⁰ In tune with changes in United States’ policies, the number of Haitians ‘stranded’ in Tijuana and Mexicali eventually grew, overwhelming available capacity in shelters.²⁶¹ They became dependent, at least initially, on civil society and community actors for alleviating needs, including shelter and basic subsistence.²⁶² 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.²⁶³ In 2013, this law was reformed and

²⁵⁸ 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.

²⁵⁹ Ibid.

²⁶⁰ 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, pp. 134 and 147, accessed: September 2018;

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, pp. 136 and 146, accessed: September 2018, respectively.

²⁶¹ See also Amnesty International, *supra* note 258; 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.

²⁶² Ibid.

²⁶³ Ley de Migración, available at:

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, 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”.²⁶⁴ The temporary visitor card allows for a 1-year renewable stay, permits work, and access to free medical services from the government.²⁶⁵ Informants suggested that some of the changes to the migration law framework were influenced by the Haitian experience.²⁶⁶ With the refugee system overburdened, in 2017, INM granted 2,797 Haitians visitor cards for humanitarian reasons.²⁶⁷ Fewer than 10 Haitians had received such cards in each of the previous three years.²⁶⁸ 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.²⁶⁹

²⁶⁴ Ley de Migración, *ibid.*, Article 52, fraction 5.

²⁶⁵ Also based on response from UNHCR Mexico Office to questionnaire circulated by author.

²⁶⁶ See also Cantor, *supra* note 182, 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.

²⁶⁷ See

http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2017/Boletin_2017.pdf, accessed: September 2018, p. 124.

²⁶⁸ 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, accessed: September 2018; p. 125;

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, accessed: September 2018. p. 127, respectively.

²⁶⁹ 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.²⁷⁰

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.²⁷¹ 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.

²⁷⁰ Other relevant research, which discusses destination States’ responses to the cross-border movement of Haitians include, Cantor, *supra* note 182 and Fagen, *supra* note 157.

²⁷¹ 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.²⁷² 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.²⁷³ 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

²⁷² Ley No. 25.871 de 2004, Política Migratoria Argentina, 21 January 2004, available at: <http://www.refworld.org/topic/50ffbbe5124,50ffbbe513f,401fcb74,0,,,ARG.html>, accessed: September 2018.

²⁷³ 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 2011.²⁷⁴

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.

²⁷⁴ 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).²⁷⁵

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.”²⁷⁶ 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.²⁷⁷ 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.

²⁷⁵ Data on applications abandoned, withdrawn, or otherwise undecided were not requested.

²⁷⁶ Cantor, *supra* note 182, p. 17.

²⁷⁷ 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.”²⁷⁸ 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.’”²⁷⁹

²⁷⁸ Cantor, *supra* note 29, p. 37; Cantor, *supra* note 182, p. 17.

²⁷⁹ 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=AAAAAQAYSGFpdGkgZWFydGhxdWFrZSByZWZ1Z2VIAAAAAAE&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.²⁸⁰

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.²⁸¹ 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.²⁸² 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.

²⁸⁰ 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.

²⁸¹ 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.

²⁸² Cantor, *supra* note 44, 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.²⁸³

²⁸³ 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.”²⁸⁴ 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

²⁸⁴ UN General Assembly, paragraph 66, *supra* note 4.

Refugees”,²⁸⁵ 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.²⁸⁶

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.”²⁸⁷ 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.”²⁸⁸

In this regard, and given the scope of this report, the discussion on “Identifying international protection needs” in the GCR is particularly relevant.²⁸⁹ 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.²⁹⁰ The section goes on to note that:

²⁸⁵ Ibid. Internal citations omitted.

²⁸⁶ Ibid., paragraph 1.

²⁸⁷ 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.

²⁸⁸ Ibid., paragraph 12.

²⁸⁹ Ibid., Chapter III, Part B, 1.6.

²⁹⁰ 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.²⁹¹

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.²⁹² 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”.²⁹³ 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

²⁹¹ Ibid., paragraph 63. Emphasis added. Internal citations omitted.

²⁹² Large-scale is not defined in the New York Declaration.

²⁹³ See e.g. Convention relating to the Status of Refugees, *supra* note 16, preamble.

agreed standards”.²⁹⁴ 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”.²⁹⁵ 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”.²⁹⁶ 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”.²⁹⁷

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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

²⁹⁴ 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.

²⁹⁵ *Ibid.*, paragraph 49.

²⁹⁶ *Ibid.*, paragraph 51.

²⁹⁷ *Ibid.*, paragraph 52.

²⁹⁸ 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.

²⁹⁹ UNHCR, *supra* note 2.

³⁰⁰ 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.³⁰¹ 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.³⁰²

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

utilized, and normative gaps addressed.” See “The Nansen Conference: Climate Change and Displacement in the 21st Century”, 2011, available at: <http://www.unhcr.org/4ea969729.pdf>, accessed: September 2018, p. 5.

³⁰¹ 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.

³⁰² The Nansen Initiative, *supra* note 7; See also, Goodwin-Gill and McAdam, *supra* note 298.

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 prejudice 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.³⁰³

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.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ 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).

³⁰³ 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.

³⁰⁴ 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.

³⁰⁵ 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.

³⁰⁶ 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*.³⁰⁷

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

³⁰⁷ UNHCR, *supra* note 84.

marginalizes victims of sexual and gender-based violence.³⁰⁸ 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

³⁰⁸ 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.³⁰⁹ 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.³¹⁰ 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.³¹¹ And certainly, when it comes to nexus dynamics, an argument can be made that these considerations are less relevant or

³⁰⁹ GIP 12, *supra* note 3, paragraph 56.

³¹⁰ Sharpe, *supra* note 21. On the themes in this commentary, see also Wood, *supra* note 17.

³¹¹ 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 2011–2012.³¹²

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.³¹³ 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.³¹⁴ Cases that could be assessed under the regional refugee definition are instead assessed under complementary forms of protection.³¹⁵ 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.³¹⁶ The study recommends further doctrinal development of the regional refugee definition in Latin America.³¹⁷

The Summary Conclusions of an expert roundtable convened by UNHCR as part of Cartagena +30 events to mark the 30th 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.³¹⁸ 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.³¹⁹ Cantor indicates, “States have tended to apply this situational element as

³¹² 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.

³¹³ GIP 12, *supra* note 3, paragraph 78. See also, Reed-Hurtado, *supra* note 177, 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.

³¹⁴ 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.

³¹⁵ *Ibid.*, p. 20.

³¹⁶ *Ibid.*, p. 21.

³¹⁷ *Ibid.*, p. 33.

³¹⁸ UNHCR, *supra* note 313. 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.

³¹⁹ Cantor, *supra* note 182, p. 18.

requiring a direct link to governmental or political circumstances.”³²⁰ 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.”³²¹ Nonetheless, Cantor acknowledges, “whether a ‘man-made’ natural disaster would engage the definition thus remains an open question.”³²² 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.³²³

³²⁰ Cantor, *supra* note 29, p. 20. See also, *ibid.*

³²¹ UNHCR, *supra* note 313, 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.”

³²² Cantor, *supra* note 182, p. 18, footnote 67.

³²³ 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.³²⁴ 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.³²⁵

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”.³²⁶ 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.”³²⁷ 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.³²⁸ 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

Agreements in Addressing Disaster Displacement”, forthcoming; draft dated May 2018 on file with author. See also, Cantor, *supra* note 29; Cantor, *supra* note 182.

³²⁴ See Cantor, *supra* note 36, p. 20.

³²⁵ See Cantor, *supra* note 29, p. 1; See Brazil Declaration and Plan of Action, 3 December 2014, available at: www.refworld.org/docid/5487065b4.html, accessed: September 2018.

³²⁶ Brazil Declaration and Plan of Action, *ibid.*, p. 6.

³²⁷ *Ibid.*, p. 7.

³²⁸ *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).³²⁹

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.”³³⁰ 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.³³¹

Most notably, the Declaration states that a “major challenge in Africa is displaced populations, *inter alia*, triggered by conflict, terrorism, and climatic pressure.”³³² With the 50th 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

³²⁹ UNHCR, *supra* note 253, p. 141. Emphasis added.

³³⁰ 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.

³³¹ *Ibid.*, p. 20

³³² *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.”³³³ 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

³³³ UN General Assembly, *supra* note 4, 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 ... [.]³³⁴

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.³³⁵

³³⁴ 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 287, paragraph 58.

³³⁵ 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 33.

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 dynamic.