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International Protection, Disasters and Climate Change

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1. INTRODUCTION

Environmental factors contribute significantly to human movement. Even the earliest migrations from Africa into Eurasia reflected the "push" of environmental factors.[1] Yet, since at least the 1970s, terms like "environmental refugees" and "climate refugees" have been increasingly used as (legally inaccurate) labels for people forced to leave their homes due to disasters and the adverse effects of climate change.[2] It is certainly true that the scale of displacement in disaster situations can be substantial. Sudden-onset disasters linked to natural hazards, such as storms, flooding, volcanic eruptions and wildfires, triggered an estimated 336.7 million incidents of internal displacement between 2009 and 2022 worldwide.[3] Slow-onset disasters, such as drought and desertification, also add significantly to internal migration and displacement trends.[4] Moreover, although displacement in disaster contexts appears mainly to take place within countries, international mobility dynamics are also documented in the context of both sudden-onset

1 Anthony Penna, *The Human Footprint: A Global Environmental History* (2nd edn, Wiley 2014) 4-8, 56-58, 106-107.
2 François Gemenne, 'How They Became the Human Face of Climate Change. Research and Policy Interactions in the Birth of the "Environmental Migration" Concept' in Etienne Piguet, Antoine Pécoud and Paul de Guchteneire (eds), *Migration and Climate Change* (CUP 2011).
3 Author calculations using data from Internal Displacement Monitoring Centre (IDMC), 'Global Internal Displacement Database' <https://www.internal-displacement.org/database> accessed 27 January 2024. The IDMC database presents comparative annual figures from the year 2009. This figure includes cases of short-term evacuations.
4 Internal Displacement Monitoring Centre (IDMC), *Global Report on Internal Displacement 2021* (2022) 91-93; David J. Wrathall, 'Migration amidst Social-Ecological Regime Shift: The Search for Stability in Garífuna Villages of Northern Honduras' (2012) 40 Human Ecology 583; Stefan Alscher, 'Environmental Degradation and Migration on Hispaniola Island' (2011) 49 International Migration 164.

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and slow-onset disasters.[5] Unchecked global climate change is likely only to exacerbate all these displacement trends.[6]

In disaster contexts, displacement is linked to the interaction of sudden- or slow-onset hazards with the vulnerability and the actual or anticipated inability of those who are exposed to it to cope with associated harm and loss.[7] These forms of actual and anticipated harm and loss drive the potential for displacement in disaster contexts, both as movement away from the affected zone and reluctance by those already outside it to return. But these disaster-related risks can act as direct and indirect drivers not only for displacement but also for wider migration trends and, conversely, immobility.[8] Nor are these risks always the only, or even primary, factor influencing individual or collective decisions about movement in these contexts.[9] Indeed, the relationship between the intersecting factors that influence movement decisions in these contexts is often highly complex and contextual.[10] This "multi-causal" character of movement in disaster contexts is not unique to these situations, but reflective of human mobility processes more generally. Thus, whilst an automatic causal link cannot always be assumed between such risks of harm in disaster contexts and the occurrence of displacement,[11] those risks (and others) do contribute to the potential for displacement and often underpin it in quite significant ways.

The risks of harm and loss posed by disasters are addressed principally by specialised legal and policy regimes relating to disaster risk reduction and climate change mitigation and adaptation.[12] But the existence of these risks also raises questions about whether international protection regimes in refugee and human rights law apply to persons displaced outside their country or unable to return. In practice, despite an emerging body of scholarship and several policy positions by international agencies,[13] legal and conceptual ambiguity persists on the eligibility for international protection of such persons. This is reinforced by the relative paucity (as yet) of jurisprudence that engages conceptually with this topic. As such, decision-makers engaged administratively or judicially in refugee status determination at the national and international levels face particular challenges in deciding claims set against the factual matrix of disasters and climate change. Accessible and practical guidance is required on the application of international refugee and human rights law to claims disclosing such facts.

The Refugee Law Initiative (RLI) Declaration on International Protection, adopted at its Annual Conference on 3 June 2024, sets out new guidance for decision-makers on determining claims from people seeking international protection due to the effects of disasters and climate

5 Isabelle Chort and Maëlys de la Rupelle, 'Determinants of Mexico-US Outward and Return Migration Flows: A State-Level Panel Data Analysis' (2016) 53 Demography 1453; Onelica C. Andrade Afonso, 'Natural Disasters and Migration: Storms in Central America and the Caribbean and Immigration to the U.S.' (2011) 14 Explorations 1.

6 Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (CUP 2022) 1079-1083; Kanta Kumari Rigaud et al, *Groundswell: Preparing for Internal Climate Migration* (World Bank 2018).

7 Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change' vol I (2015) para 16.

8 IPCC, *Climate Change 2022,* 1079-1083; Richard Black et al, 'Climate Change: Migration as Adaptation' (2011) 478 Nature 447.

9 Foresight, *Migration and Global Environmental Change* (UK Government Office for Science 2011).

10 W. Neil Adger, Ricardo Safra de Campos and Colette Mortreux, 'Mobility, Displacement and Migration, and their Interactions with Vulnerability and Adaptation to Environmental Risks' in Robert McLeman and François Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration* (Routledge 2018).

11 Lorenzo Guadagno and Michelle Yonetani, 'Displacement Risk: Unpacking a Problematic Concept for Disaster Risk Reduction' (2023) 65 International Migration 13.

12 At the international level, these respective regimes are oriented principally by the 2015 Sendai Framework for Disaster Risk Reduction, the United Nations Framework Convention on Climate Change (adopted 9 May 1991, entered into force 21 March 1994) 1771 UNTS 107 and the Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

13 Leading works of legal scholarship include Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (CUP 2020) and Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012). Prominent policy guidance includes Nansen Initiative, *Protection Agenda* (2015); United Nations High Commissioner for Refugees (UNHCR), *Legal Considerations Regarding Claims for International Protection made in the Context of the Adverse Effects of Climate Change and Disasters* (2020); and UNHCR, *Climate Change Impacts and Cross-Border Displacement: International Refugee Law and UNHCR's Mandate* (2023).

change. The present paper provides analysis for the positions outlined in the Declaration, which reflects the views of a range of independent experts and scholars at the RLI.[14] This paper starts by situating international protection as but one legal response to the situation of people outside their countries due to disasters (section 2). Instead, migration law will often be the primary framework for resolving mobility issues in this context. Nonetheless, for persons who do face a risk of harm, international protection law may potentially apply. The paper sets out guidance, for international protection purposes, on how to conceptualise disasters (section 3) and claims in this context (section 4), and on the application of specific elements of the universal and regional refugee definitions (section 5) and the non-refoulement principle in international human rights law (section 6).[15]

2. LEGAL AND POLICY RESPONSES TO DISASTER-RELATED MOBILITY: SITUATING INTERNATIONAL PROTECTION

The fact or risk of a disaster occurring, and other dangers associated with the disaster context, can be a contributory factor to people leaving their country or being unable to return. In these scenarios, legal questions arise concerning their capacity to travel to a country of which they are not a national, to enter and/or stay in that country (and the corresponding rights they enjoy there), and to not be returned to their own country. A range of national and international legal and policy frameworks are potentially relevant to resolving these questions in any particular case. The regimes of international protection in refugee and human rights law will often not be the principal framework for resolving the legal issues associated with international mobility in the disaster context. In practice, they are likely to come into play only where a person outside their country for reasons related to the disaster context is unable to avail themselves of one of the other migration-based options in this wider "toolbox", and be triggered only where risks in the country of origin are sufficiently serious.

Instead, in many mobility scenarios, migration frameworks at national and international (including regional and sub-regional) levels are likely to be the principal vehicle for resolving the legal situation of people who are outside their country for reasons linked to the disaster context there. The breadth of "regular" migration categories (i.e. based on a connection with the country, such as family, work, studies or even tourism) and "exceptional" migration categories (i.e. other grounds) in these frameworks gives them the capacity to accommodate many different kinds of movement in the disaster context. This can encompass: "preventative" movement by people in the face of ongoing and anticipated changes in the environment, such as sea-level rise or desertification, and "reactive" movement undertaken ahead of or during a disaster, or in their aftermath; and offer short-term temporary stay as well as longer-term or even permanent resettlement. Extant practice demonstrates the expanding use and potential of migration laws and policies to address mobility issues in the context of disasters and climate change.[16] These

14 The paper draws on collaborative work by the many RLI staff and RLI Research Affiliates who researched and authored this paper over the preceding nine months. The invaluable input on drafts of the Declaration and of this paper by RLI Senior Research Associate Dr Matthew Scott and RLI Research Fellow Dr Hugo Storey is also gratefully acknowledged.

15 The paper provides guidance on how key elements of refugee law apply to the disaster context, rather than resolving competing interpretations of those elements more generally. As such, authoritative policy (such as UNHCR guidelines) and academic sources (which canvass the extensive refugee law jurisprudence) are usually given in support of the broad principles. Specific case references are provided here usually only where they bear directly on the approach in claims set against the factual context of disasters.

16 See, generally, for examples in this section, David Cantor, 'Environment, Mobility, and International Law: A New Approach in the Americas' (2021) 21 Chicago Journal of International Law 263; and Bruce Burson, Richard Bedford and Charlotte Bedford, *In the Same Canoe: Building The Case for A Regional Harmonisation of Approaches to Humanitarian Entry and Stay In 'Our Sea Of Islands'* (Platform on Disaster Displacement report 2021) <https://disasterdisplacement.org/wp-content/uploads/2021/08/PDD-In_the_Same_Canoe-2021-screen_compressed.pdf> accessed 12 March 2024. For relevant laws, policies and other instruments see the CLIMB Human Mobility in the Context of Disasters, Climate Change and Environmental Degradation Database <https://migrationnetwork.un.org/climb> accessed 12 March 2024.

frameworks thus offer an important primary point of reference in responding to any instance of cross-border disaster-related mobility.

There are several ways in which migration frameworks can be applied in practice. Most crucially, their importance in this context implies that destination countries should not restrict "regular" migration pathways following a disaster in a country of origin.[17] They offer a pathway for people from a disaster-affected country to migrate lawfully on the basis of existing ties, including through study and employment.[18] Some States have adopted national laws and policies to allow these regular migration categories to be applied in a flexible or expedited way to applicants from countries experiencing disasters, e.g. by prioritising their visa applications or waiving and relaxing requirements for travel or stay. Many States also apply "exceptional" migration categories in national law that regulate entry, stay, and return in order to aid non-citizens from disaster-affected countries, e.g. by issuing humanitarian visas prior to departure from the country of origin or on arrival, or providing stay to people already present when conditions in the country of origin do not permit safe return, or by allowing transition to another temporary visa when they are unable to fulfil the requirements of an existing visa because of the impact of a disaster. These provisions often explicitly reference "disasters" or "climate change" as a relevant humanitarian consideration.

Bilateral and multilateral migration agreements reinforce efforts by States to address cross-border movements. Bilateral agreements can address specific contexts and be designed to offer temporary (including seasonal) or longer-term admission for people from countries experiencing disasters.[19] In the Pacific, for instance, visa free or visa on arrival arrangements are commonplace between Pacific island countries.[20] In the Intergovernmental Authority on Development (IGAD) regional bloc in Africa, a treaty on free movement explicitly cites disasters as a permissible reason for entry and stay.[21] More generally, regional and sub-regional free movement agreements can enable people experiencing the impacts of disasters to make their own decisions and choices about travelling to and staying in participating countries, so long as they fulfil the applicable legal requirements for free movement. This has been done in parts of Africa and the Americas, but could be an option elsewhere too.[22] Regional policy guidance can also orient States on how relevant migration provisions in national law and policy (see above) can be applied in disaster contexts.[23]

Nonetheless, the migration law and policy mechanisms in this toolkit can be quite variable in the extent to which they address safe and regular access to territory, status in the destination country, duration of stay, and the scope of ensuing rights.[24] In practice, then, it is important to identify not only which migration law and policy mechanisms exist in any particular country,

17 On the contrary, some States have introduced immigration quotas for temporary or permanent admission from countries experiencing disasters, even if addressing disasters is not their primary purpose.

18 That this occurs quite regularly can be inferred from immigration data (see, for example, Andrade Afonso, 'Natural Disasters and Migration').

19 Government of Costa Rica/Government of Panama, Procedimientos Operativos para la atención de personas desplazadas a través de fronteras en contextos de desastre (May 2017). See also Tatiana Rinke, 'Temporary and Circular Labor Migration between Spain and Colombia' in François Gemenne, Pauline Brücker and Dina Ionesco (eds), *The State of Environmental Migration 2011* (IDDRI 2012).

20 Bruce Burson and Richard Bedford, *Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific – Discussion Paper* (Nansen Initiative, 2013).

21 Protocol on Free Movement of Persons in the IGAD Region (endorsed 26 February 2020).

22 See generally Tamara Wood, 'The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement – A Study of Africa' (Platform on Disaster Displacement, 2019); Ama Francis, 'Free Movement Agreements & Climate-Induced Migration: A Caribbean Case Study' (Sabin Centre for Climate Change Law, 2019); and Cantor, 'Environment, Mobility, and International Law'.

23 Regional Conference on Migration, Protection for Persons Moving across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries (2016); South American Conference on Migrations (SCM), *Lineamientos regionales en materia de protección y asistencia a personas desplazadas a través de fronteras y migrantes en países afectados por desastres de origen natural* [Regional guidelines on protection and assistance for persons displaced across borders and migrants in countries affected by natural disasters] (2018).

24 Cantor, 'Environment, Mobility, and International Law'.

but also which is the most appropriate for a given mobility context and people's needs. The degree to which protection considerations underpin such mechanisms may be a relevant factor. In countries where migration laws and policies do provide an adequate response to the pertinent needs, it should not be assumed that international protection regimes represent the most suitable framework for resolving the legal situation of people outside their country for reasons related to disasters. Indeed, the international protection regime is likely to come into play only where a person facing serious risks due to the disaster context in their home country is unable to access such migration options in the destination country or when those mechanisms are insufficiently protective in the individual case.

3. CONCEPTUALISING DISASTERS AND CLIMATE CHANGE FOR THE PURPOSE OF INTERNATIONAL PROTECTION

The apparent complexity of factual contexts involving disasters and climate change can make it difficult for decision-makers to get to grips with international protection claims adducing these elements. The risk of overlooking the nuances of these contexts is that such claims end up being determined incorrectly. Such failure to take into account any relevant circumstances, including those deriving from the disaster context, can be an error of law. Nonetheless, the wider body of research and thinking about disasters and climate change provides crucial insight here. Drawing on that body of work, this paper identifies five key conceptual points that frame the determination of international protection claims in these contexts. These are not legal precepts, but conceptual points that serve to help decision-makers understand how the risk of harm (which is at the heart of international protection rules) plays out empirically in disaster contexts.

Firstly, a disaster is commonly understood as "a serious disruption of the functioning of a community or society at any scale" due to hazardous events that leads to "human, material, economic or environmental" losses or impacts.[25] The occurrence of a disaster thus generates various actual and anticipated harms; and the risk of a disaster occurring implies a risk of such harms. It is the existence of these risks, rather than their potential for triggering displacement or other forms of mobility, which is the key to understanding how international protection rules apply to claims from disaster contexts. At the same time, the hazards that trigger disasters (see below) may cause people harm or losses before the overall impact on a community is serious enough to qualify formally as a "disaster". Risks from other sources may also arise in pre- and post-disaster contexts, as where criticism of disaster response plans attracts political persecution by the government. For these reasons, we speak of the risk of harm in disaster "contexts", rather than just from the disaster itself, and recognise that these factual contexts can still present risks of harm even if the "disaster" threshold is not yet reached.

Secondly, there is no such thing as a purely "natural" disaster. It is the interaction of a particular hazard or hazards (see below) with human conditions of "exposure, vulnerability and capacity" that causes a disaster.[26] The impact of a hazard reflects not only its frequency and intensity but also, more crucially, the extent to which people are exposed and vulnerable to its effects and can manage the risks.[27] Thus, where a hazardous event occurs or is anticipated, human

25 United Nations General Assembly (UNGA), 'Report of the Open-Ended Intergovernmental Expert Working Group on Indicators and Terminology relating to Disaster Risk Reduction' (2016) A/71/644, 13. The Intergovernmental Panel on Climate Change has adopted the same definition, IPCC, 'Annex VII: Glossary' in J.B.R. Matthews and others (eds), *Climate Change 2021: The Physical Science Basis* (CUP 2021) 2226.

26 UNGA, 'Disaster Risk Reduction', 13. IPCC, 'Annex VII: Glossary' 2226.

27 "Exposure" is defined as the "situation of people, infrastructure, housing, production capacities and other tangible human assets located in hazard-prone areas" (UNGA, 'Disaster Risk Reduction', 18). "Vulnerability" is defined as the "conditions determined by physical, social, economic and environmental factors or processes which increase the susceptibility of an individual, a community, assets or systems to the impacts of hazards" (at 24) and "capacity" as the "combination of all the

action can reduce its impact on society and even prevent a disaster from occurring. Conversely, in any society, the heightened exposure and vulnerability of certain sections of the population is often tied to purely societal factors, such as inequality and discrimination.[28] As the impact of hazards on people is largely rooted in human factors, it is essential that we recognise this *social* basis for disasters and for the wider impact of the hazards which trigger them.

Thirdly, a variety of different kinds of hazards can present risks to people.[29] This includes not just "natural" hazards (both "geophysical", such as earthquakes, volcanic activity and landslides, and "weather-related", such as tropical cyclones, floods, heatwaves and cold spells) but also "human-induced" hazards (e.g. nuclear radiation, dam failures and industrial accidents). "Socionatural" hazards originate from a combination of natural and human factors (e.g. environmental degradation); and one kind of hazard can give rise to another (e.g. tsunami contributing to a nuclear accident). There can be variation too in how hazards play out temporally. Thus, "sudden-onset" disasters are "triggered by a hazardous event that emerges quickly or unexpectedly" (e.g. earthquake, tropical cyclone), whilst "slow-onset" disasters "emerge gradually over time" (e.g. drought, desertification). But there is also the potential for significant interaction between these different scenarios.[30] The need for precise classification of the hazard is not the point here. It is rather that, in any country situation, a range of different hazards may coexist and interact concurrently or in a compound fashion to produce risks of harm or loss at different time scales.[31]

Fourthly, we have seen that disaster contexts may present a range of risks, some deriving from exposure and vulnerability to the hazard and others from broader aspects of such disaster contexts. But these risks of harm or loss often intersect with risks deriving from other "contexts" within the area or country. Armed conflict and other targeted violence, for example, are not usually treated as "hazards" by disaster definitions,[32] but they can present distinct and well-acknowledged risks of harm.[33] They will also need to be taken into account, not least as most countries experiencing armed conflict tend also to be seriously affected by disasters.[34] Moreover, over the longer term, the interaction between conflicts and disasters can increase people's exposure and vulnerability in multiple ways.[35] A similar concern exists for development projects, which can generate their own risks but also contribute to disaster-related risks.[36] Thus, it is necessary to take a holistic approach to the risks that may exist in disaster contexts and avoid focusing only on those from natural hazards.[37]

strengths, attributes and resources available within an organization, community or society to manage and reduce disaster risks and strengthen resilience" (at 12).

28 For instance, it is well understood that disasters are not gender-neutral with women and girls often more vulnerable to the hazard itself. More broadly, other factors such as age and health also shape vulnerability.

29 This paragraph cites the classification developed in UNGA, 'Disaster Risk Reduction', 18-19.

30 For example, sudden-onset disasters can still have effects that last or emerge over a long time or contribute to slow-onset disasters (e.g. cyclones leading to environmental degradation). Conversely, slow-onset events can contribute to the patterns of sudden-onset hazardous events (e.g. landslides due to permafrost thawing).

31 For a discussion of a hazard-based approach to refugee and complementary protection, see *MS (India)* NZIPT [2022] 802082.

32 For instance, the term "hazard" does not include "the occurrence or risk of armed conflicts and other situations of social instability or tension which are subject to international humanitarian law and national legislation" (UNGA, 'Disaster Risk Reduction', 18). This is largely for institutional reasons, since it is already regulated by its own specialised field of law and institutions.

33 David Cantor, 'Divergent Dynamics: Disasters and Conflicts as "Drivers" of Internal Displacement?' (2024) 48 Disasters, e12589.

34 Ibid.

35 For example, by degrading the environment, forcing people to displace to high risk areas, or impeding effective relief efforts to people affected by disasters. See Elizabeth King and John C. Mutter, 'Violent Conflicts and Natural Disasters: The Growing Case for Cross-disciplinary Dialogue' (2014) 35 *Third World Quarterly* 1239.

36 For example, by causing environmental degradation, creating new hazards, increasing exposure and raising vulnerability. See Andrés Pereira Covarrubias and Emmanuel Raju, 'The Politics of Disaster Risk Governance and Neo-Extractivism in Latin America' (2020) 8 Politics and Governance 220, 224.

37 See, for example, *AC (Eritrea)* [2023] NZIPT 802201-202.

Fifthly, climate change is an important wider consideration. As a global process, it often functions as a "threat-multiplier", producing risks for individuals by acting through more localised hazards and disaster contexts.[38] Thus, it can underpin the emergence of slow-onset hazards (e.g. a warmer climate leads to melting ice and rising sea levels, higher temperatures lead to desertification) and increase the intensity, frequency and unpredictability of sudden-onset weather-related ones (e.g. storms).[39] However, it can also affect the capacity of societies to cope with disasters by reducing the resources available and undermining critical infrastructure usability.[40] Thus, it is important to identify the risks posed by the hazards to which the locality is exposed, before considering how climate change will impact on the ways in which these hazards – or new ones – manifest themselves through time. The focus should be on how anticipated and relevant climate-related changes in that locality will impact on the risk of harm posed by these hazards.

4. ASSESSING INTERNATIONAL PROTECTION CLAIMS INVOLVING DISASTER ELEMENTS

A disaster context in the country of origin forms part of the factual backdrop against which the individual's claim for international protection is assessed. The disaster context does not automatically lead to the conclusion that there is a need for international protection, nor that such a need is absent.[41] Rather, as for any other claims, all pertinent aspects of the context, including those relating to disasters, must be fully considered by the decision-maker as part of their usual factual assessment of whether the risks in that country disclose a need for international protection for the particular claimant. No new or special legal rules apply to these claims or to the process of fact-finding and determining such claims under refugee and human rights law. Thus, for instance, decision-makers do not need to determine whether the situation in the country of origin meets the threshold for a "disaster" or results from climate change. Likewise, the fact that a situation has been classified as a "disaster" by the authorities or others may be indicative, but will never be determinative, as to the risks faced by the individual in that disaster context.[42]

At the same time, there are particular factual aspects of disaster contexts to which decision-makers need to give careful consideration when applying the established rules of international protection. As a starting point, a number of important conceptual elements for understanding how relevant risks are shaped within these contexts have been outlined above (section 3). However, disaster contexts also tend to generate certain common factual scenarios in which a risk of harm or suffering to an individual may arise. Five common scenarios are described here as an aid to decision-makers in identifying potentially relevant sources of risk in the context of disasters and climate change.[43] These scenarios are illustrative of several important ways in which the risk of harm may arise in disaster contexts, but they do not forestall the possibility of

38 IPCC, *Climate Change 2014: Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014).

39 Ibid.

40 Ibid.

41 A disaster is not in itself a reason for refugee status under art 1A(2) of the Refugee Convention. But this does not mean that the disaster context is not capable of producing claims that meet this definition (see section 5.1) or which engage human rights rules on *non-refoulement* (see section 6). Regional refugee definitions can recognise disasters as a situational element (see section 5.3). Even in 1979, the UNHCR Handbook recognised this fact, i.e. having a well-founded fear of being persecuted "rules out such persons as victims of famine or natural disaster, *unless* they also have well-founded fear of persecution for one of the reasons stated" (emphasis added). UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 39. This is recognised too in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn CUP 2014) 176-177 and Hugo Storey, *The Refugee Definition in International Law* (OUP 2023) 344-348.

42 See, *mutatis mutandis*, UNHCR, *Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence* (2016) para 15.

43 A similar set of disaster-related 'categories' of claims is elucidated by Scott, *Climate Change*, 48-87.

other risk scenarios arising in these contexts. In practice, these scenarios may apply simultaneously or overlap in any particular claim.

However, it is important to emphasise that the fact that a claim for international protection fits within one or more of these scenarios does not mean that it automatically engages refugee definitions and/or human rights *non-refoulement* rules. In any claim, whether the risks faced by the claimant legally engage refugee definitions or human rights *non-refoulement* rules depends entirely on the particular facts of the case. As such, these scenarios serve primarily to direct the attention of decision-makers to common situations in which the disaster-related risks *may* potentially indicate a need for international protection under one or other body of law. It provides an empirical basis for the legal analysis of how pertinent risks of harm arising in these disaster-related scenarios should be assessed in relation to the refugee definitions (section 5) and human rights *non-refoulement* rules (section 6).

Scenario 1: where disputes or controversies around disasters, climate change or related environmental issues place people at risk of harm from other people. For example, this scenario can arise as a result of: individual or community activism or media reporting related to disaster or climate or environmental issues that is perceived as "controversial" by violent actors; individual or a community protests against disaster risk management (DRM) actions,[44] especially in a highly politicised post-disaster humanitarian space, or climate change adaptation (CCA) actions,[45] including where they are used as a cover for persecution or land grabs; individuals or communities being accused of being responsible for disasters such as forest fires.[46]

Scenario 2: where disasters contribute to a breakdown in law and order or exacerbate dynamics of conflict, violence or exploitation, placing people at risk of harm from other people. For example, this can arise where the disaster: unleashes a wave of suppressed violence within society, including rioting, looting and predatory criminality; or exposes people to the risk of trafficking or exploitation,[47] or to violence in poorly administered evacuation centres or in internally displaced person (IDP) camps and settlements; or ignites pre-existing tensions between communities that erupt into violent inter-community conflict. Such depredations are often carried out on underlying discriminatory grounds, with profiles such as women, children and ethnic or religious minorities facing a heightened risk of targeting.

Scenario 3: where State or non-State actors induce a disaster by severely degrading the natural environment, e.g. poisoning water sources, draining or flooding habitats and destroying crops or other natural resources essential for survival. This scenario can arise where such actors deliberately "weaponise" the environment in this way, e.g. to punish suspected insurgents or oppress minority ethnic groups.[48] Socionatural or human-induced disasters can also occur as an accidental or unintended consequence of other dangerous activities by such actors, e.g. where hostilities result in the accidental destruction of a dam or nuclear power station during armed conflict.

Scenario 4: where the nature of the response by the State or other authorities to disasters, or their DRM/CCA action, produces or exacerbates the risk of harm or suffering for inhabitants. For example, this can arise where: an inadequate relief/recovery response or DRM/CCA action generates such risks generally, including where the authorities arbitrarily reject international

44 Disaster risk management is the "application of disaster risk reduction policies and strategies to prevent new disaster risk, reduce existing disaster risk and manage residual risk, contributing to the strengthening of resilience and reduction of disaster losses" (UNGA, 'Disaster Risk Reduction', 15).

45 Climate change adaptation is the "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities" (IPCC, 'Annex VII: Glossary', 2216).

46 New Zealand Refugee Status Appeals Authority, *Myanmar and TC Nargis* Refugee Appeal No 76374 (28 October 2009).

47 Tribunal of Florence, Decree no. 16935/2019 (3 May 2023).

48 *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013).

assistance; or the exclusion of particular sectors of society from the relief/recovery response or DRM/CAA action generates such risks for that sector specifically.[49]

Scenario 5: where natural hazards present a risk of harm or suffering for persons exposed to them. For example, this can arise as a result of: the more immediate dangers posed by (repeated) life-threatening sudden-onset hazards; the effect of (repeated) sudden-onset and slow-onset hazards on safety and well-being over the long-term (undermining wider conditions for life, reducing State capacity etc). The extent of people's vulnerability to the effects of hazards is often (but not always) rooted in social characteristics, including patterns of State or societal discrimination; and hazards can interact with one another (and with other processes such as logging and mining) to exacerbate the risks involved.

In all these scenarios, the decision-maker will need to be alert to connections between the sources of risk and wider social and political processes (e.g. the role of discrimination in structuring vulnerability to hazards). Moreover, although the evidence-based evaluation of risk and the burden and standard of proof is unchanged in terms of responsibility for establishing the claim, decision-makers may need to supplement the sources of country of origin evidence with which they are most familiar. Other sources drawn from institutions, researchers and reporters working more closely on disaster, climate and environmental issues may be needed to round out the picture to ensure that the situational risks (and the functioning of relevant risk reduction, adaptation and mitigation measures) are properly understood and the reasons why they exist are fully documented and acknowledged.[50]

5. REFUGEE LAW DEFINITIONS

At the global level, refugee law is rooted in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("Refugee Convention").[51] This establishes a basic point of reference on not only the refugee definition but also the obligations, benefits and guarantees deriving from refugee status under international law.[52] Regional complementary refugee definitions have been created by instruments in Africa and Latin America.[53] In many countries, national law incorporates applicable international standards and sometimes also provides its own interpretation of whom to treat as a refugee. These established refugee law principles and standards apply as usual to claims constituted against the factual backdrop of a disaster context. Decision-makers should not characterise a person or claim by using terms that have no relevance in refugee status determination, such as "climate refugees", "disaster refugees" or "disaster displacement". Rather, they must apply existing refugee definitions to such claims, carefully considering the issues as they arise in relation to inclusion under the Refugee Convention (5.1) and regional refugee instruments (5.2) and to cessation (5.3).[54] These definitions apply equally to refugee claims *sur place*.

49 See discussion in *AC (Tuvalu)* [2014] NZIPT 800517-520, paras 83-98; UK Asylum and Immigration Tribunal, RS and Others (Zimbabwe – AIDS) Zimbabwe v Secretary of State for the Home Department CG [2010] UKUT 363; Australia Refugee Review Tribunal, RRT Case No. 1002650 [2010] RRTA 595, 14 July 2010; New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 76237 RSAA (15 December 2008).

50 For example, they may include evidence from international sources such as IPCC analyses, official national sources such as National Action Plans and reports from organisations such as the International Federation of Red Cross and Red Crescent Societies and national and international civil society. Many country-specific pertinent sources can be located currently on repository sites such as ReliefWeb (https://reliefweb.int/) and PreventionWeb (https://www.preventionweb.net/).

51 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); amended by Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

52 A similar refugee definition appears in the 1950 Statute of UNHCR.

53 See, respectively, *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 UNTS 45; and *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.

54 It is assumed that disaster contexts do not throw up any particular issues in relation to exclusion definitions, which should continue to apply as usual.

5.1 Refugee Convention: inclusion as a refugee

Globally, Article 1A(2) of the Refugee Convention (as amended by the Protocol) sets out the main contemporary affirmative "refugee" definition as applying to any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …[55]

This definition applies as a single coherent whole. However, for legal analysis, it is often broken down into several constituent elements. The following sections of this paper address those elements for which disaster-related risks may pose particular questions.

5.1.1 Being persecuted

The concept of "being persecuted" always requires careful attention to context, since persecution is never divorced from the context in which it occurs. In claims constituted against the backdrop of disasters, it may be tempting to assume the dangers are "natural" and thus do not constitute persecution. But the risks that this context poses to people are constituted and shaped intrinsically by human factors (section 3); and it is from the interplay of these factors that the risk of persecution arises (section 4).[56] Thus, "it would be wrong to think that there is a lack of human agency solely because certain easily identifiable actors are not involved".[57]

Disaster contexts can generate direct forms of persecution, for example, where certain people are targeted for ill-treatment due to their stance on disaster-related or wider environmental issues, or where the breakdown in public order following a disaster exposes certain people to a heightened risk of ill-treatment, or where a community's water sources or other essential natural resources are intentionally destroyed or "weaponised" against them as a means to harm them (Scenarios 1–3).[58] But broader practices of deprivation and exclusion against individuals and groups may also feed into their situation of "being persecuted".[59] These experiences often make up the everyday fabric of life for marginalised groups that, formally or informally, are excluded from important social institutions, labour opportunities, political processes etc. In the disaster context, such dynamics of everyday exclusion can result in people from these groups being forced to live in areas particularly exposed to hazards, being excluded from risk reduction programmes, being left in harm's way when others are evacuated, being denied access to life-saving disaster relief in the aftermath etc. (i.e. Scenarios 3–5).[60]

In claims relating to disaster contexts, all of these potential aspects of persecution must be taken into account "cumulatively" in determining whether the "severity" threshold implicit in that concept is met in the particular claim.[61] The fact that a claim is constituted against the

55 The provision also defines in similar terms the situation for persons lacking a nationality.

56 In the scholarship, this approach to the Convention refugee definition in the disaster context has been advanced particularly by Scott, *Climate Change*.

57 European Union Agency for Asylum, *Judicial Analysis on Qualification for International Protection (Directive 2011/95/EU)* (EUAA 2nd edn, 2023) 267.

58 New Zealand Immigration and Protection Tribunal, *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) and *Myanmar and TC Nargis* Refugee Appeal No 76374 (28 October 2009); Refugee Review Tribunal of Australia, Case No 0903555 [2010] RRTA 31 (15 January 2010). This point is also recognised by Storey, *The Refugee Definition* 344-348.

59 It is well-established in refugee law that socio-economic harms and similar forms of deprivation and exclusion are pertinent to the persecution analysis. See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007); Storey, *The Refugee Definition*, 333-342.

60 UK Asylum and Immigration Tribunal, *RN (Returnees) Zimbabwe* (2008); New Zealand Refugee Status Appeals Authority, Refugee Appeal No 76237 (15 December 2008).

61 This "severity" threshold underpins the differing interpretations of this element. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979 (reissued 2019) paras 51-55; Hugo Storey, *The Refugee Definition in International Law* (OUP 2023) 298-409; James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn CUP 2014) 182-207.

backdrop of disasters does not imply that any higher threshold of severity is required for the harm to amount to persecution.[62] Nor does it absolve a decision-maker of their duty to reflect carefully on the full range of harms to which the claimant fears being exposed as a result of their particular profile: some forms of harm might manifest on an everyday basis; and others will do so only in the disaster context. Thus, decision-makers should recognise that disasters have the potential to exacerbate the harms resulting from underlying patterns of exclusion against particular groups. But they must equally take care to place any disaster-specific risks within the wider context of the everyday harms feared outside the disaster context when assessing whether the "being persecuted" threshold is met. As in any other claim, an individual does not have to be singled out or targeted in order for them to be persecuted.[63]

5.1.2 For reasons recognised by the Convention

In disaster contexts, persecution in all these forms can occur "for reasons of" any one or more of the Convention grounds of "race, religion, nationality, membership of a particular social group or political opinion". As with claims based on situations other than disasters, the Convention ground need only be a contributing factor; it need not be the sole reason why the person is at risk.[64] Grounds can also overlap.[65] Thus, the decision-maker need ask only: "Do the reasons for the person's feared predicament, within the overall context of the country, relate to a Convention ground?"[66] In some disaster contexts, the nexus between persecution and Convention grounds may be evident. For example, pre- and/or post-disaster humanitarian space can become politicised, exposing persons engaged in advocacy or relief to persecution for reasons of political opinion (Scenario 1).[67] Indeed, environmental issues more broadly are clearly "political" in many societies, or have the potential to be seen as such in the eyes of a persecutor. Where violence takes place on Convention grounds, the fact that it has been unleashed in the context of a disaster is irrelevant to establishing this nexus (Scenario 2). Harms inflicted by intentionally degrading the environment to the detriment of certain groups may likewise be inflicted on Convention grounds (Scenario 3).

In Scenarios 4 and 5, decision-makers will need to consider the varied ways in which Convention reasons contribute to the exposure and vulnerability of a claimant to hazards. Both factors may reflect wider patterns of discrimination that are connected to one or more of the five Convention grounds. However, the mere fact of being exposed and vulnerable to natural hazards is not in itself sufficient to satisfy the discriminating aspect of "being persecuted" on Convention reasons.[68] Here, a key question for decision-makers will be whether the link between such patterns of exclusion (which must be for Convention reasons) and the claimant's exposure and vulnerability to harm is sufficiently proximate to establish the causal nexus to the appropriate national refugee law standard. Where that nexus is too remote, then persecution on Convention grounds will not be made out. For example, differential exposure to disaster risk might result from predominantly structural forms of disadvantage in society rather than

62 See, *mutatis mutandis*, UNHCR, *Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence* (2016) para 12.

63 UNHCR, *Handbook*, paras 43-44; UNHCR, *UNHCR Guidelines on International Protection No 12* (2016) para 17; Hathaway and Foster, *The Law of Refugee Status*, 174-181; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn OUP 2021), 174-178.

64 There is a reasonable degree of consensus that the Convention ground is assessed by the decision-maker to play, in context, a sufficiently contributory or effective reason for the claimant having a future risk of persecutory harm. See discussion in Storey, *The Refugee Definition*, 654-656; Hathaway and Foster, *The Law of Refugee Status*, 382-390.

65 UNHCR, *Handbook*, para 66. For example, women from ethnic minority groups may be more exposed and vulnerable to disaster risk for combined reasons of "race" and "membership of a particular social group" (women).

66 UNHCR, *Guidelines on International Protection No 12*, para 32.

67 *Myanmar and TC Nargis*, concerning involvement in humanitarian relief efforts in the aftermath of Cyclone Nargis in 2008.

68 Scott emphasises the importance of this point for resolving claims in disaster contexts (*Climate Change*).

from specific practices of discrimination towards particular groups. However, the Convention ground can be linked either to the risk of harm or to the failure of state protection.[69] This includes both acts and omissions by the State in managing disaster risks or in the aftermath of a disaster, e.g. where its discriminatory approach leaves specific sections of a disaster-affected population at increased risk of suffering for Convention reasons.

5.1.3 Well-founded fear

In the refugee definition, the "well-founded fear" element comprises a forward-looking assessment of the risk of being persecuted on Convention grounds. This requires decision-makers to establish the existence of an objective basis for that risk (and, in a few jurisdictions, also a subjective fear of persecution).[70] The requisite degree of risk to satisfy this element is expressed by different national jurisdictions using varied terms, but there is a broad and long-standing consensus that the threshold falls at the lower end of the scale, usually below the "balance of probabilities" standard.[71] In claims that take place against a factual backdrop of disasters or climate change, this legal approach applies unchanged. There is no requirement to establish an additional or "differential" level of risk over and above that of similarly situated persons in the country or context.[72]

Some disasters play out over long periods of time, such that their impacts emerge only gradually. These "slow-onset" disasters raise a question about whether the risk of being persecuted must be "imminent" to satisfy the "well-founded fear" element.[73] In tandem, some jurisdictions suggest that the risk of harm must be "reasonably foreseeable".[74] But, in principle, both "foreseeability" and "imminence" are issues of evidence, rather than legal requirements substituting for the assessment of well-founded fear. They merely point to the fact that, the longer the time between the date at which the claim is being determined and a future scenario of anticipated persecutory harm, the more likely it is that factors known and unknown will shape the prospective risk to the individual in ways that are difficult to predict with any degree of certainty. The closer the feared scenario is to the present day, the more accurately a decision-maker is able to assess the corresponding degree of risk to the individual. Conversely, the further into the future that the feared scenario lies, the more compelling the evidence will need to be of its potential occurrence, the risk posed to the individual and the absence of potential mitigating factors.[75] In this regard, certainly, it is difficult to see how a decision-maker could determine the risk of a harm that is not foreseeable. Equally, though, the fact that a risk may be "foreseeable" in a general sense does not of itself establish the likelihood of its occurrence to the requisite standard.

Time here operates, then, as a sliding scale concerning the strength of evidence required. Refugee law is used to dealing with cases in which the fear of persecution exists in a current scenario: the refugee may not yet have experienced persecution, but usually the scenario giving

69 UNHCR *Guidelines on International Protection No 2: "Membership of a Particular Social Group"* (2002) para 23; Storey, *The Refugee Definition*, 658-659; Hathaway and Foster, *The Law of Refugee Status*, 373-376.

70 See discussion in Storey, *The Refugee Definition*, 663-692; Hathaway and Foster, *The Law of Refugee Status*, 91-105.

71 This is the case since, at least, Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol 1 (A.W. Sijthoff 1966) 180-181. In national jurisdictions that see this standard as falling below the balance of probabilities, this threshold is usually expressed as there being a "real chance", "reasonable possibility" or "reasonable degree of likelihood" of persecution occurring, which all express the same test. See Storey, *The Refugee Definition*, 704-711; Hathaway and Foster, *The Law of Refugee Status*, 91-122.

72 New Zealand Immigration and Protection Tribunal, *AW (Kiribati)* [2023] NZIPT 802085, paras 98-99; see also, *mutatis mutandis*, UNHCR, *Guidelines on International Protection No 12*, para 22.

73 Discussions about "imminence" in relation to these cases have taken place also in the *non-refoulement* jurisprudence of human rights treaty bodies (see section 6).

74 For a discussion in relation to Australian practice, see Adrienne Anderson, Michelle Foster, Hélène Lambert and Jane McAdam 'A Well-founded Fear of Being Persecuted … But When?' (2020) 42 *Sydney Law Review* 155.

75 It is very difficult to evaluate the risk of harm, and thus to establish the well-foundedness of a fear, of a scenario that is purely speculative or not ultimately foreseeable on the current evidence.

rise to the real risk of it is already present. Where the scenario itself lies in the future, it demands an assessment not only of the risk of persecution for the individual in this future scenario, but also the degree of certainty that this scenario will in fact occur in the future. For this reason, very compelling evidence will be required to demonstrate the "well-foundedness" of any future fear of persecution where the level of risk in the current scenario does not meet the appropriate standard of proof. Moreover, in all cases, but particularly those relating to slow onset-hazards, it is necessary to take into account any risk-reducing activities by the State, including climate change adaptation, disaster risk reduction and/or sustainable development projects and programming, and to weigh their impacts on the risk faced by the claimant given their characteristics.[76] Nevertheless, adaptation to climate change is not without limits.[77] As those limits are approached in relation to the relevant hazard(s) and territory at the heart of the claim, their risk-reducing weight is likely to lessen.[78]

Temporal issues can arise also in relation to sudden-onset hazards. Here too, it is a question of the inferences about the future which that evidence can reasonably support.[79] Indeed, it will usually be easier to meet the standard of proof where the country evidence shows that an anticipated sudden-onset hazard is frequently recurring and/or seasonal.[80] Moreover, it is important for decision-makers to recall that sudden-onset hazards can have long-term effects, as well as posing an immediate threat to life; and they may also interact with slow-onset hazards to produce cumulative impacts over the longer-term. For sudden-onset hazards, the prospect of risk-reducing activities carried out by the authorities, including DRM and CCA measures, must also always be considered in determining the degree of risk to which the person is likely to be exposed.[81] Particularly for non-recurrent hazards, past events may not be determinative of future risk where circumstances on the ground have changed in the interim (e.g. public order has been restored since the disaster occurred, non-access to humanitarian assistance is no longer an issue as the emergency is over). But, as many natural hazards are recurrent, seasonal or worsening in the context of climate change, decision-makers should be hesitant to find that the fear of such a hazard recurring is not "well-founded". Moreover, even if a sudden-onset disaster has passed, decision-makers must consider whether any discriminatory practices underpinning a claimant's exposure and vulnerability to hazards or lack of access to support remain in place and may produce a future risk of other discriminatory harms.

5.1.4 State protection

At the core of refugee law is the concept that "[p]ersons are not in need of international protection if they can find protection in their home state".[82] Nowadays, this is usually understood as referring to the "willingness" and "ability" of the national authorities to provide protection that is "accessible, effective, and non-temporary" in relation to the persecution feared.[83] Doctrinal approaches to refugee law differ on such questions as the limb of the refugee definition under which the concept of protection is to be located (i.e. "well-founded fear", "being persecuted",

76 *AC (Tuvalu)* [2014] NZIPT 800517, para 69; *AW (Kiribati)* [2023] NZIPT 802085, para 108; Human Rights Committee, *Teitiota v New Zealand*, Communication No 2728/2016 (7 January 2020) para 9.12; Human Rights Committee, *Daniel Billy et al v Australia*, CCPR/C/135/D/3624/2019 (22 September 2022) para 8.7.

77 IPCC, *Climate Change 2023: Synthesis Report* (2023).

78 *AW (Kiribati)* [2023] NZIPT 802085, para 114.

79 *AW (Kiribati)* [2023] NZIPT 802085, paras 104-105. Foreseeability is also a standard used by the Human Rights Committee and some regional human rights courts in the context of removal or expulsion (see section 6).

80 For instance, even though the occurrence of a storm is still months away and not always a given in each year, the seasonal patterns of storm frequency, intensity and duration may support a finding that the likelihood of its occurrence is sufficiently certain to provide the contextual basis for determining whether a claimant's fear of persecutory harm is well-founded.

81 *AC (Tuvalu)* [2014] NZIPT 800517.

82 Storey, *The Refugee Definition*, 719; generally, see Hathaway and Foster, *The Law of Refugee Status*, 288-361.

83 Storey, *The Refugee Definition*, 720.

"availment" or a combination of the above), and whether authorities or entities other than the State are capable of providing such protection (and, if so, which ones).[84] Nonetheless, claims made against the backdrop of disasters will tend to raise similar issues for decision-makers in relation to the concept of national protection, regardless of the doctrinal approach that prevails in the particular refugee law jurisdiction.

The willingness and capacity of the authorities in the home country to provide protection play into the determination of whether the harm feared should be treated as persecutory. Clearly, in scenarios where the authorities are *unwilling* – for reasons recognised by the refugee definition – to provide adequate protection, it is irrelevant whether the source of harm is a human actor or a natural hazard. The discriminatory behaviour of the authorities on Convention grounds can turn such exposure to harm into a persecutory act.[85] In disaster contexts, for example, the authorities might – on Convention grounds: decline to facilitate life-saving evacuations, relocations or other rescue measures to move particular profiles of people out of harm's way; refuse to provide certain profiles of disaster-affected people with life-saving humanitarian assistance despite the capacity to do so or obstruct their access to available aid; or refuse to take preventive action, including DRM and CCA measures, in relation to identified risks for people with those profiles.[86] But, in Scenario 5, where a State's unwillingness to protect one community against natural hazards in fact reflects a choice to use its limited resources to protect another vulnerable community, this does not of itself indicate discrimination (unless that choice was in fact made on discriminatory grounds). Decision-makers will need to assess whether the evidence establishes that such operational choices are based on Convention-relevant discriminatory grounds.

By contrast, where the authorities are willing but *unable* to protect against discriminatory harm by non-State actors, any persecutory element must be located in the attitude of the non-State actors. For example, the inability of the State to protect may allow non-State actors to target certain people or groups for violence on discriminatory grounds in disaster contexts (Scenario 1) or to weaponise the environment against them (Scenario 3). Non-State actor violence unleashed by the breakdown of law and order following a disaster may be also be undertaken on discriminatory grounds (Scenario 2). Equally, the inability to provide adequate protection may allow non-state actors to discriminatorily obstruct access to life-saving humanitarian assistance for certain disaster-affected persons (Scenario 4). However, where the authorities are willing but unable to protect against a natural hazard (Scenario 5), this failure of protection alone will qualify the serious harm as persecution only where exposure or vulnerability to the hazard is rooted in discriminatory practices by non-State actors against which the State is unable to protect.

The scope of the protection provided by the authorities of the country of origin is also crucial for determining the degree of risk of the feared persecution occurring (see section 5.1.2 above).[87] Given the range of harms that can arise in disaster contexts (see section 5.1.1 above), such protection must be appropriate for mitigating the risks of the particular harm(s) feared from affecting the person concerned. Thus, the scope of the protection assessment in disaster contexts must consider not only the national protection mechanisms for mitigating the risk of harm from human actors (police, judiciary etc.), but also the disaster prevention, protection

84 Ibid 409-471 and 545-585; Hathaway and Foster, *The Law of Refugee Status*, 288-361.

85 Clearly, where such unwillingness to protect instead reflects considerations other than discrimination on Convention grounds, then the harm to which a person fears exposure is not treated as persecutory. This may be the case, for example, in a country affected by widespread flooding where the authorities are unwilling to organise relief because they decide to prioritise relief to another area where thousands more people are at risk. Such scenarios often turn as much on inability as unwillingness. But, where that decision is made on discriminatory grounds, even in the context of resource scarcity, then there is the potential for a nexus to the Convention grounds to be made out.

86 They may also employ such measures to actively persecute relevant groups, e.g. by using them as a pretext to displace people and deprive them of their land and property.

87 This is the case whether it is framed as part of the "well-founded fear" enquiry or in terms of the "sufficiency" of protection.

and recovery mechanisms. These may be less familiar to refugee status decision-makers, but international law recognises that the State's duty of national protection includes taking steps to avert known risks of disasters and minimise their foreseeable impacts.[88] Finally, decision-makers should take account of the fact that, in many countries, disasters and the adverse impacts of climate change are likely to undermine the willingness and ability of national authorities to protect persecuted people, as overwhelming demands and scarce resources force them to make hard choices about what to prioritise.

In Scenario 5 cases, the prospect of "planned relocation", as an organised measure used in the context of disasters and climate change to move people out of harm's way, may also need to be considered.[89] However, caution is needed in assessing the prospect of protection through relocation programmes. Firstly, as a matter of international law, it is not clear that States are required to take this particular measure.[90] Secondly, planned relocations are often lengthy and uncertain processes.[91] Thus, unless a programme already exists for the particular community, the mere prospect that the authorities might take such a measure should be given little weight. Thirdly, in practice, planned relocations often lead to poor outcomes for relocated populations.[92] Thus, even where a relocation programme is already in place to mitigate the disaster-related risk faced in the home area,[93] careful assessment of the relocation conditions (and evidence from similar processes in the past in that country) is needed before any conclusions as to their viability are drawn.

5.1.5 *The internal protection alternative*

Howsoever the "internal protection alternative" (IPA) concept is legally framed in the particular national refugee law jurisdiction,[94] all disaster-related and other risks in a potential IPA site need to be cumulatively factored into assessing whether, for the particular individual, there is (a) a risk of persecution there and, if not, (b) its accessibility and reasonableness as an IPA. Disaster-related risks in these sites are always pertinent to the IPA assessment, regardless of whether the persecution in the claimant's home area is for disaster-related reasons or not.[95] No country is immune to the effects of climate change; and parts of many countries are already highly disaster-prone or expected to become so. As such, disaster-related risks are likely to be a relevant factor in the IPA assessment, whether they are general or specific to the characteristics of the claimant. For example, a site where the person is exposed to great dangers due to natural hazards is unlikely to be a viable alternative for anyone.[96] By contrast, urban centres in countries prone to heatwaves may not be viable for the elderly or others with health issues that increase the likelihood of heat-related illness and death.

88 *Özel and others v Turkey* App nos 14350/05, 15245/05 and 16051/05 (ECtHR, 17 November 2015) para 170 referencing *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 29 September 2008) paras 128-130; *Teitiota v New Zealand* para 9.4 and *Daniel Billy et al. v Australia* paras 8.3, 8.7.

89 The measure can be used reactively where a household or community cannot return home after a disaster or proactively to reduce disaster risk or promote adaptation to the anticipated impacts of climate change.

90 See discussion in Bruce Burson, Walter Kälin, Jane McAdam and Sanjula Weerasinghe, 'The Duty to Move out of Harm's Way in the Context of Climate Change and Disasters' (2018) Refugee Survey Quarterly, 379–407.

91 See *AW (Kiribati)*, para 112.

92 Erica Bower and Sanjula Weerasinghe, *Leaving Place, Restoring Home: Enhancing the Evidence Base on Planned Relocation Cases in the context of Hazards, Disasters, and Climate Change* (Kaldor Centre 2021); Michael Cernea and Christopher McDowell (eds), *Risks and Reconstruction: Experiences of Resettlers and Refugees* (World Bank 2000).

93 In *Teitiota v New Zealand*, the Human Rights Committee expressly noted that Kiribati may seek to relocate its population so as to protect the claimant's right to life (para 9.12).

94 This concept is referred to variously by such terms as "IPA", "internal flight" and "internal relocation" by different national jurisdictions. For analysis, see Storey, *The Refugee Definition*, 474-544; Hathaway and Foster, *The Law of Refugee Status*, 332-361; Goodwin-Gill and McAdam, *The Refugee in International Law*, 144-149.

95 If it is disasters or climate change that would drive people back to their home area, then no human agency needs to be shown, so long as that was already established when the claimant was found to be at risk of persecution in the home area. See Storey, *The Refugee Definition*, 538-539.

96 *Perampalam v Minister for Immigration and Multicultural Affairs* FCA 165, 1 March 1999, para 19; *Abid Hassan Jama v. Utlendingsnemnda*, Borgarting Court of Appeal (Norway) 2011.

In Scenario 5 cases, it may be possible to avoid exposure to a particular hazard by moving elsewhere in the country.[97] In this scenario, the viability of this option will depend partly on the geography of the country and the nature of hazard(s).[98] The potential for moving elsewhere through "planned relocation" may also need to be considered, although caution is needed in assessing whether such programmes offer a viable IPA (see section 5.1.3).

5.2 Regional refugee definitions

In Africa and Latin America, regional instruments establish refugee definitions complementary to the refugee inclusion definition in the Refugee Convention.[99] Africa's regional refugee definition is set out in Article I(2) of the OAU Convention and has been widely incorporated into the domestic legislation of African States.[100] It applies the term "refugee" 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.[101]

In Latin America, paragraph III(3) of the 1984 Cartagena Declaration calls on States to include 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.[102]

The Cartagena Declaration is not binding under international law, but most States in Latin America have incorporated some version of this complementary definition into domestic legislation.[103]

These regional definitions have the potential to be relevant to claims for refugee status arising from disaster contexts.[104] Each definition includes serious disturbances of public order as one of their key situational elements.[105] The impacts of natural hazards and adverse effects of climate change may amount to disasters, which can contribute to creating or exacerbating

97 Even groups that face societal discrimination across the whole of a country may find that this exposes them to additional dangers (e.g. natural hazards) or heightened levels of risk in certain parts of the country, but not in others.

98 For example, the small geographical extent of some island States.

99 Article 1A(2) of the 1951 Convention is replicated in Article I(1) of the OAU Convention and para III(3) of the Cartagena Declaration calls on states to apply the regional refugee definition 'in addition to' the 1951 definition.

100 Tamara Wood, 'Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31 International Journal of Refugee Law 290, 295; David Cantor and Farai Chikwanha, 'Reconsidering African Refugee Law' (2019) 31 International Journal of Refugee Law 182.

101 OAU Convention art 1(2).

102 Cartagena Declaration, para III(3).

103 David Cantor and Diana Trimiño Mora, 'A Simple Solution to War Refugees? The Latin American Expanded Definition and its relationship to IHL' in David Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Nijhoff 2014); Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America' UNHCR Legal and Protection Policy Research Series PPLA/2013/03 (2013).

104 An Arab regional refugee treaty expressly adds "because of the occurrence of natural disasters" as a complementary ground for refugee status, although this treaty has never entered into force. League of Arab States, *Arab Convention on Regulating Status of Refugees in the Arab Countries* (1994 art 1, second paragraph).

105 For discussion of this element, see Wood, 'Who Is a Refugee in Africa?'; Cantor and Trimiño Mora, 'A Simple Solution to War Refugees?'; Cleo Hansen-Lohrey, 'Assessing Serious Disturbances to Public Order under the 1969 OAU Convention, including in the Context of Disasters, Environmental Degradation and the Adverse Effects of Climate Change' UNHCR Legal and Protection Policy Research Series PPLA/2023/01 (2023); Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 International Journal of Refugee Law 185; Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America' (1990) 2 International Journal of Refugee Law 83 (CIREFCA Guidelines).

serious disturbances of public order.[106] Serious disturbances of public order often occur in situations where disasters interact with and exacerbate or trigger armed conflict and generalised violence.[107] Depending on the situation, the same may be true where disasters contribute to creating or exacerbating other circumstances that seriously disturb public order. Moreover, to engage this element, the disturbance to public order must be "serious" and, in all cases, this must be determined based on the particular facts of the given disturbance.[108]

Under the OAU Convention definition, the refugee must also be "compelled to leave" because of these events. This entails a forward-looking assessment of the risk of serious harm posed to the refugee by the circumstances seriously disturbing public order if returned to his or her place of origin.[109] It looks to the connection between the event and the refugee's flight, including whether the event is "sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country".[110] To qualify for protection, the refugee must be compelled to leave his or her "place of habitual residence". Those who habitually reside in a place unaffected by the serious disturbance to public order will not satisfy this requirement. Unlike the Refugee Convention definition, there is no requirement that the harm take place on discriminatory grounds.

In tandem, the Cartagena definition requires also that the refugees' "lives, safety or freedom have been threatened" by the circumstances seriously disturbing public order. This "connotes the *possibility* of harm being inflicted" as a result of the dangers inherent in the situation, but "it does not imply that the harm has actually materialized".[111] In other words, it is an assessment of the risk that such conditions pose to the refugee and is determinative of the individual "threat" element of the definition. Clearly, that must take account of "the objective situation in the country of origin and the particular situation of the individual or group of persons who seek protection".[112] There is no requirement that the harm take place on discriminatory grounds.

5.3 Cessation of refugee status

Article 1C of the 1951 Refugee Convention covers cessation of refugee status.[113] This paper focuses on its paragraphs 5 and 6, which regulate cessation due to a change of circumstances in the country of origin relevant to a refugee's claim.[114] The principles that ordinarily regulate cessation under Article 1C(5)–(6) apply equally to refugees whose claims were made out against the backdrop of a disaster context.[115] Cessation cannot occur where the grounds on which refugee status was recognised persist. In disaster contexts, it is vital to consider whether any discriminatory social practices that underpinned an individual's exposure and vulnerability to hazards

106 Public order has been interpreted, variously, as the effective functioning of law and order mechanisms (Wood, 317-318), "societal stability, demonstrated by a predominant state of public peace, safety and security" (Hansen-Lohrey, 30ff) and "the prevailing level of administrative, social, political and moral order" in a society (UNHCR, *Legal Considerations Regarding Claims for International Protection made in the Context of the Adverse Effects of Climate Change and Disasters*, para 16).

107 This is recognised in some State practice. See Sanjula Weerasinghe, 'In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change', UNHCR Legal and Protection Policy Research Series PPLA/2018/05 (2018) 44, 55-56, 81-83.

108 UNHCR *Legal Considerations*, para 16.

109 See UNHCR, *Legal Considerations*, para 17.

110 Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of Internal and Comparative Law 204, 230.

111 UNHCR, *Guidelines on International Protection No 12*, para 81, emphasis added.

112 CIREFCA Guidelines, para 26.

113 In practice, similar standards apply for the cessation of refugee status under regional refugee definitions. See Joan Fitzpatrick and Rafael Bonoan, 'Cessation of Refugee Protection' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003) 493, 495-496.

114 Paragraphs 1–4 regulate cessation due to a refugee's own actions and thus are not likely to raise distinct issues in the disaster context.

115 For relevant principles, see UNHCR Executive Committee Conclusion No. 69 (XLIII) – Cessation of Status (1992); UNHCR, *Guidelines on International Protection No 3: Cessation of Refugee Status* (2003).

(or other kinds of persecutory harm) on Convention grounds remain in place. Even where the original basis of the refugee claim made no reference to risks arising from disaster contexts, decision-makers should consider them at the point of determining whether to cease refugee status under Article 1C(5)–(6) if the evidence suggests that they now contribute to a risk of persecution (or situational threat to the person under the regional refugee definitions).

For Article 1C(5)–(6) to apply, any change in circumstances must also be sufficiently "fundamental, durable and stable" to demonstrate the availability of national protection.[116] This requires, at a minimum, "a functioning government and basic administrative structures, … as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood".[117] Yet those are precisely the kinds of institutions and infrastructure that are often weakened by disasters and the impacts of climate change. Decision-makers will thus need to consider any risk that the State's capacity for national protection will be further undermined by the impacts of recurrent sudden-onset disasters, deteriorating adaptation capacity etc. Particularly in Scenario 5 cases, cessation will not be appropriate if robust disaster risk reduction and/or climate adaptation measures are still not implemented in practice or where such disaster impacts mean that affected people still cannot go about their ordinary working lives, lack access to basic service infrastructure and resources, or are economically dependent on the State.[118]

Finally, even if a fundamental change of circumstances in the country of origin shows that adequate national protection is now available, some national jurisdictions take the position that a refugee should not have their status ceased under Article 1C(5) if "compelling reasons" of a humanitarian nature exist.[119] Disaster contexts present a range of potential humanitarian concerns, whether or not the risks arising from the disaster context were the original basis for refugee status. This might include severe trauma in the individual case which, in the context of disaster, could apply to victims of extreme violence unleashed in the aftermath of a disaster, victims of sexual or other violence in evacuation or relocation centres, or activists who have suffered serious trauma.[120] Even where the individual fear of persecution is no longer well-founded, the risk of exposure to recurrent life-threatening natural hazards or the lingering severe humanitarian impacts of disasters might provide a basis for this exception. Special characteristics, such as disability, youth or very old age, might also give rise to compelling reasons of a humanitarian nature in these contexts.[121]

6. HUMAN RIGHTS *NON-REFOULEMENT* OBLIGATIONS

Within international human rights law, the principle of *non-refoulement* prohibits a State from sending a person to another country where they are at a real risk of serious harm.[122] It represents

116 UNHCR, *Guidelines on International Protection No 3*, para 11. See also, Hathaway and Foster, *The Law of Refugee Status*, 480-494.

117 UNHCR, *Guidelines on International Protection No 3*, para 15.

118 Fitzpatrick and Bonoan, 'Cessation of Refugee Protection', 508.

119 Fitzpatrick and Bonoan, 'Cessation of Refugee Protection', 517-522; Goodwin-Gill and McAdam, *The Refugee in International Law*, 174-178. However, see also Hathaway and Foster, *The Law of Refugee Status*, 490-494.

120 For example, on trauma and sexual violence, see UNHCR, 'Humanitarian Consideration with Regard to Return to Afghanistan' (2006).

121 UNHCR, *Guidelines on International Protection No 3*, para 21.

122 See, for example, Convention Against Torture (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 3; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 36 Organization of American States Treaty Series 1 (ACHR), art 22(8); *Advisory Opinion OC-21/14: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (IACtHR, 19 August 2014) para 226; *Soering v United Kingdom* App No 14038/88 (ECtHR, 7 July 1989); Human Rights Committee, General Comment No 31 CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para 12; African Commission on Human and Peoples' Rights (ACHPR), General Comment No 4 (2017) para 17, and 'African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers' (20 October 2023) Principle 20(3)-(4).

an important complementary source of international protection, alongside refugee law. The principle does not operate by extending the sending country's human rights obligations to the destination country or conferring a specific status on the beneficiary. Rather, its rationale is that the act of transferring a person to a situation where they face serious harm would in itself infringe the sending State's own negative human rights obligations.[123] It is for this reason that the principle is sometimes said to apply only where the act of removal is "imminent".[124] This use of the term expresses the established position that human rights *non-refoulement* protection arises primarily in response to a definite prospective act of removal (to serious harm), rather than accruing generally to an individual as a guarantee against any future *refoulement* (as with *non-refoulement* protection accruing to refugees under refugee law). As a result of this different originating logic, the *non-refoulement* principle in human rights law can serve to offer a "complementary" basis for international protection where a non-national resists removal to a disaster context.

A State's *non-refoulement* obligations under human rights law are triggered only where the harm faced by the person in the destination country meets a "minimum level of severity",[125] or is "irreparable".[126] This high threshold of severity is usually understood as implying a violation of the right to be free from torture, inhuman or degrading treatment or punishment. A violation of the right to life or, in principle, a "flagrant" violation of other rights may also meet this standard.[127] However, this minimum is relative and may shift depending on the sex, age and state of health of the person concerned.[128] Moreover, unlike the "being persecuted" element in refugee law, the *non-refoulement* rule in human rights law does not usually require harms violating these rights to be rooted in discrimination.[129] Crucially, it is generally accepted that, with the exception of freedom from torture,[130] the rights underpinning the *non-refoulement* concept in human rights law can be violated not only by harms emanating from human sources but also by those deriving from natural sources, including natural hazards.[131] This is true also in relation to the *non-refoulement* obligations associated with those rights.[132]

Comparisons between conditions in the removing State and the destination State are not pertinent to the *non-refoulement* assessment, which must focus purely on empirical conditions in the latter and their envisaged impact on the individual.[133] Moreover, the severity test requires a decision-maker to make a "cumulative" assessment of the combined impact of all the pertinent harms faced by the person due to the conditions on return.[134] A decision-maker must not artificially separate out these elements and assess each individually against the severity threshold.

123 *Soering v United Kingdom*; *Paposhvili v Belgium* App No 41738/10 (ECtHR, 13 December 2016) para 188.
124 *Teitiota v New Zealand* para 8.5.
125 The ECtHR consistently uses this terminology. See, for example, *Hilal v United Kingdom* App no 145276/99 (ECtHR, 6 March 2001) para 60; *Paposhvili v Belgium*; *N v United Kingdom* App No 26565/05 (ECtHR, 27 May 2008) para 25.
126 Human Rights Committee, General Comment No 31, para 12; ACHPR, 'African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers' (2023) Principle 20(4).
127 *Teitiota v New Zealand*; *Othman (Abu Qatada) v UK* App No 8139/09 (ECtHR, 9 May 2012) paras 232, 258; ACHPR, 'African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers' (2023) Principle 20(4).
128 *Savran v Denmark* App No 57467/15 (ECtHR, 7 December 2021) para 122.
129 An exception is Art 22(8) ACHR, but in this system a separate *non-refoulement* guarantee which does not require discrimination has also been read into Art 5 ACHR. See, for example, *Advisory Opinion OC-21/14: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,* Inter-American Court of Human Rights, 19 August 2014, para 226.
130 Intention is a defining element of the act of torture, according to international law. Nigel Rodley and Matt Pollard, *Treatment of Prisoners under International Law* (3rd edn OUP 2009) 117-122.
131 See, for example, *Özel & Ors v Turkey* para 17; *Advisory Opinion OC-23: Human Rights and the Environment* (IACtHR, 15 November 15 2017); *Portillo Cáceres and Ors v Paraguay*, CCPR/C/126/D/2751/2016, Communication 2751/2016; AComHPR, General Comment No 3: The Right to Life (2015) paras 3 and 41.
132 *Teitiota v New Zealand*; *Paposhvili v Belgium* para 188; *Sufi and Elmi v United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 November 2011) para 282.
133 *Paposhvili v Belgium* paras 189-190.
134 *JK and others v Sweden* App No 59166/12 (ECtHR, 23 August 2016) para 95.

This approach is of substantive importance where the person resisting *refoulement* faces removal to a disaster context. Aside from any impacts of natural hazards (Scenario 5), such contexts often present disaster-related risks in the form of direct harm at the hands of State and/or non-State agents for disaster-related reasons (Scenarios 1–4). Often, these contexts are also riven simultaneously by other conflicts or social tensions that represent separate sources of harm (see section 3). Decision-makers are required to take into account these distinct harms cumulatively when assessing whether the appropriate severity threshold is met for *non-refoulement*.

As in refugee law, human rights *non-refoulement* obligations require a forward-looking assessment of risk, which must be made out, to a standard lower than the balance of probabilities. This is usually expressed as "substantial grounds for believing" that the person faces a "real risk" of harm sufficient to breach the severity threshold outlined above.[135] A real risk must be made out for the individual concerned, but this can result from general circumstances (i.e. there is no requirement for individual targeting or differential risk).[136] Whether measures taken by the State authorities or third parties to protect people from these harms are sufficient to displace that "real risk" will be a matter of critical importance for the decision-maker. So too is the question of whether an internal relocation alternative exists. However, the disaster context also raises the prospect of harms that evolve over a longer period of time, such as slow-onset processes of environmental degradation or sea level rise, or which are recurrent, such as sudden-onset seasonal storms. In these situations, the debate has focused on the implications of concepts such as "imminence" and "foreseeability" that appear in the jurisprudence of human rights treaty bodies.[137] However, the approach to the similar risk test in refugee law (section 5.1.2) applies equally here.[138] In general, the more imminent the harm, the easier it will be to show on the evidence that there are "serious reasons for considering" that there is a real risk of it eventuating; and vice-versa where the harm is temporally more distant.

Finally, it is important to note the emergence of a "predominant cause" approach within the European regional case-law on *non-refoulement* obligations.[139] It is not clear that this approach is, or will be, followed by other human rights treaty bodies.[140] Nonetheless, this European case-law affirms that where the "predominant cause" of the harm is poverty or "the State's lack of resources to deal with a naturally occurring phenomenon, such as drought", then a higher severity threshold for engaging *non-refoulement* obligations applies than where the predominant cause is "the direct and indirect actions" of human State or non-State actors.[141] For the latter cause, the

135 See sources cited at note 122 above.

136 *Teitiota v New Zealand* para 9.7; *Nizomkhon Dzhurayev v Russia* App No 31890/11 (ECtHR, 3 October 2013) para 110; *Wong Ho Wing v Peru* (IACtHR, 30 June 2015) para 174.

137 The decision of the Human Rights Committee in *Teitiota* for instance, has led to claims that, to satisfy the "real risk" test, the harms must be "imminent". But a careful reading of the Committee's approach shows that "imminence" is not a hard threshold. (Michelle Foster and Jane McAdam, 'Analysis of "Imminence" in International Protection Claims: "Teitiota v New Zealand" and Beyond' (2022) 71 International & Comparative Law Quarterly 975, 977). Rather, in connection with the real risk assessment, the Committee has simply observed that "the imminence of any anticipated harm in the receiving state *influences* the assessment of the real risk faced by the individual (*Teitiota*, para 8.5, emphasis added). This should be read merely as a statement of evidentiary approach, rather than a legal test.

138 The exception may be in jurisdictions following the "predominant cause" approach (see below).

139 This refers principally to European Court of Human Rights jurisprudence on art 3 ECHR. However, subsidiary protection under art 15(b) of the EU Qualification Directive also refers to "serious harm" as including "inhuman or degrading treatment", which essentially corresponds to art 3 ECHR (Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] para 28). This provision is apparently interpreted even more narrowly, as requiring some "form of conduct on the part of a third party" and not encompassing harms deriving from natural sources (Case C-542-13 *Mohamed M'Bodj v Etat Belge* [2014] para 35).

140 The Human Rights Committee, in *Teitiota*, does not expressly require a human actor as the source of the harm. Alternatively, in addressing its comments to "the effects of climate change" (paras 9.7–9.12), it may implicitly apply this requirement but see it as fulfilled by the influence of humans on this process. Existing jurisprudential approaches in the Inter-American Human Rights System or that of the African Union give reason to doubt that they will adopt the predominant cause test in these types of cases (see Monica Iyer, 'Environmental Migration in Regional Human Rights Courts: A Lifeboat from the "Sinking Vessel"' (Duke Law School Public Law & Legal Theory Series No 2023-58, 2023)).

141 *Sufi and Elmi v United Kingdom* para 282.

jurisprudence sensibly identifies several factors relevant to meeting the standard threshold for severity. They include "an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame".[142] But for the former cause, this higher threshold of "very exceptional" circumstances[143] will be met only "where the humanitarian grounds against the removal are compelling".[144]

As yet, neither the European Court of Human Rights nor the Court of Justice of the European Union appears to have applied this higher threshold to any case contesting *refoulement* on the basis of disaster-related harms in the country of origin, as compared with their frequent application of this threshold to a line of cases involving challenges to removal on medical grounds. This may suggest the recognition on their part of the relative importance of human actions in shaping the risk of harm in many disaster contexts. This might also be inferred from the developing body of national jurisprudence in countries such as Austria, Germany, Italy and France that applies the standard threshold for severity to *non-refoulement* cases where removal is to conditions of harm defined by the intersection of disasters and conflicts or even sometimes on the basis of disaster-related risks alone.[145] Otherwise, decision-makers in jurisdictions applying the "predominant cause" approach face a series of potentially challenging tasks in identifying the predominant cause in disaster contexts.

In cases where the conditions encompass not only the risks of harm presented by natural hazards but also risks from a range of other sources, these decision-makers will need to assess the extent to which the contribution of these other sources of harm points away from "nature" as predominant cause. In tandem, when weighing up the relative contribution of natural hazards to this causal assessment, they will need to reflect on the extent to which an individual's exposure and vulnerability to these natural hazards and their effects is itself due to the "direct and indirect actions" of State and non-State actors. Since these "actions" include also "omissions",[146] the predominant cause analysis will also need to take account of any foreseeable DRM/CCA actions that should have been carried out by the authorities to mitigate the risks posed by these hazards to the individual but which were not implemented (see, *mutatis mutandis*, section 5.1.4). Further, where the hazards are weather-related, decision-makers may need to consider whether their frequency, intensity, duration and unpredictability are influenced by human-driven climate change.[147] These factors will point away from human actors as the predominant cause only where they are due primarily to resource limitations,[148] or perhaps where the actions or omissions are not "intentional".[149]

142 *Sufi and Elmi v United Kingdom* para 283. This follows the approach set out in *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) para 254.

143 *Sufi and Elmi v United Kingdom*.

144 *N v United Kingdom* para 43.

145 See Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and *Non-Refoulement* under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322; Francesco Negozio and Francesca Rondine, 'Analysing National Responses to Environmental and Climate-Related Displacement: A Comparative Assessment of Italian and French Legal Frameworks' (2022) 61 Quarterly on Refugee Problems 53; Camilla Schloss, 'Climate Migrants – How German Courts Take the Environment into Account when Considering Non-refoulement' (3 March 2021) <https://voelkerrechtsblog.org/climate-migrants/> accessed 12 March 2024.

146 *SHH v United Kingdom* App No 60367/10 (ECtHR, 8 July 2013) paras 89-91; *N v United Kingdom* para 43.

147 See Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights' (2014) 26 International Journal of Refugee Law 404, 422-424. Moreover, attributing responsibility to any single State either for climate change in general or for the extent to which it has shaped a specific weather-related disaster is also a highly complex exercise. See, for example, Gabriele Hegerl et al 'Understanding and Attributing Climate Change' in Susan Solomon et al (eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2007).

148 *SHH v United Kingdom* para 91; *Sufi and Elmi v United Kingdom* para 282.

149 The requirement that such actions and omissions be "intentional" or "deliberate" appears in some of the jurisprudence (*SHH v United Kingdom* paras 89-91; *N v United Kingdom* para 43). However, it does not seem to be applied in a particularly limiting way, as the findings in *Sufi and Elmi* illustrate (paras 282-292).

Even if "nature" were ultimately found to be the predominant cause in a disaster-related case, there is also a question about how the "exceptionality" threshold would be interpreted in this context. To establish "exceptionality" in medical cases where nature is the predominant cause, the European Court has held that the temporal proximity of the future suffering is relevant to establishing its legal connection to the impugned act of removal, i.e. onset must be "rapid".[150] Intriguingly, a UK tribunal has applied this approach to a disaster case in which it found that nature was the predominant cause in order to suggest that the real risk test here is constrained by a further criterion of "immediacy".[151] However, whilst the rapidity of the onset of medical complications might be an appropriate factor for identifying "exceptionality" in medical cases, it is not clear that this is a relevant criterion for construing "exceptionality" in disaster-related cases. Moreover, even if it were, the differing factual contexts of medical cases and disaster cases suggest that the parameters of any "rapidity" criterion are likely to be distinct in each context. A contrasting approach to identifying "exceptional" circumstances of a humanitarian nature is illustrated by a New Zealand tribunal, which treated the differential heightened vulnerability of a deaf and mute claimant to weather-related hazards as engaging this criterion of exceptionality.[152]

[*With thanks to the Refugee Law Institute for providing this document*]

150 *Paposhvili* para 183.
151 Upper Tribunal, *OA (Somalia) Somalia CG* [2022] UKUT 00033, paras 113-127.
152 New Zealand Immigration and Protection Tribunal, *AV (Tuvalu)* [2022] 505532. This case did not concern the application of human rights *non-refoulement* obligations but rather domestic law protections that apply on the basis of exceptional circumstances of a humanitarian nature.