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RESEARCH SERIES**



**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**

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The views expressed in this paper are those of the author and do not necessarily reflect those of the United Nations or UNHCR. Any errors are the author's own.

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## EXECUTIVE SUMMARY

As the impacts of climate change, environmental degradation and disasters increasingly influence human mobility around the world, States, UNHCR and others have recognised the critical need to consider how existing legal frameworks can protect people forcibly displaced in such contexts. In Africa, the key legal framework is the continent's regional refugee treaty – the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention). Article I(2) of the 1969 OAU Convention expands the scope of refugee protection beyond the international definition of a “refugee”, found in the 1951 Refugee Convention, to protect people fleeing events which can be characterized by their widespread and indiscriminate nature. These events include external aggression, occupation, foreign domination, and events seriously disturbing public order.

As the broadest of the listed events in the Article I(2) definition, “events seriously disturbing public order” (ESDPO) has the most potential to protect people fleeing in connection to the adverse effects of climate change, environmental degradation, and the impacts of disasters. By their nature, such events can impact the prevailing level of public order within a society. They may do so on their own – for example, in situations involving sudden-onset disasters, such as storms or flooding – or through interaction with other factors affecting societal instability, such as conflict, violence, and serious human rights violations. For example, slow-onset climate change impacts, such as drought, can exacerbate conflict and instability in a society, while also diminishing a State's capacity to protect its population from harm.

In the absence of clear or consistent state practice, various actors and experts have called for guidance on the application of the Article I(2) refugee definition in the 1969 OAU Convention to people displaced in such contexts. This is particularly significant given Africa's vulnerability to climate change, and the fact that access to scarce natural resources, such as water, is predicted to be an increasing cause of conflict on the continent.

In 2022, UNHCR initiated a three-part project aimed at developing further normative guidance on the application of the Article I(2) refugee definition in the context of the adverse effects of climate change, environmental degradation, and the impacts of disasters. This paper forms the first stage of that project and aims to develop practical guidance for assessing serious disturbances to public order under the 1969 OAU Convention based on principled legal analysis. This guidance ultimately takes the form of indicia of ESDPO. In the second stage of UNHCR's project, the ESDPO indicia will be applied to country case studies in southern Africa involving the adverse effects of climate change, environmental degradation and disasters. The third stage of the project proposes to see UNHCR develop normative guidance, drawing on the institution's existing publications and the outcomes of the first two stages of this project.

### **Scope and purpose of the paper**

In practice, it is primarily refugee status decision makers in Africa whose role it is to apply the Article I(2) refugee definition across a range of different factual scenarios, and often while managing large caseloads with limited resources. This paper supports African States and their decision makers to apply the Article I(2) definition in a consistent and fair manner by developing concrete and practical guidance for its application. Based on a principled interpretation in accordance with international law

rules of treaty interpretation, this paper provides an in-depth legal analysis of the Article I(2) refugee definition, with a particular focus on the phrase “events seriously disturbing public order”. In applying established rules for the interpretation of treaties, the paper draws on evidence of state practice, UNHCR’s existing guidance, scholarship and analysis of “public order” across relevant fields of law. Based on this analysis, the paper then articulates practical guidance in the form of 1) indicators of a disturbance to public order, and 2) criteria for assessing when that disturbance can be characterised as “serious”. Together, the public order indicators and seriousness criteria are referred to as the “ESDPO indicia”. These ESDPO indicia can be used by refugee decision makers to assess whether there has been a serious disturbance to public order, including in the context of the adverse effects of climate change, environmental degradation and the impacts of disasters.

A few points of clarification regarding the scope of the ESDPO indicia should be noted at the outset. First, the ESDPO indicia articulated in this paper are not exclusive to situations involving the adverse impacts of climate change, environmental degradation and disasters. Indeed, the Article I(2) definition should be applied in an equal and consistent manner to people seeking protection across all contexts. Thus, the ESDPO indicia are also applicable to displacement from situations involving other, more traditional drivers of displacement, such as conflict, violence and serious human rights violations, as well as so-called “nexus” situations involving a combination of drivers.

Second, while this paper provides criteria for assessing when a disturbance to public order will be characterized as serious, there is no hard and fast rule regarding the number of factual indicators that must be present in order for a particular disturbance to amount to ESDPO. In some cases, the severity of a single indicators may be sufficient to qualify. In others, it may be the cumulative effect of numerous indicators that brings the disturbance within the scope of ESDPO. Thus, an assessment of whether a particular disturbance does (or does not) qualify as ESDPO can only be made on a case-by-case basis, taking into account all the relevant evidence and circumstances.

The above two points are important as they make clear that not every person displaced in the context of the adverse effect of the climate change, environmental degradation or disasters will qualify for protection under the 1969 OAU Convention. Rather, ESDPO ought to be assessed in a principled and consistent manner across all situations, and without any different or special rules for situations based on their nature or cause (i.e., whether related to climate change, conflict or any other cause). Thus, while previous analyses of this issue have focused on whether or not disasters or climate change-related events can be ESDPO, this paper focuses on how to determine whether ESDPO exist, irrespective of whether they result from natural hazards, disasters, conflict or other drivers.

Lastly, it must be noted that the existence of ESDPO in a person’s home country will not on its own qualify them for protection as a refugee. All refugee claimants will also need to meet the other criteria for refugee status set out in Article I(2), including that they are “compelled to leave [their] place of habitual residence” *owing to* that serious disturbance (the “individual component”). Both the collective and individual components must therefore be met for the Article I(2) definition to apply.

### **Assessing a serious disturbance to public order in practice: the ESDPO Indicia**

ESDPOs can be assessed in two steps. The **first step** involves determining whether there is disturbance to public order in a refugee applicant’s home country. For the purpose of the Article I(2) refugee definition, “public order” refers to the maintenance of societal stability, demonstrated by a

predominant state of public peace, public safety and public security, and underpinned by the effective operation of the rule of law and the protection of individuals' rights and freedoms within the society.

A disturbance to public order can be assessed by reference to eight factual indicators which decision makers can weigh up to determine whether, on balance, public order has been disturbed in a particular case. These factual indicators can often overlap in practice and can be evidenced by a number of sub-factors, which are set out in full in Part 5 of the paper. The eight indicators of a disturbance to public order are set out below:

1. **Government services** are failing to meet the basic needs of individuals in the society and therefore do not ensure that individuals are able to enjoy minimum core human rights.
2. **Government institutions** are weak and function ineffectively.
3. **Freedom from harm:** Individuals are unable to go about their daily lives with dignity and without fear for their lives, physical integrity or liberties, as a result of actions or omissions of the State, foreign States, non-State actors or other individuals.
4. **Rule of law:** Judicial, security, and law enforcement bodies (including the courts, police, armed forces and other officials exercising public order powers) do not operate in accordance with the rule of law, and in a way that is fair, impartial, transparent and non-discriminatory.
5. **Management of public protests:** Authorities respond to public protests, strikes or demonstrations with coercive and repressive measures, contrary to human rights law and the rule of law.
6. **Civil conflict** is not effectively limited.
7. **Government accountability** is limited.
8. Other circumstances that result in a disturbance to general societal stability, public peace, public safety or public security.

The **second step** is to assess the *seriousness* of the disturbance to public order, through a consideration of the nature, extent and duration of the disturbance. A disturbance to public order will meet the threshold of "serious" where it involves a widespread or generalised threat to the rights to life, physical integrity and/or liberty of individuals in a society, such that the disturbance can be said to affect society at large, and the state is unable or unwilling to restore public order. For a disturbance to meet the seriousness threshold, and thus constitute ESDPO, it must meet all three of the following criteria:

1. The disturbance to public order involves a threat to the rights to life, physical integrity and/or liberty of individuals;
2. The disturbance can be said to affect society at large, for example by being widespread (affecting a proportionately large number of people within a society) and/or generalized (where there is a risk to an indeterminate number of people within a society). Serious disturbances need not affect the majority of individuals in a society, so long as enough individuals are affected in a way that it creates a general sense of instability in the society by undermining public peace, public safety or public security; and
3. The State is unable or unwilling to restore public order.

As noted above, the ESDPO indicia can be applied whether a person has been displaced 1) in the context of the adverse effects of climate change, environmental degradation or the impacts of disasters, 2) in more traditional contexts of displacement such as conflict and violence, or 3) where disasters and conflict interact.

# 1. INTRODUCTION

## 1.1 The 1969 OAU Convention's expanded refugee definition in Article I(2)

The protection of people displaced in connection with the adverse effects of climate change, environmental degradation and disasters continues to present challenges to refugee and human rights regimes globally. Displacement due to weather-related events over the last decade triggered more than twice as many displacements caused by conflict and violence<sup>1</sup> and has been described by the United Nations High Commissioner for Refugees (UNHCR) as one of the most devastating consequences of climate change.<sup>2</sup> Despite this, there is no comprehensive legal framework to cover the protection of people displaced across borders in connection with the adverse effects of climate change, environmental degradation and disasters.<sup>3</sup> While people displaced across borders in such contexts may be entitled to refugee protection under the 1951 Convention Relating to the Status of Refugees<sup>4</sup> and human rights-based complementary protection regimes in limited and specific circumstances,<sup>5</sup> Africa's regional refugee treaty provides broader scope to do so where the adverse effects of climate change, environmental degradation and the impacts of disasters seriously disturb public order.

Since its adoption in 1969, Africa's regional refugee treaty – the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>6</sup> (1969 OAU Convention) – has been celebrated for its expansive approach to refugee protection.<sup>7</sup> This is in large part due to its expanded refugee definition in Article I(2).<sup>8</sup> Article I(2) of the 1969 OAU Convention expands on the definition of a refugee in the 1951 Refugee Convention beyond a person with a well-founded fear of being persecuted on the basis of a particular attribute they possess, or are perceived to possess, to also include people fleeing from events which can be characterized by their widespread and indiscriminate nature.<sup>9</sup> These events are: external aggression, occupation, foreign domination and

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<sup>1</sup> Internal Displacement Monitoring Centre, '2023 Global Report on Internal Displacement' II <<https://www.internal-displacement.org/global-report/grid2023/>> accessed 3 July 2023. Statistics are based on internal displacements. The IPCC has also confirmed in its most recent report that climate and weather extremes are increasingly driving displacement in Africa: IPCC, 'Synthesis Report of the IPCC Sixth Assessment Report (AR6) (Longer Report)' (March 2023) 16 <[https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_LongerReport.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf)> accessed 26 May 2023.

<sup>2</sup> UNHCR, 'Displaced on the Frontlines of the Climate Emergency' (19 July 2022) <<https://storymaps.arcgis.com/stories/065d18218b654c798ae9f360a626d903>> accessed 26 May 2023.

<sup>3</sup> See Walter Kalin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change; Normative Gaps and Possible Approaches' (2012) UNHCR Legal and Protection Policy Research Series, 24.

<sup>4</sup> Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (the 1951 Refugee Convention) art 1A(2), and the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 660 UNTS 267 (entered into force 4 October 1967) art 1(2). Together, these instruments will be referred to as 'the 1951 Refugee Convention'.

<sup>5</sup> Walter Kälin and Nina Schrepfer (n 3) see the summary at pages 24-28 in particular; also Michelle Foster, Hélène Lambert and Jane McAdam, 'Refugee Protection in the COVID-19 Crisis and Beyond: The Capacity and Limits of International Law' (2021) 44 UNSW Law Journal 103.

<sup>6</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) (OAU Convention).

<sup>7</sup> George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 Refugee Survey Quarterly 79, 109.

<sup>8</sup> Tsion Tadesse Abebe, Allehone Abebe and Marina Sharpe, 'The 1969 OAU Refugee Convention at 50' 5 <<https://issafrica.org/research/africa-report/the-1969-oau-refugee-convention-at-50>> accessed 26 May 2023. See also Okoth-Obbo (n 7) 109.

<sup>9</sup> As Arboleda explains, Africa's Article I(2) refugee definition "considers situations where the qualities of deliberateness and discrimination need not be present": Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 International Journal of Refugee Law 185, 195.



events seriously disturbing public order.<sup>10</sup> The expansion of refugee protection on the continent has been widely praised and has led to the further development of refugee definitions in other regions.<sup>11</sup>

The 1969 OAU Convention has been ratified by 48 of the 55 Member States of the African Union.<sup>12</sup> As such, the 1969 OAU Convention's provisions "represent the crucial point of agreement among its State parties regarding the scope and content of refugee protection in the African context".<sup>13</sup> Developed in the context of African decolonisation, the drafters of the 1969 OAU Convention sought to make international refugee law applicable in Africa as well as to address refugee problems specific to the continent.<sup>14</sup> Today, the ongoing effective implementation of the 1969 OAU Convention requires that it continue to address current and emerging causes of displacement where an interpretation of its terms permits. This will largely depend on how the phrase "events seriously disturbing public order" (ESDPO) is interpreted and applied in practice.

Amidst growing displacement in the context of the adverse effects of climate change, environmental degradation, and the impacts of disasters,<sup>15</sup> there has been widespread recognition of the need to consider how existing legal frameworks apply to the protection of people displaced in such contexts.<sup>16</sup> The last five years have seen a rapid increase in attention on exactly this question.<sup>17</sup>

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<sup>10</sup> OAU Convention, art I(2).

<sup>11</sup> The Latin American 1984 Cartagena Declaration on Refugees's expanded refugee definition includes a serious disturbance to public order ground, which is based on Africa's Article I(2) definition: Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium, held at Cartagena, Colombia, 19–22 November 1984, Conclusion III(3). Two other international soft law instruments include definitions of a refugee which are similar to Africa's Article I(2) definition and which include a public order protection ground. The first is the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries Adopted by the League of Arab States 1994 <<https://www.refworld.org/docid/4dd5123f2.html>> accessed 26 May 2023. The second instrument is the 1966 Bangkok Principles on the Status and Treatment of Refugees: As adopted on 24 June 2001 by the Asian-African Legal Consultative Organization <<https://www.refworld.org/docid/3de5f2d52.html>> accessed 26 May 2023.

<sup>12</sup> For states parties, see <<https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf>>. This document was last updated on 16 May 2019, accessed: 24 May 2023. This list does not include Morocco, which is a state party (see <https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028010433e&clang=en> accessed 26 May 2023) or Djibouti, which is also a state party (see

<<https://www.refworld.org/pdfid/5072836f2.pdf>> accessed 26 May 2023); Sanjula Weerasinghe, 'Refugee Law in a Time of Climate Change, Disaster and Conflict' UNHCR PPLA/2020/01 (January 2020) 12, fn 53.

<sup>13</sup> 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, 292.

<sup>14</sup> Ivor C. Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers 1999) 187–188; Marina Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (UNHCR Legal and Protection Policy Research Series, PPL A/2013/01, January 2013) 15–16 <<https://www.refworld.org/docid/50fd3edb2.html>> accessed 25 May 2023.

<sup>15</sup> See notes 1 and 2 above.

<sup>16</sup> 'Research Agenda For Advancing Law and Policy Responses to Displacement and Migration in the Context of Disasters and Climate Change in Africa' (2021) outcome document of the Virtual Workshop Series on 'Developing a Research and Policy Agenda for Addressing Displacement and Migration in the Context of Disasters and Climate Change in Africa', held between April and July 2021 <<https://disasterdisplacement.org/portfolio-item/research-agenda>> accessed 5 February 2023.

<sup>17</sup> Examples from the scholarship include: Sanjula Weerasinghe, 'In Harm's Way; International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change' UNHCR PPLA/2018/05, December 2018 111; Aderomola Adeola, 'Protecting "Climate Refugees" Under the OAU 1969 Refugee Convention' in Aderomola Adeola and Makau W Mutua (eds), *The Palgrave Handbook of Democracy, Governance and Justice in Africa* (Springer International Publishing 2022); Tamara Wood and Cleo Hansen-Lohrey, 'Disasters, Climate Change and Public Order: A Principled Application of Regional Refugee Definitions' (*RLI Blog on Refugee Law and Forced Migration*, 24 May 2021) <<https://rli.blogs.sas.ac.uk/2021/05/24/disasters-climate-change-and-public-order/>> accessed 24 August 2022; Cleo Hansen-Lohrey, 'Applying Refugee Law in Africa and Latin America: Disasters, Climate Change and Public Order' (2022) 69 *Forced Migration Review* 69.

In 2018, the Global Compact on Refugees called for protection-related guidance to assist those forcibly displaced by “natural” disasters, including through the application of regional measures,<sup>18</sup> with the importance of “accurate interpretation of the law” being underlined in this context.<sup>19</sup> Also in 2018, the UN High Commissioner for Human Rights recommended that governments and other relevant stakeholders strengthen the role of regional conventions in addressing climate change-related human mobility, suggesting that States promote regional protection frameworks in the absence of a broader international obligation to admit people affected by climate change.<sup>20</sup>

In 2019, the African Union Commission organized a regional roundtable in Addis Ababa on addressing root causes of forced displacement and achieving durable solutions in Africa, which included representatives of African Union Member States, the UN Special Rapporteur on the Human Rights of Internally Displaced Persons (IDPs), international and regional organizations, nongovernmental organizations, diplomats, experts, refugees, the media and other stakeholders.<sup>21</sup> The roundtable participants noted that the “refugee definition in the 1969 OAU Refugee Convention may allow decision makers to recognize refugee status in the context of climate change”<sup>22</sup> and proposed that additional guidance from UNHCR on this point be requested.<sup>23</sup>

In 2020, UNHCR declared that the 1969 OAU Convention, through its Article I(2) refugee definition, protects people fleeing the adverse effects of climate change and disasters where these effects seriously disturb public order.<sup>24</sup>

In 2021, more than 200 representatives from governments, international and regional organizations, researchers, practitioners and policy experts engaged in a virtual workshop series to discuss frameworks that address displacement and migration in the context of climate change and displacement in Africa.<sup>25</sup> One of the outcomes of this workshop series was the publication of a Research Agenda with a number of research proposals aimed at clarifying the extent of existing knowledge gaps on the scope and application of Africa’s regional and sub-regional frameworks relating to climate change, disasters and human mobility.<sup>26</sup> Research Proposal 3.2.5 specifically recognized the need for further research on the 1969 OAU Convention’s Article I(2) refugee definition and, in particular, how events seriously disturbing public order could be measured and assessed in

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<sup>18</sup> UNGA, ‘Report of the United Nations High Commissioner for Refugees - Part II - Global Compact on Refugees’, A/73/12 (Part II), 13 September 2018, [61] and [63] <<https://digitallibrary.un.org/record/1640526?ln=en>> accessed 22 May 2023.

<sup>19</sup> Volker Turk and Madeline Garlick, ‘Addressing Displacement in the Context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees’ (2019) 31 *International Journal of Refugee Law* 389, 394.

<sup>20</sup> UNGA, ‘Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge the Protection Gaps; Report of the United Nations High Commissioner for Human Rights’, UN Doc A/HRC/38/21, 23 April 2018, 17, recommendation (l) <<https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change>> accessed 20 May 2023.

<sup>21</sup> African Union Commission, ‘Summary Conclusions: Roundtable on Addressing Root Causes of Forced Displacement and Achieving Durable Solutions in Africa’, 9 February 2019, 2 <<https://data2.unhcr.org/en/documents/details/68798>> accessed 25 May 2023.

<sup>22</sup> *ibid* 4 and 5 respectively.

<sup>23</sup> *ibid* 6.

<sup>24</sup> ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ [14] <<https://www.refworld.org/docid/5f75f2734.html>> accessed 3 February 2023.

<sup>25</sup> The workshop was jointly organized by: the Andrew & Renata Kaldor Centre for International Refugee Law, University of New South Wales; Platform on Disaster Displacement; International Organization for Migration; UNHCR; Intergovernmental Authority on Development (IGAD); Centre for Human Rights, University of Pretoria; University of Nairobi; with the support of the Australia Africa Universities Network, France, Germany and GIZ.

<sup>26</sup> ‘Research Agenda For Advancing Law and Policy Responses to Displacement and Migration in the Context of Disasters and Climate Change in Africa’ (n 16) 6.

practice.<sup>27</sup> Of note, refugee law practitioners at the workshop described a lack of interpretive materials on “events seriously disturbing public order” as limiting their ability to advocate for the protection of people who may fall within the definition’s scope, echoing the research of Wood in 2015 when she interviewed advocates, decision makers and other officials working in refugee protection in Kenya and South Africa.<sup>28</sup> Indeed, the desire for further guidance on the interpretation and application of the Article I(2) definition has been repeatedly expressed by decision makers “at all levels of refugee status determination processes in Africa”.<sup>29</sup>

While there is reasonably strong institutional and scholarly recognition that Article I(2) is, or may be, capable of applying in the context of disasters and the adverse effects of climate change, the limited evidence of state practice in Africa is equivocal. The varying positions are discussed in detail in Part 1.2 below. Amidst those actors and scholars who view ESDPO as applying in the context of disasters and the adverse effects of climate change, perspectives are either limited or differ on exactly *when* public order will be practically disturbed and by reference to which societal elements.<sup>30</sup>

In the wake of calls for further guidance, in 2022 UNHCR initiated a three-part project aimed at developing normative guidance on the application of the expanded refugee definition in Article I(2) and, in particular, its ESDPO ground. This paper forms the first stage in that project.

The aim of this paper is to develop and articulate practical guidance that can be used by refugee status decision makers to determine when there has been a serious disturbance to public order, based on a principled, legal analysis of the terms of the Article I(2) refugee definition drawing on evidence of state practice, UNHCR’s existing guidance, and relevant scholarship. This practical guidance takes the form of 1) indicators of a disturbance to public order, and 2) criteria for assessing when that disturbance can be characterised as “serious”. Together, the public order indicators and seriousness criteria are referred to as the “ESDPO indicia” for ease of reference. The ESDPO indicia set out a list of factual indicators and key criteria that can be applied by decision makers across a multitude of circumstances, including in the context of climate change, environmental degradation, disasters, and other drivers of displacement. By providing practical and principled guidance to those applying the Article 1(2) definition in practice, this paper aims to support a more consistent application of regional refugee law among African states.

The second stage of UNHCR’s project will build on this paper by exploring how the ESDPO indicia can be applied in situations involving the adverse effects of climate change, environmental degradation and the impacts of disasters through country case studies in southern Africa. The case study analysis will therefore assist in illustrating and refining the ESDPO indicia and will provide additional guidance on their application in these specific contexts. The third stage of the broader project proposes to see UNHCR develop normative guidance, drawing on the institution’s existing guidance and the outcomes of the first two stages of the project.

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<sup>27</sup> *ibid* 23–24.

<sup>28</sup> Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 OAU Convention’s Expanded Refugee Definition’ (2014) 26 *International Journal of Refugee Law* 555, 577.

<sup>29</sup> See the examples discussed in Tamara Wood, ‘In Search of the African Refugee; a Principled Interpretation of Africa’s Expanded Refugee Definition’ (Unpublished thesis - book publication is forthcoming, University of New South Wales 2018) 71.

<sup>30</sup> See Part 1.2 and the discussion on the meaning of “public order” in Part 4.3.

## 1.2 Current perspectives on the application of the Article I(2) refugee definition in the context of climate change, environmental degradation and the impacts of disasters

There has been increasing recognition by institutional actors and experts that the Article I(2) refugee definition applies to people displaced in the context of the adverse effects of climate change, environmental degradation and the impacts of disasters.<sup>31</sup> While there is some limited state practice supporting the application of the Article I(2) definition in the context of disasters and the adverse effects of climate change, there is insufficient evidence to demonstrate agreement between African States. The various positions are set out below.

As early as 1992, the Africa Group of UNHCR's Executive Committee Working Group on Solutions and Protection were of the view that while "victims of man-made disasters who are at the same time victims of natural disasters" were not explicitly referred to in the 1969 OAU Convention, the Convention's "events seriously disturbing public order" ground could "be construed to cover this category".<sup>32</sup>

Recent examples of institutional support (of varying levels) for the potential application of the Article I(2) definition in the context of the adverse effects of climate change, environmental degradation and disasters include the following:

- In 2018, a study by the UN High Commissioner for Human Rights and the Platform on Disaster Displacement (PDD) recognized that the expanded refugee definitions in the 1969 OAU Convention and the Latin American Cartagena Declaration "could encompass those facing the adverse impacts of climate change, including slow onset events".<sup>33</sup>
- In 2019, participants of the African Union Commission's regional roundtable on addressing root causes of forced displacement and achieving durable solutions in Africa noted that "climate change and environmental disasters can threaten stability and cause displacement", and that the "refugee definition in the 1969 OAU Refugee Convention may allow decision makers to recognize refugee status in the context of climate change".<sup>34</sup> The Summary Conclusions of this roundtable proposed that additional guidance from UNHCR on this point be requested.<sup>35</sup> While not a definite statement of States' interpretation of the Article I(2) refugee definition, this may suggest that many African States' views on the scope of the definition are continuing to evolve to reflect emerging causes of displacement.
- In UNHCR's 2020 Legal Considerations, the Agency unequivocally states that "people displaced by the adverse effects of climate change and disasters can be refugees under regional refugee criteria", including under Article I(2) of the 1969 OAU Convention.<sup>36</sup>
- In 2021, the African Commission on Human and Peoples' Rights highlighted the connection between climate-related forced displacement and States obligations under regional refugee law by reminding States of their treaty obligations and commitments under the 1969 OAU

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<sup>31</sup> 'Research Agenda For Advancing Law and Policy Responses to Displacement and Migration in the Context of Disasters and Climate Change in Africa' (n 16); Wood and Hansen-Lohrey (n 17).

<sup>32</sup> UNHCR, 'Persons Covered by the OAU and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)' 6 April 1992, EC/1992/SCP/CRP.6 [7].

<sup>33</sup> UN Human Rights Council, 'The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants', UN Doc A/HRC/37/CRP4, 22 March 2018 [72]. See also UN Human High Commissioner for Human Rights (n 20) [26].

<sup>34</sup> African Union Commission (n 21) 4 and 6 respectively.

<sup>35</sup> *ibid* 6 (original emphasis).

<sup>36</sup> 'Legal Considerations 2020' (n 24) [14].

Convention in a resolution on “Climate Change and Forced Displacement in Africa”.<sup>37</sup> This resolution also called on States to take “action to address forced displacement due to climate change” and to “continue making progress promoting the rights of people displaced by the climate crisis”.<sup>38</sup>

- In 2022, the UN Special Rapporteur on the Human Rights of Migrants noted that the adoption of broader refugee definitions in Africa and Latin America increases “the possibility of refugee status and protections applying to persons displaced by climate change” on the basis of the events seriously disturbing public order ground.<sup>39</sup>

The weight of scholarly opinion considers that the Article I(2) refugee definition provides protection to people fleeing the adverse effects of climate change, environmental degradation and the impacts of disasters where they seriously disturb public order. While some literature – most notably from Edwards,<sup>40</sup> Rankin<sup>41</sup> and Mandal<sup>42</sup> writing in the early 2000s – argued that serious disturbances to public order must be caused by “human-made” acts or omissions, scholarly views now align with the increasing recognition of the complex and multi-causal character of displacement. Today, the majority of both anglophone and francophone scholarship on the Article I(2) refugee definition supports the view that the phrase “events seriously disturbing public order” applies to the adverse effects of climate change, environmental degradation and the impacts of disasters.<sup>43</sup> Okoth-Obbo notes, “the source of danger need not be the actions of a State or its agents”, emphasising the

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<sup>37</sup> African Commission on Human and Peoples’ Rights, ‘Resolution on Climate Change and Forced Displacement in Africa’ ACHPR/Res. 491 (LXIX)2021 (31 December 2021) [1].

<sup>38</sup> African Commission on Human and Peoples’ Rights, ‘Resolution on Climate Change and Forced Displacement in Africa’ ACHPR/Res. 491 (LXIX)2021 (31 December 2021) [3] and [5] respectively.

<sup>39</sup> ‘Report of the Special Rapporteur on the Human Rights of Migrants’, A/77/189, 19 July 2022 [20] and [65] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/431/49/PDF/N2243149.pdf?OpenElement>> accessed 25 October 2022.

<sup>40</sup> Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204, 225–227.

<sup>41</sup> Micah Bond Rankin, ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal on Human Rights* 406, 429.

<sup>42</sup> Ruma Mandal, ‘Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)’ 13–14 <<https://www.unhcr.org/435df0aa2.pdf>> accessed 20 May 2023.

<sup>43</sup> Notable examples in English include: Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, ‘The Protection of Climate Refugees under the African Human Rights System: Proposing a Value-Driven Approach’ 3 *African Human Rights Yearbook* 242; Adeola (n 17); Abiy Ashenafi, ‘Protecting Persons Displaced Due to the Impacts of Climate Change in Africa: Through a New Treaty, or through a “Progressive” Interpretation?’ (*africanlegalstudies.blog*, 30 April 2022) <<https://africanlegalstudies.blog/2022/04/30/protecting-persons-displaced-due-to-the-impacts-of-climate-change-in-africa-through-a-new-treaty-or-through-a-progressive-interpretation/>> accessed 30 March 2023; Sam Huckstep and Michael Clemens, ‘Climate Change and Migration: An Omnibus Overview for Policymakers and Development Practitioners’ (2023) 67 <<https://www.cgdev.org/publication/climate-change-and-migration-omnibus-overview-policymakers-and-development>> accessed 14 May 2023; Walter Kälin and Nina Schrepfer (n 3) 88 here, Kälin observes that sudden onset disaster could seriously disturb public order; Ana Martin Gil and others, ‘How Can We Protect “Climate Refugees”?’ (*Baker Institute*, 13 October 2022) <<https://www.bakerinstitute.org/research/how-can-we-protect-climate-refugees>> accessed 25 October 2022; Gugulethu Mkwanzani, ‘Conceptualising Poverty as a Ground for Refugee Status under the 1969 OAU Refugee Convention’ (Mini Dissertation (LLM)–University of Pretoria, University of Pretoria 2018) <<http://hdl.handle.net/2263/69928>> accessed 15 May 2023; Gino J Naldi, *The Organization of African Unity; An Analysis of Its Role* (2nd edn, Mansell 1999) 79–80; MR Rwelamira, ‘Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa’ (1989) 1 *International Journal of Refugee Law* 557, 588 however there is some internal inconsistency in Rwelamira article on this point; Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (Oxford University Press 2018) 54; Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 243; Wood, ‘In Search of the African Refugee’ (n 29) 205; Notable examples in the French literature include: Christel Cournil, ‘Les Réfugiés Écologiques. Quelle(s) Protection(s), Quel(s) Statut(s) ?’ [2006] *Revue du droit public et de la science politique en France et à l’étranger* 1035, 1044; Charlotte Huteau, ‘Le Déplacement En Zones Côtières : Entre Anticipation et Gestion Des Risques Naturels : Perspectives Juridique’ (Université de La Rochelle 2016) 185 <<https://theses.hal.science/tel-01661389/document>> accessed 5 May 2023; Dorothee Lobry, ‘Une étude juridique des crises humanitaires résultant de catastrophes climatiques : l’exemple du continent africain’ (2012) 65 *Les Cahiers d’Outre-Mer. Revue de géographie de Bordeaux* 537; Pierre-François Mercure, ‘À La Recherche d’un Statut Juridique Pour Les Migrants Environnementaux Transfrontaliers: La Problématique de La Notion de Réfugié’ [2006] *Revue de Droit Université de Sherbrooke* 1, 34 Mercure’s view is that the expanded refugee definition does not apply to slow-onset disasters; Michèle Morel and Nicole de Moor, ‘Migrations Climatiques: Quel Rôle Pour Le Droit International?’ (2012) 88 *Cultures Conflits* 61.

“wideness of the definition”.<sup>44</sup> While several scholars emphasize that it is the impacts of events and not their cause that is the key consideration, some others explicitly argue that the concept of “public order” includes fundamental societal values that require protection of the environment (described as “ecological public order”<sup>45</sup>) and that public order will be disturbed where there is a serious violation of the human right to a healthy environment.<sup>46</sup> Interpreting the Article I(2) definition as capable of applying to people fleeing in the context of the adverse effects of climate change and disasters has also been said to align with the broader values-based approach of pan-African solidarity, cooperation and communitarianism that underpins the African human rights system.<sup>47</sup>

Beyond a broad consensus that the Article I(2) definition can apply in the context of the adverse effects of climate change and disasters, scholars diverge on the exact scope of the phrase “events seriously disturbing public order” and how it should be assessed in practice.<sup>48</sup>

State practice on the application of the 1969 OAU Convention in the context of the adverse effects of climate change, environmental degradation and disasters is both limited and mixed. Ethiopia and Kenya previously recognized Somalis fleeing famine and drought in 2011 and 2012 as refugees on the basis of the “events seriously disturbing public order” ground.<sup>49</sup> As part of the Nansen Initiative’s Global Consultation in 2015, Ethiopia expressed the view that the Article I(2) refugee definition includes people compelled to leave their countries “due to natural disasters”.<sup>50</sup> Angola has domestic laws which authorise the grant of refugee status to groups of people who leave countries bordering on Angola “as a result of serious armed conflicts, occupation or foreign domination of its national territory or natural disasters”.<sup>51</sup> On the other hand, South Africa has previously indicated that it does not consider as refugees people fleeing their countries of origin solely for reasons of poverty or other social or economic hardships or “environmental disasters”.<sup>52</sup> This statement was, however, made in 1998 and since that time there has been an increasing recognition that disasters are not “natural” but are the combined effects of natural hazards and human elements which cause a “serious disruption of the functioning of a community or a society at any scale”.<sup>53</sup> While there has been one case of the Refugee Appeal Board in South Africa rejecting a claim to refugee status on the basis of, among other things, flooding in the applicants’ home country, the applicant did not contest that issue in their appeal to the Supreme Court.<sup>54</sup> Finally, where the adverse effects of climate change, environmental degradation and disasters interact with drivers of displacement such as conflict and violence (so-called “nexus” situations), analysis suggests that States are more willing to accept the Article I(2) refugee definition’s applicability.<sup>55</sup>

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<sup>44</sup> Okoth-Obbo (n 7) 112, para 71.

<sup>45</sup> Most notably in the work of Lobry: Dorothée Lobry, ‘Pour Une Définition Juridique Des Réfugiés Écologiques: Réflexion Autour de La Qualification Juridique de l’atteinte à l’environnement’ [2008] *Revue Asylon(s)* <<http://www.reseau-terra.eu/article846.html>> accessed 24 May 2023. See also Huteau (n 43) 185, relying on the work of Charles-André Dubreuil.

<sup>46</sup> Lobry (n 45) Part II(A)(1).

<sup>47</sup> Addaney, Jegede and Matinda (n 43) 253.

<sup>48</sup> In particular regarding scholars’ interpretations of “public order”, as discussed in Part 4.3.

<sup>49</sup> Weerasinghe (n 12) 78–79.

<sup>50</sup> *ibid* 70.

<sup>51</sup> David James Cantor and Farai Chikwanha, ‘Reconsidering African Refugee Law’ (2019) 31 *International Journal of Refugee Law* 192, 233.

<sup>52</sup> Republic of South Africa, ‘Draft Refugee White Paper for Refugee Affairs (South Africa)’ para 2.6 <<https://www.gov.za/documents/refugee-white-paper-draft>> accessed 20 May 2023.

<sup>53</sup> UN Office for Disaster Risk Reduction, ‘Terminology > Disaster’ <<https://www.undrr.org/terminology/disaster>> accessed 20 May 2023 discussed in Part 2.1 below.

<sup>54</sup> *Rahim v The Minister of Home Affairs* (965/2013) [2015] ZASCA 92 [26].

<sup>55</sup> See the discussion in Weerasinghe (n 12) Part 5.3.1. This is further discussed in Part 4.1 of the present paper.

Outside of the 1969 OAU Convention context, there has been growing recognition by African States of the need to protect people displaced in the context of climate change, environmental degradation and disasters. Thirty-three African States have committed to taking measures to protect and assist people “who have been internally displaced due to natural or human made disasters, including climate change” under the 2009 Kampala Convention on Internally Displaced People (IDPs).<sup>56</sup> In a free movement protocol adopted in 2020 in East Africa, Members States of the Intergovernmental Authority on Development (IGAD) recognized the contribution that “drought and disasters, as well as the adverse effects of climate change and environmental degradation” make to displacement and migration in the region, and committed to allowing free movement and registration of people moving “in anticipation of, during or in the aftermath of disaster”, and the facilitation of extended stays where return is not possible in the context of disaster.<sup>57</sup> While these are not refugee law treaties, they form part of the broader normative environment of the 1969 OAU Convention and, as such, are relevant to informing the Convention’s terms.<sup>58</sup>

### 1.3 Scope and structure of the paper

The above overview of current perspectives on the application of the Article I(2) refugee definition in the context of the adverse effects of climate change, environmental degradation and disasters shows a recognition from UNHCR and most scholars that the definition is capable of applying in such contexts, while a number of other actors recognise the potential for the definition to do so. This recognition is mostly expressed, however, at a high level and without detailed guidance on the specific practical circumstances in which the definition will apply. It is also clear from Part 1.2 that the limited evidence of state practice is equivocal. In this context, and given the limited availability of state practice on the 1969 OAU Convention generally,<sup>59</sup> the need for practical guidance based on a principled interpretation of the Article I(2) definition becomes even more apparent.

As noted earlier, this paper’s main focus is the interpretation and application of “events seriously disturbing public order” under Article I(2) of the 1969 OAU Convention, in accordance with international law rules. Drawing on legal analysis, the paper articulates a set of factual indicia that

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<sup>56</sup> Preamble and Article V(4) respectively, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), [2009] (entered into force 6 December 2012). The Kampala Convention has been signed by 40 African states, and ratified by 33 states as at November 2022 according to Yolanda Centre for Human Rights, University of Pretoria, ‘Advocacy Brief: A Call on African States to Ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)’ (17 November 2022) <<https://www.chr.up.ac.za/migration-news/3180-advocacy-brief-a-call-on-african-states-to-ratify-the-african-union-convention-for-the-protection-and-assistance-of-internally-displaced-persons-in-africa-kampala-convention>> accessed 1 April 2023. The Kampala Convention also defines IDPs as persons or groups who have been forced to flee as a result of, amongst other things, “natural or human-made disasters” (Art I(k)), with article IV(4)(f) prohibiting the arbitrary displacement of people in “[f]orced evacuations in cases of natural or human made disasters”. There is a growing body of scholarship on the application of the Kampala Convention in the context of climate-related displacement; see for example: AO Jegede, ‘Indigenous peoples, climate migration and international human rights law in Africa, with reflections on the relevance of the Kampala Convention’ in F Crépeau & B Mayer (eds) *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar, 2017) 169-189; Romola Adeola, ‘Climate Change, Internal Displacement and the Kampala Convention’ (*Africa Portal*, Policy Briefing Paper, May 2020) <[https://africaportal.org/wp-content/uploads/2023/06/Adeola\\_-\\_Final.pdf](https://africaportal.org/wp-content/uploads/2023/06/Adeola_-_Final.pdf)> accessed 1 June 2023.

<sup>57</sup> Protocol on Free Movement of Persons in the IGAD Region, adopted 26 February 2020, art 16 <<https://environmentalmigration.iom.int/sites/environmentalmigration/files/Final%20IGAD%20PROTOCOL%20ENDORSED%20BY%20IGAD%20Ambassadors%20and%20Ministers%20of%20Interior%20and%20Labour%20Khartoum%2026%20Feb%202020.pdf>> accessed 1 December 2022. The Protocol was endorsed by all seven active IGAD states.

<sup>58</sup> As such, these instruments provide contextual interpretive value under the principle of systemic integration reflected in international law rules for the interpretation of treaties, per VCLT art 31(3)(c); see Martti Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission - Finalized by Martti Koskenniemi’, (2006) UN Doc A/CN.4/L.682 (13 April 2006) [413].

<sup>59</sup> See Part 3.5.1.

can be used by refugee decision makers to assess whether a serious disturbance to public order exists in practice (the ESDPO indicia).

Despite being developed in the context of UNHCR's broader project which aims to ultimately develop normative guidance on displacement in connection with the adverse effects of climate change, environmental degradation and the impacts of disasters, the ESDPO indicia are capable of applying to all situations of displacement. This includes displacement from events involving the adverse effects of climate change, as well as other, more traditional drivers of displacement, such as conflict, violence and serious human rights violations, and so-called "nexus" situations which involve a combination of drivers. There are two main reasons for this: one is a question of fact, the other is a matter of legal interpretation.

Firstly, it is not always possible to clearly identify whether a particular disturbance to public order has been caused by the adverse effects of climate change, environmental degradation or the impacts of disasters, given the unstable, and often multi-causal, nature of some disturbances.<sup>60</sup> Even where it is possible, experts now recognise that these adverse effects are the result of a complex combination of environmental, social, economic and other elements (and are not, therefore, "natural").<sup>61</sup> As such, an assessment of an individual's refugee protection needs should focus on a careful evaluation of the effects of the events on public order within a society.<sup>62</sup> This is further explored in Part 2. Part 2.1 frames the paper by beginning with a section on key terminology relating to climate change, environmental degradation and disasters. Part 2.2 then highlights the factual complexity surrounding issues of causation, and why it is important to focus on the effects of climate change, environmental degradation and disasters on a society rather than their origins.

The second reason why the ESDPO indicia are capable of applying to all situations of displacement is that this conclusion is supported by a principled interpretation of the Article I(2) refugee definition. By applying established rules for the interpretation of treaties, it is apparent that the Article I(2) definition requires a factual assessment of a serious disturbance to public order, not its specific origins or causes. Indeed, a principled interpretation suggests that the Article I(2) definition should be applied in an equal and consistent manner to people seeking protection across all contexts, without excluding certain categories of disturbing events.<sup>63</sup> Part 3 of the paper outlines the methodology required for a principled interpretation of the Article I(2) refugee definition under international law. Part 4 applies that methodology in a substantive and rigorous legal analysis of each of the key components of the 1969 OAU Convention's Article I(2) refugee definition, with a predominant focus on the phrase "events seriously disturbing public order". Drawing on the analysis in Part 4, Part 5 sets out the ESDPO indicia – that is, the factual indicators for identifying a disturbance to public order, and criteria for assessing when that disturbance can be characterized as "serious" – with accompanying guidance on their application.

What the above points demonstrate is that not every person displaced in the context of the adverse effects of the climate change, environmental degradation and disasters will qualify for protection under the 1969 OAU Convention. Rather, ESDPO ought to be assessed in a principled and consistent

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<sup>60</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Protection' 6 and 15 <<https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>>; Huckstep and Clemens (n 43) 10.

<sup>61</sup> As discussed in Parts 2.1- 2.2.

<sup>62</sup> Discussed in Parts 2.2 and 4.1.

<sup>63</sup> See, in particular, the analysis in Part 4.1 of this paper.



manner across all situations, and without any different or special rules for situations based on their nature or cause (i.e., whether related to climate change, conflict or any other cause). Thus, while previous analyses of this issue have focused on whether or not disasters or climate change-related events can be ESDPO, this paper focus on how to determine whether ESDPO exist, irrespective of whether they result from natural hazards, disasters, conflict or other drivers.

Finally, it must be noted that even where ESDPO is determined to exist in a person's home country, this alone will not qualify them for protection as a refugee. All refugee claimants will also need to meet the other criteria for refugee status set out in Article I(2), including that they are "compelled to leave [their] place of habitual residence" *owing to* that serious disturbance (the "individual component"). Both the collective and individual components must therefore be met for the Article I(2) refugee definition to apply.

## 2. UNDERSTANDING THE ADVERSE EFFECTS OF CLIMATE CHANGE, ENVIRONMENTAL DEGRADATION AND DISASTERS IN THE CONTEXT OF THE 1969 OAU CONVENTION

### 2.1 Terminology

The concepts of "disasters", "environmental degradation" and "climate change" are central to UNHCR's broader project and are discussed throughout this paper. Noting that these terms do not have universally agreed definitions, for the purposes of this paper the following definitions are adopted.

- The UN Office for Disaster Risk Reduction (UNDRR) defines a **disaster** as a "serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts".<sup>64</sup>
- Similarly, the International Law Commission's *draft articles on the protection of persons in the event of disasters* define disaster to mean: "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society".<sup>65</sup>
- The UNDRR defines a **hazard** as a "process, phenomenon or human activity that may cause loss of life, injury or other health impacts, property damage, social and economic disruption or environmental degradation".<sup>66</sup> Natural hazards can be biological (e.g. epidemics, insect infestation and dangerous wildlife), environmental (e.g. environmental degradation, air, water or soil pollution), geological/geophysical (e.g. earthquakes, volcanoes, rock landslides), hydrometeorological (e.g. tropical cyclones, flash floods, drought, heatwaves, and storm surges) or technological (e.g. industrial pollution, nuclear radiation, toxic waste, factory explosions, transport accidents) in nature.<sup>67</sup>

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<sup>64</sup> UN Office for Disaster Risk Reduction (n 53).

<sup>65</sup> International Law Commission, 'Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries' (2016) Vol II, Part Two Yearbook of the International Law Commission, 2016, 25, draft art 3(a).

<sup>66</sup> UN Office for Disaster Risk Reduction, 'Terminology > Hazard' <<https://www.undrr.org/terminology/hazard>> accessed 20 May 2023.

<sup>67</sup> *ibid.*

- The **impact of a disaster** includes “the total effect, including negative effects (e.g., economic losses) and positive effects (e.g., economic gains), of a hazardous event or a disaster. The term includes economic, human and environmental impacts, and may include death, injuries, disease and other negative effects on human physical, mental and social well-being”.<sup>68</sup>
- Disasters may be characterized in different ways, including as follows:<sup>69</sup>
  - A **slow-onset disaster** is defined as “one that emerges gradually over time. Slow-onset disasters could be associated with, e.g., drought, desertification, sea-level rise, epidemic disease”.
  - A **sudden-onset disaster** is “one triggered by a hazardous event that emerges quickly or unexpectedly. Sudden-onset disasters could be associated with, e.g., earthquake, volcanic eruption, flash flood, chemical explosion, critical infrastructure failure, transport accident”.
- **Environmental degradation** refers to “the deterioration of the environment through depletion of resources such as air, water and soil, and the destruction of ecosystems and the extinction of wildlife. It is defined as any change or disturbance to the environment perceived to be deleterious or undesirable”.<sup>70</sup>
- **Climate change** is defined in the UN Framework Convention on Climate Change (UNFCCC) to mean “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.<sup>71</sup> The UNFCCC also defines **adverse effects of climate change** to mean “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare”.<sup>72</sup>

The definitions above highlight that disasters and climate change are not “natural” events that are neatly distinguishable from “human-made” events. Instead, disasters and climate change can involve a complex interaction between a number of environmental, economic, social and other factors which, together, contribute to a disaster, environmental degradation and/or climate change.<sup>73</sup> It is now understood that disasters are “deeply social”<sup>74</sup> and that the scale of the impact of a disaster often depends on issues such as a community’s adaptive capacity, disaster resilience and resources. In order to understand the ways in which the adverse effects of climate change, environmental degradation and disasters can impact a society and seriously disturb its public order, it is therefore important to avoid blanket characterisations that reinforce traditional dichotomies between “natural” and “man-made” disasters.

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<sup>68</sup> UN Office for Disaster Risk Reduction (n 53).

<sup>69</sup> *ibid.*

<sup>70</sup> UN Economic and Social Commission for Western Asia, ‘Environmental Degradation’ <<https://archive.unescwa.org/environmental-degradation>> accessed 25 May 2023. A similar definition is found in Chris Park, *A Dictionary of Environment and Conservation* (1st edn, Oxford University Press) ‘Environmental Degradation’.

<sup>71</sup> United Nations Framework Convention on Climate Change, opened for signature 21 March 1994, 1771 UNTS 107 (entered into force 21 March 1994) art 1(2). This is also the definition adopted by UNHCR, ‘Master Glossary of Terms’ <<https://www.unhcr.org/glossary/>> accessed 24 May 2023.

<sup>72</sup> UNFCCC (n 71) art 1(1).

<sup>73</sup> For a helpful discussion on the difficulties of defining a ‘disaster’ and the inaccuracy of referring to ‘natural’ disasters see Giulio Bartolini, ‘A Taxonomy of Disasters’ in Flavia Zorzi Giustiniani and others (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

<sup>74</sup> See for example Matthew Scott, ‘Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change’ (2016) 35 *Refugee Survey Quarterly* 26; Caitlin Sturridge and Kerrie Holloway, ‘Climate Change, Conflict and Displacement: Five Key Misconceptions’ (*ODI: Think change*, 5 September 2022) <<https://odi.org/en/publications/climate-change-conflict-and-displacement-five-key-misconceptions/?lctg=103128259>> accessed 9 September 2022.

## 2.2 Focusing on the effects of climate change, environmental degradation and disasters rather than their origins

The relationship between the adverse effects of climate change, environmental degradation and disasters on the one hand and human mobility on the other is complex, and identifying clear causal links between the two is often difficult.<sup>75</sup> As the Intergovernmental Panel on Climate Change states, the impacts of climatic drivers on migration are “highly context-specific and interact with social, political, geopolitical and economic drivers”.<sup>76</sup>

In recognition of the deeply social, complex and multi-causal<sup>77</sup> nature of disasters, there is increasing emphasis on the need for refugee protection to focus on the social and political characteristics of the effects and impacts of climate change, environmental degradation and disasters and how they interact with other drivers of displacement.<sup>78</sup> This paper’s focus is not, therefore on whether disasters or the adverse impacts of climate change are *in themselves* ESDPO, but instead on assessing the *effects* such conditions have on people and societies (and thus public order) – which is more relevant in the determination of international protection needs. For example, the effects of climate change and disasters can overwhelm state resources due to their severity or can act as threat multipliers by amplifying pre-existing vulnerabilities within a society.<sup>79</sup> Movement of people away from areas impacted by disasters and competition over scarce natural resources may, for example, lead to conflict or exacerbate existing tensions.<sup>80</sup> Access to water is foreshadowed to potentially be the “single biggest cause of conflict and war in African in the next 25 years”.<sup>81</sup>

The adverse effects of climate change, environmental degradation and disasters can therefore exacerbate violence, conflict and instability in a society, while also diminishing the State’s capacity to protect its population from harm.<sup>82</sup> This is especially the case where government institutions and structures are already weak and the capacity of the State to prevent and respond to the adverse impacts is limited.<sup>83</sup> In East Africa, for example, communities’ capacity to cope with the impacts of

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<sup>75</sup> UN High Commissioner for Human Rights 2018 report (n 18) [8]-[9].

<sup>76</sup> IPCC, ‘Climate Change 2022: Impacts, Adaptation and Vulnerability; Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ (2022) 52 <[https://report.ipcc.ch/ar6/wg2/IPCC\\_AR6\\_WGII\\_FullReport.pdf](https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf)> accessed 25 May 2023. Indeed, the extent to which we can identify when displacement is caused by the effects of climate change or the impacts of disasters is the subject of much commentary and controversy: for example, Ingrid Boas, ‘“Climate Mobility” Is a Proper Subject of Research and Governance’ in Alexander Zahar and Benoit Mayer (eds), *Debating Climate Law* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/debating-climate-law/climate-mobility-is-a-proper-subject-of-research-and-governance/D3296B3B582229DFE7D7011DA5FFF279>> accessed 9 February 2023; Calum TM Nicholson, ‘Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration’ (2014) 180 *The Geographical Journal* 151; Huckstep and Clemens (n 43) 70–71.

<sup>77</sup> See, for example, the Report of the Office of the United Nations High Commissioner for Human Rights, Summary of the Panel Discussion on Human Rights, Climate Change, Migrants and Persons Displaced across International Borders, UN Doc A/HRC/37/35, 14 November 2017 [12].

<sup>78</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [5].

<sup>79</sup> UN Security Council Report, *Research Report: The UN Security Council and Climate Change* (June 2021), 7 <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/climate\\_security\\_2021.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/climate_security_2021.pdf)> 25 May 2023; ‘Climate Change “a Multiplier Effect”, Aggravating Instability, Conflict, Terrorism, Secretary-General Warns Security Council’ (*UN Press*, 9 December 2021) <<https://press.un.org/en/2021/sgsm21074.doc.htm>> accessed 13 May 2023; Jane McAdam, ‘Displacement in the Context of Climate Change and Disasters’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 833. The ‘complex interrelationship between migration and development’ was recognized by states in the *New York Declaration for Refugees and Migrants*, UN Doc. A/RES/71/1, Resolution adopted by the General Assembly on 19 September 2016, para 3.

<sup>80</sup> See IPCC, ‘Climate Change 2014: Impacts, Adaptation, and Vulnerability: Part B Regional Aspects’ 1175 <[https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartB\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartB_FINAL.pdf)> accessed 20 May 2023.

<sup>81</sup> Report of the Office of the United Nations High Commissioner for Human Rights (n 77) [21].

<sup>82</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [11].

<sup>83</sup> *ibid* [1] and [11].

drought and flooding is low due to “high levels of poverty, fragile contexts and the existence of various violent conflicts in many parts of the region”, which has a direct effect on agricultural production, food security and access to basic services.<sup>84</sup> As Wood notes:

the disproportionately severe impact of the 2011 Horn of Africa drought in Somalia, when compared with neighbouring states, clearly illustrates the interrelationship between environmental hazards and socio-political factors, including conflict, insecurity and government capacity.<sup>85</sup>

The adverse effects of climate change, environmental degradation and disasters may be felt through one-off events, or through a cumulative effect of recurring or varied contributing factors. For example, a sudden-onset disaster, such as a tsunami, earthquake, flooding, tornado or volcanic eruption, may immediately impact the provision of basic government services, public infrastructure and the capacity of the authorities to maintain peace, safety and security. However, the adverse effects of climate change and environmental degradation may also be felt more gradually over time through slow-onset events such as drought, desertification, sea-level rise and diseases, whose impacts can be cumulative in nature.

The capacity of a State to prevent and respond to the adverse effects of climate change, environmental degradation and the impacts of disasters has a significant influence on the potential for displacement. While in many cases of cross-border disaster displacement the country of origin is willing to assist and protect people affected, including by recourse to the assistance of the international community,<sup>86</sup> this will not always be the case. Where a State is unwilling or unable to ensure the basic humanitarian needs of a community, a person affected may be entitled to the protection of other States.<sup>87</sup> It is not, therefore, the disaster or effects of climate change *per se* that gives rise to refugee protection, but the inadequacy of State protection in response to the adverse effects of such events that is central to determining refugee protection under the 1969 OAU Convention.<sup>88</sup>

### 3. INTERPRETING THE 1969 OAU CONVENTION: METHODOLOGY

The 1969 OAU Convention is a binding treaty, the contents of which reflect the agreement of the State parties regarding who is a refugee in Africa.<sup>89</sup> As such, the 1969 OAU Convention must be interpreted in accordance with established rules for the interpretation of treaties. Under international law, the interpretation of treaty terms must be undertaken by reference to the rules set out in the 1969 Vienna Convention on the Law of Treaties (VCLT).<sup>90</sup> However, the current “dearth in research analyzing the

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<sup>84</sup> GIZ, ‘Climate Change Impacts on Human (Im-) Mobility in Sub-Saharan Africa: Recent Trends and Options for Policy Responses’ (*ReliefWeb*, 30 July 2020) 21 <<https://reliefweb.int/report/world/climate-change-impacts-human-im-mobility-sub-saharan-africa-recent-trends-and-options>> accessed 25 May 2023.

<sup>85</sup> Wood, ‘In Search of the African Refugee’ (n 29) 203–4.

<sup>86</sup> Walter Kälin and Nina Schrepfer (n 3) 32. States’ obligations to accept international assistance stem from article 2(1) of the International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 18 July 1978).

<sup>87</sup> In the context of the 1951 Convention, see the detailed discussion in Scott (n 74); also Sturridge and Holloway (n 74).

<sup>88</sup> See McAdam (n 79) 836. Here, it should be noted that the focus of this paper is on States’ refugee protection obligations under the 1969 OAU Convention only and that, while important, questions of States’ broader responsibility for climate change are not (presently) the core concern of refugee law, which is instead directed at the risk to the individual in their home country and whether or not they can obtain effective protection from that risk in their home country.

<sup>89</sup> Cantor and Chikwanha describe the OAU Convention as ‘codif[ying] a particular regional approach to refugee problems in Africa’: Cantor and Chikwanha (n 51) 183.

<sup>90</sup> Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[expanded] refugee definition in accordance with the rules of treaty interpretation articulated in the VCLT” has been recognized as a particular concern.<sup>91</sup>

The VCLT rules reflect customary international law; a fact that has been recognized by the International Court of Justice as well as several international courts and tribunals.<sup>92</sup> As a reflection of customary international law, the VCLT rules are binding on all States, regardless of whether the State in question has ratified the VCLT. Further, as the VCLT reflects customary international law that existed prior to its adoption, the time at which a treaty is entered into does not affect the applicability of the VCLT rules. Thus, as a matter of law, State parties to the 1969 OAU Convention – which was adopted a few months after the VCLT but entered into force long before it<sup>93</sup> – are bound to apply the VCLT rules to the interpretation of the 1969 OAU Convention’s terms.

The use of established legal rules for interpretation as found in the VCLT helps to protect against an arbitrary approach which could jeopardize the legality and predictability of refugee decision making, and accords with the fundamental legal principle that like cases should be treated alike.<sup>94</sup> Importantly, this goal is reflected in the text of the 1969 OAU Convention itself, which recognizes the desire of State parties “to establish common standards for [refugees’] treatment”.<sup>95</sup>

Correctly understood, the VCLT rules both limit and empower the interpretation of treaty terms to accord with the intention of the parties (an intention that is to be objectively determined through the treaty text itself<sup>96</sup>). Where the intention of the parties is the protection of people in changing and evolving circumstances that cause cross-border displacement, as in the case of the 1969 OAU Convention, the application of the VCLT rules merely facilitates that intention and promotes the effective implementation of the treaty. These rules are found in articles 26, 27, and 31 – 33 of the VCLT. Article 26 emphasises the obligation of States to perform their treaty obligations in good faith, which requires that they act honestly, fairly and reasonably, and in a manner that does not intentionally seek to ‘read down’ a state’s obligations, contrary to the inclusive protection-oriented purpose of the OAU Convention. Article 27 provides that a State cannot rely on its domestic laws to justify its failure to perform its obligations under a treaty. Together, articles 26 and 27 require that while a State might legislate to expand on its obligations under the OAU Convention, it cannot legislate to restrict them.

VCLT article 31 sets out the general rule of interpretation which provides that treaty terms must be interpreted in good faith in accordance with the ordinary meaning to be given to those terms in their context and in light of the treaty’s object and purpose. Paragraph 2 of article 31 describes what is included in the “context” of the treaty, with paragraph 3 outlining what must be taken into account

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<sup>91</sup> Weerasinghe (n 12) 101. Tamara Wood’s detailed analysis of the Article I(2) definition by reference to the VCLT rules is a notable exception; for example, see: Wood, ‘Who Is a Refugee in Africa?’ (n 13).

<sup>92</sup> For example, *LaGrand Case (Germany v United States of America) Judgment of 27 June [2001] ICJ Reports 466, [99] and [101]*. For a discussion of relevant jurisprudence on this point see Richard K Gardiner, *Treaty Interpretation* (2nd ed, Oxford University Press 2015) 7, and 16–19; also Oliver Dörr, ‘Article 31’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer Berlin Heidelberg 2018) 562–563.

<sup>93</sup> The VCLT opened for signature in May 1969 but did not enter into force until January 1980. By contrast, the OAU Convention was adopted in September 1969 and entered into force in June 1974.

<sup>94</sup> James C. Simeon, ‘Moving Refugee Protection from Regional Divergence to International Convergence’ (*Canadian Association for Refugee and Forced Migration Studies (CARFMS / ACERMF*), 25 April 2021) <<https://carfms.org/fr/moving-refugee-protection-from-regional-divergence-to-international-convergence/>> accessed 18 May 2022; Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill Nijhoff 2020) 191-192; Wood, ‘Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts’ (n 122) 26.

<sup>95</sup> OAU Convention, preambular paragraph 9.

<sup>96</sup> Gardiner (n 92) 466–467.

together with the context. The general rule of interpretation in article 31 is the starting point for the interpretation of all treaty terms,<sup>97</sup> and contains several elements that must be “thrown into the crucible” with the interaction of those elements resulting in a “legally relevant interpretation”.<sup>98</sup> In other words, there is no hierarchy of application of the elements of article 31, which are intended to have “a single combined operation”.<sup>99</sup> Article 32 complements the general rule in article 31 and provides that supplementary materials may be used to either a) confirm the meaning resulting from the application of article 31, or b) determine the meaning where the application of article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Article 33 has a particular role to play where the interpretation of multilingual treaties reveals a divergence of meanings between the treaty texts, as is the case for the term “public order” within the Article I(2) refugee definition. For this reason, there is greater substantive consideration of the term “public order” in the application of the VCLT rules.

Four elements of the VCLT rules in articles 31-33 play a particularly important role for the interpretation of the Article I(2) refugee definition:<sup>100</sup> object and purpose; the ordinary meaning of the treaty terms; comparative treaty interpretation; and reconciling differences in multilingual treaty terms.<sup>101</sup> These are discussed in turn below.

### 3.1 Object and purpose

Reading the 1969 OAU Convention as a whole, a number of provisions point to the primary object and purpose of the Convention being the humanitarian protection of refugees.<sup>102</sup> The first paragraph of the 1969 OAU Convention’s preamble notes the States parties’ desire to alleviate the “misery and suffering” of refugees and of “providing them with a better life and future”. The 1969 OAU Convention goes on in the second preambular paragraph to recognize “the need for an essentially humanitarian approach towards solving the problems of refugees”. A secondary object and purpose may also be identified from a number of provisions in the 1969 OAU Convention, being the prevention of internal subversion and the aim of safeguarding friendly relations between States.<sup>103</sup> The 1969 OAU Convention’s primary object and purpose of the humanitarian protection of refugees must influence the interpretation of its treaty terms, as will its secondary purpose to the extent that it is relevant and does not conflict with the primary purpose.

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<sup>97</sup> Though it should be emphasised that it is *only* a starting point, with articles 32 and 33 also being particularly relevant, as are customary international law interpretive maxims when not in conflict with the VCLT rules.

<sup>98</sup> International Law Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) II Yearbook of the International Law Commission 1966 187, 219–220.

<sup>99</sup> *ibid* 219. Most recently recognized by the International Court of Justice in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, [1994] ICJ Reports 6 [78].

<sup>100</sup> The drafting history of the treaty is not discussed in any depth given that there are no *travaux préparatoires* of the OAU Convention. For a comprehensive discussion on the broader drafting history see Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) Ch 2; Ivor C. Jackson (n 14) 177–194.

<sup>101</sup> The analysis in Part 3 represents the abridged conclusions of a doctoral thesis that applied these elements to the phrase ‘events seriously disturbing public order’ in Article I(2) of the OAU Convention.

<sup>102</sup> Including: article I(2) (expanded refugee definition), article II(2) (principle of asylum), article II(3) (protection against *refoulement*), article V (voluntary repatriation), article VI (right to travel documents), and noting that refugee under the OAU Convention are entitled to refugee rights under the 1951 Convention, given the former instruments’ complementary character: Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 38.

<sup>103</sup> Most prominently: preambular paragraphs 3-5; article II(2) which emphasises that “the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State”; article II(4)’s burden sharing provision references “the spirit of African solidarity and international co-operation”; and article III’s prohibition on subversive activities, which provides in paragraph 1 that refugees have a duty to “abstain from any subversive activities against any Member State of the OAU”. See also the discussion in Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) Ch 2.

The humanitarian object and purpose of the 1969 OAU Convention supports an evolutionary approach to interpretation,<sup>104</sup> as does the wording of the Article I(2) definition, given its lack of temporal limitations.<sup>105</sup> Further, the definition's use of broad and undefined terms suggests an intention by the drafters to provide "a flexible and pragmatic solution to the protection of asylum-seekers and refugees".<sup>106</sup> While the 1969 OAU Convention has no formal *travaux préparatoires*,<sup>107</sup> as Adeola notes:

At the time of the development of the OAU 1969 Refugee Convention, African States were mindful of the wide array of challenges associated with the emergence of independent nation-States. And more importantly, the imperative of reflecting on the fluid causes of refugee movement in an emerging continent.<sup>108</sup>

An evolutionary approach to interpretation (sometimes referred to as a "living instruments"<sup>109</sup> or "dynamic" approach<sup>110</sup>) is one which reflects ongoing developments in international law and, in the context of refugee law, reflects the "changing realities of people in need of international protection".<sup>111</sup> As UNHCR states, an evolutionary approach to interpreting the 1969 OAU Convention is necessary to ensure "the ongoing effectiveness of the regional refugee criteria".<sup>112</sup> Interpreting the 1969 OAU Convention in a way that ensures its effective implementation is also required by the principle of good faith.<sup>113</sup>

The use of an evolutionary approach is now widely accepted as appropriate in the context of humanitarian and human rights-related treaties,<sup>114</sup> and has been recognized as appropriate for interpreting the 1951 Refugee Convention<sup>115</sup> and the 1969 OAU Convention.<sup>116</sup> The result is that any interpretation of the 1969 OAU Convention should start with a positive interpretive bias towards inclusivity and the avoidance of a restrictive and exclusionary reading of the treaty's terms.<sup>117</sup> This position is supported by the literature, in which there is a general consensus that the phrase "events seriously disturbing public order" should be interpreted broadly and in a way that promotes the humanitarian objects and purpose of the 1969 OAU Convention.<sup>118</sup>

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<sup>104</sup> *ibid* 40; Wood, 'Who Is a Refugee in Africa?' (n 13) acts 311–313.

<sup>105</sup> Wood, 'Who Is a Refugee in Africa?' (n 13) 313.

<sup>106</sup> Tiyanjana Maluwa and Anton Katz, 'Who Is a Refugee?: Twenty-Five Years of Domestic Implementation and Judicial Interpretation of the 1969 OAU and 1951 UN Refugee Conventions in Post-Apartheid South Africa' (2020) 27 *Indiana Journal of Global Legal Studies* 129, 142.

<sup>107</sup> Ivor C. Jackson (n 14) 191.

<sup>108</sup> Adeola (n 17) 367.

<sup>109</sup> Daniel Moeckli and Nigel D White, 'Treaties as "Living Instruments"' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).

<sup>110</sup> Dörr (n 92) 573.

<sup>111</sup> UNHCR, 'Legal Considerations 2020' (n 24) [14]; Caroline Nalule, 'Migration in Africa: Filling in the Gaps and Strengthening the Regional Refugee Protection and Migration Regime' [2020] *Journal of the African Union Commission on International Law (Forum on The Legal, Political and Socio-Economic Consequences of Migration, Situation of Refugees and Internally Displaced Persons in Africa)* 31 <<http://www.jutajournals.co.za/wp-content/uploads/2020/07/AUCIL-3-2020.pdf>> accessed 25 May 2023.

<sup>112</sup> UNHCR, 'Legal Considerations 2020' (n 24) [14]. See also Wood, 'Who Is a Refugee in Africa?' (n 13) 311–313.

<sup>113</sup> On the principle of effectiveness as an element of good faith see: Gardiner (n 92) 168.

<sup>114</sup> Moeckli and White (n 109).

<sup>115</sup> Guy S Goodwin-Gill, 'The Search for the One, True Meaning...' in Hélène Lambert and Guy S Goodwin-Gill (eds), *The limits of transnational law: refugee law, policy harmonization and judicial dialogue in the European Union* (Cambridge University Press 2010) 207.

<sup>116</sup> For example, UNHCR, 'Legal Considerations 2020' (n 24) [14]; Wood, 'Who Is a Refugee in Africa?' (n 13) 311–313.

<sup>117</sup> See the discussion in Wood, 'Who Is a Refugee in Africa?' (n 13) 308–311.

<sup>118</sup> See Wood, 'In Search of the African Refugee' (n 29) 103; Tal Schreier, 'The Expanded Refugee Definition' in Fatima Khan and Tal Schreier (eds), *Refugee Law in South Africa* (Juta and Co 2014) 81; Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 49; UNHCR, 'Legal Considerations 2020' (n 24) [14]-[16].

The terms of the phrase “events seriously disturbing public order” in Article I(2) of the 1969 OAU Convention are not defined within the treaty. The key concept within this phrase, “public order”, is ambiguous in meaning, having different and sometimes ill-defined meanings in the authoritative languages of the Convention and across other areas of international law.<sup>119</sup> These facts support the view that the parties to the 1969 OAU Convention intended for the term to be interpreted in an evolutive manner, recalling that the intention of the parties is to be objectively determined through the treaty text itself. This requires that in interpreting the term “public order”, relevant modern-day usages of the term should be considered when identifying its ordinary meaning (under article 31(1) and its uses in comparable areas of international law (under article 31(3)(c)). A treaty’s meaning may therefore evolve based on developments in international law and the subsequent practice of States.<sup>120</sup> Parties to the treaty can always clarify the meaning of a treaty through subsequent agreements<sup>121</sup> or state practice which develops to meet the requisite threshold of demonstrating agreement between the parties.<sup>122</sup>

What appears to be an intention by the 1969 OAU Convention’s State parties to apply a generous approach to refugee protection does not, however, require that the boundaries of that protection should be undetermined. Those boundaries might be capable of conceptual evolution – for example, to address the evolving situations in which people are in need of protection – but this does not mean they should not be assessed by reference to identifiable tests or standards.<sup>123</sup> After all, the purpose of a refugee definition is to set out the grounds for who States have agreed to provide protection to and who they have not.<sup>124</sup> Using a principled interpretation to identify who falls within the Article I(2) refugee definition is both legally justified and allows for an evolutionary approach to interpretation in accordance with the object and purpose of the 1969 OAU Convention.

## 3.2 Ordinary meaning

VCLT article 31(1) refers to a general “rule” of interpretation in the singular sense, in which the ordinary meaning of a treaty term is not that which is used in an everyday sense alone but is one that is informed by the term’s context and the treaty’s object and purpose. Given this, the term “ordinary meaning” itself in article 31 can be said to have a technical meaning. In determining the ordinary meaning of “events seriously disturbing public order” in Article I(2) of the 1969 OAU Convention, the various “ordinary and everyday” meanings of the relevant terms must first be considered, including by reference to dictionaries as a starting point, so that one can then be selected that best accords with the treaty’s context and object and purpose.<sup>125</sup>

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<sup>119</sup> Based on the author’s broader research, key elements of which are summarised in Part 4.3 of the present paper.

<sup>120</sup> As recognized in VCLT articles 31(3)(c) and 31(3)(b) respectively.

<sup>121</sup> VCLT art 31(3)(a).

<sup>122</sup> VCLT art 31(3)(b).

<sup>123</sup> See, for example, the discussion of Hathaway and Foster regarding the “membership of a particular social group” ground in the universal refugee definition in the 1951 Refugee Convention, which they argue “must be defined to delimit the beneficiary class on the basis of a form of civil or political status” given that international refugee law was meant to serve as a (limited) substitute for national protection: James C Hathaway and Michelle Foster, ‘Membership of a Particular Social Group: Discussion Paper No. 4 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002’ (2003) 15 International Journal of Refugee Law 477, 479 relying in part on the judgment of Dawson J in Applicant “A” and Anor v. MIMA (1997) 190 CLR 225 (Australia).

<sup>124</sup> Tamara Wood, ‘The African War Refugee: Using IHL to Interpret the 1969 OAU Convention’s Expanded Refugee Definition’ in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 183.

<sup>125</sup> See the discussion in Gardiner (n 92) 181–185.



While the 1969 OAU Convention has mostly been published in English and French – both the African Union and UNHCR’s publications of the Convention include the English and French texts<sup>126</sup> – the Convention was authenticated in English, French and Arabic.<sup>127</sup> As the 1969 OAU Convention does not provide whether a particular text will prevail over the other in the case of divergence, all three texts of the treaty are equally authoritative.<sup>128</sup> While the VCLT provides that terms in each of the treaty languages are presumed to have the same meaning,<sup>129</sup> further scrutiny is required where there is an apparent difference in meaning between the terms.<sup>130</sup> While the African Union’s official languages also include Portuguese, Spanish, and Kiswahili, as a matter of international law a treaty must be interpreted by reference to its authentic texts as a starting point, though other local languages and customs can influence the interpretation of treaty terms where they can be said to establish the agreement of the State parties regarding the interpretation of its terms.<sup>131</sup> For example, if the understanding of certain terms of the Article I(2) refugee definition in other African languages was widespread amongst State parties, this would inform domestic practice regarding the interpretation of the terms. While there is not, at present, evidence of such widespread agreement between the State parties in any language, state practice may develop in the future to further inform the interpretation of the Article I(2) definition’s terms.

At present, the existing uncertainty around the scope of the phrase “events seriously disturbing public order” in the Article I(2) refugee definition largely stems from the contention around the meaning of the term “public order” and whether it reflects the purported English ordinary meaning or the broader French ordinary meaning.<sup>132</sup> For this reason, the English and French texts of the 1969 OAU Convention form the primary basis of the analysis of “public order” in Part 4. Focusing on those texts of a treaty that involve apparent differences is also consistent with the approach of the International Court of Justice (ICJ).<sup>133</sup>

References to the meaning of “public order” in Arabic are included where available and relevant, noting that available English-language literature suggests that the Arabic term has a broad coherence with the French “*ordre public*”. As noted in Part 4.3, this coherence appears to be in part due to the adoption or influence of civil law systems in those countries. A comprehensive analysis of the Arabic term has not, however, been possible within the linguistic limitations of the author’s broader research project to date.

The ordinary and everyday meaning of the English term public order, in particular, is not initially apparent, and the meaning of the equally authoritative French “*ordre public*” varies depending on the context in which it is used. For example, Kiss writes:

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<sup>126</sup> African Union - <<https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>> accessed 1 June 2023; UNHCR - <<https://www.unhcr.org/media/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted-assembly-heads>> accessed 1 June 2023.

<sup>127</sup> UN Treaty Series <<https://treaties.un.org/pages/showDetails.aspx?objid=080000028010432f>> accessed 1 June 2023.

<sup>128</sup> VCLT art 33(1).

<sup>129</sup> VCLT art 33(3).

<sup>130</sup> See VCLT art 33(4).

<sup>131</sup> VCLT art 31(3)(b)

<sup>132</sup> As discussed in Part 4.3.

<sup>133</sup> For example, in the case of *LeGrand*, the ICJ focused on the contentious meanings of the English and French texts of the Statute of the International Court of Justice, despite it also having authentic texts in Chinese, Arabic, Spanish and Russian *LaGrand Case (Germany v. United States of America) Judgment of 27 June (n 92)*.

Any attempt to interpret the term 'public order' has to recognize it as a term of art borrowed from national legal systems. It must also consider the significance of the term in different legal systems, since it clearly differs from system to system.<sup>134</sup>

In such circumstances, it is appropriate to investigate the use and meaning of the terms "public order" and its French equivalent, "*ordre public*", and the specific concepts they embrace, within the relevant fields in which the terms are used.<sup>135</sup> As Gardiner explains, "recourse to the ordinary meaning can include a search among meanings appropriate to a particular subject".<sup>136</sup> Thus, when interpreting the meaning of the English term "public order" and the French "*ordre public*" – terms that have conceptual meanings which vary between their use in private international law, human rights law, and domestic public law – it is necessary to investigate the conceptual ordinary meanings by reference to how they are interpreted in anglophone and francophone public and private domestic law, as well as in other relevant fields of law.<sup>137</sup>

### 3.3 Comparative treaty interpretation

VCLT article 31(3)(c) requires that an interpreter take into account "all relevant rules of international law" in the interpretation of a particular treaty term. In its reference to "rules of international law", article 31(3)(c) is often interpreted as referring to the sources of international law set out in article 38 of the Statute of the International Court of Justice, including treaties, customary international law, and general principles of law.<sup>138</sup>

Article 31(3)(c) is said to reflect the principle of systemic integration, a process "whereby international obligations are interpreted by reference to their normative environment ('system')".<sup>139</sup> The application of systemic integration through comparative treaty interpretation is a well-established practice in international and regional courts and tribunals.<sup>140</sup> In this paper, consideration is given to the meaning of relevant terms, and in particular to the term "public order" and its French equivalent, "*ordre public*", in comparable areas of public international law to assist with interpreting the Article I(2) refugee definition. International refugee law and international and regional human rights law in particular form an important part of the broader context of the 1969 OAU Convention. International Humanitarian Law, a field with humanitarian-oriented purposes, also provides relevant comparative context.

Finally, given that the writing of "the most highly qualified publicists" forms a subsidiary source of international law,<sup>141</sup> ambiguities in the meaning of a treaty term may also be resolved through the writings of scholars and institutions in the field.

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<sup>134</sup> AC Kiss, 'Permissible Limitations on Rights', in *The International Bill of Rights; The Covenant on Civil and Political Rights* (Columbia University Press 1981) 300. While Kiss writes in the context of international human rights law, his discussion of "public order" and "*ordre public*" starts with a review of the term's meaning in different contexts to identify its ordinary meaning.

<sup>135</sup> Gardiner (n 92) see 195, 429.

<sup>136</sup> *ibid* 430.

<sup>137</sup> This analysis is undertaken in Part 4.3.

<sup>138</sup> *Statute of the International Court of Justice* ('ICJ Statute') (annexed to the Charter of the United Nations Charter, signed 26 June 1945, entered into force 24 October 1945).

<sup>139</sup> Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission - Finalized by Martti Koskenniemi', UN Doc A/CN.4/L.682', 13 April 2006 [413].

<sup>140</sup> In African jurisprudence, see *Scanlen and Holderness v Zimbabwe* (Communication No 297/2005) [2009] ACHPR 96 [103]-[106]; in the Americas, see *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29)* (1985) Advisory Opinion OC-5/85 of 13 November 1985 [51].

<sup>141</sup> ICJ Statute, article 38(1)(d).

### 3.4 Reconciling differences in multilingual treaty terms

The literature on the 1969 OAU Convention demonstrates that there is a divergence in meanings between the English “public order” and the French “*ordre public*”. The scope of the phrase “events seriously disturbing public order” in the Article I(2) refugee definition will, therefore, largely depend on how differences between the English and French meanings of “public order” are reconciled. VCLT article 33(4) outlines the process to be applied in the case of divergences of meaning between texts:

...when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Understanding the meaning of public order in the Article I(2) refugee definition therefore requires an interpreter to start with a close investigation of the term’s contentious ordinary meanings in English and French, in accordance with VCLT article 31. The first step to removing or reconciling differences in the English and French meanings is to identify an ordinary meaning in each language which has conceptual equivalence (that is, where the concepts inherent in the term are equivalent, though they may not be described using the same terminology). Where the use of a literal, purposive (teleological) and contextual interpretation, required by articles 31 – 32,<sup>142</sup> does not provide conceptual equivalence, a primarily purposive interpretation may be used to do so.<sup>143</sup> This purposive approach involves interpreting the English and French terms in a way that best accords with the object and purpose of the treaty in an attempt to find conceptual equivalence, without creating a new meaning of the terms. This may involve “pushing or stretching the meaning”<sup>144</sup> of each text towards each other, but only where this is permitted by the treaty itself, such that it can be said that the final autonomous meaning is one intended by the parties (as objectively determined). Where reconciliation is still not achieved, one of the English or French meanings that are most conceptually equivalent with the other may be selected as representing the meaning of the term for the purposes of the 1969 OAU Convention.<sup>145</sup>

### 3.5 Key sources of interpretive guidance

The 1969 OAU Convention does not provide for a formal supervisory treaty body. Guidance on its terms must therefore be found in State-based jurisprudence, publications of institutions including the African Union, the African Commission on Human and Peoples’ Rights and UNHCR, and scholarly literature. The research method for this paper was specifically a desk review of institutional, inter-

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<sup>142</sup> Article 31 emphasises the ordinary meaning, treaty context and object and purpose in interpretation, with Article 32 providing supplementary context.

<sup>143</sup> In accordance with VCLT art 33(4).

<sup>144</sup> Mala Tabory, *Multilingualism in International Law and Institutions* (Sijthoff & Noordhoff 1980) 213.

<sup>145</sup> The approach to applying Article 33(4) described in this paragraph represents the summarised conclusions of extensive research by the author on the VCLT’s rules on the removal and reconciliation of differences between treaty texts, and is underpinned by the work of the International Law Commission and scholars, and the approach taken by various international courts and tribunals, as evidenced in cases such as: *Arbitral Tribunal for the Agreement on German External Debts, signed at London on 27 February 1953* (‘Young Loan’ case) (Belgium, France, Switzerland, UK and USA v Federal Republic of Germany) (1980) 59 ILR 495, [15]-[39]; *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (WT/DS257/AB/R) [59]; *Case Concerning Elettronica Sicula S.pA (ELSI)* (*United States v Italy*) [1989] ICJ Rep 15 [132]; *LaGrand Case (Germany v. United States of America) Judgment of 27 June* (n 55) [101]-[102] in particular; *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, [278]-[280]; International Law Commission (n 61) 222-226; examples of key literature include Gardiner (n 55) 444-445; Tabory (n 101) in particular, see 218; Ulf Linderfalk, *On the Interpretation of Treaties; The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 360-368; BJ Condon, ‘Lost in Translation: Plurilingual Interpretation of WTO Law’ (2010) 1 *Journal of International Dispute Settlement* 191.

governmental and regional documents, scholarly literature, and international, regional and domestic jurisprudence, where available. The research that is drawn on in this paper was carried out between February 2020 and July 2023. Three key sources of interpretive guidance are discussed below: state practice; UNHCR's guidance; and scholarly literature. The African Commission on Human and Peoples' Rights has jurisdiction over the 1969 OAU Convention.<sup>146</sup> While it has only considered a complaint under the 1969 OAU Convention once and has not as yet engaged in any in-depth analysis of its terms,<sup>147</sup> its competence means it will continue to be "a potentially important source of refugee norms".<sup>148</sup> No other treaty body in Africa with relevant competence has so far engaged in any in-depth consideration of refugee issues relevant to the interpretation of the Article I(2) refugee definition.<sup>149</sup>

### 3.5.1 State practice

State parties to the 1969 OAU Convention have the primary responsibility for interpreting and applying the terms of the Convention, including its Article I(2) refugee definition. The most detailed analysis of state practice on the Article I(2)'s definition is found in a 2008 study by Schreier,<sup>150</sup> a study commissioned by UNHCR in 2013 by Marina Sharpe,<sup>151</sup> Wood's 2018 thesis,<sup>152</sup> and a 2019 paper by Cantor and Chikwanha.<sup>153</sup> Evidence of state practice predominantly falls into four categories: 1) domestic incorporation of the Article I(2) definition; 2) domestic case law; 3) domestic refugee status decisions; and 4) other governmental policy documents. Where evidence of state practice is available, it is highlighted in the analysis in Part 4. For present purposes, a few comments are made below on categories 1-3.

The Article I(2) refugee definition has been incorporated into the domestic law of 37 of the 48 State parties to the 1969 OAU Convention, and is also reflected in the domestic law of two countries who are not States parties to the 1969 OAU Convention (Somalia and Namibia<sup>154</sup>).<sup>155</sup> Thirty-five of those 37 State parties incorporate all or a slightly modified version of the Article I(2) definition in domestic legislation.<sup>156</sup> The other two of the 37 countries (Congo and Côte d'Ivoire) have not incorporated

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<sup>146</sup> Article 60 of the African Charter of Human and Peoples' Rights gives the African Commission competence to draw from "international law on human and peoples' rights, particularly from the positions of various African instruments on human and peoples' rights... [and] other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights...". See also Marina Sharpe, 'Regional Refugee Regimes: Africa' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 289.

<sup>147</sup> This case was *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v. Republic of Guinea*, (Communication No 249/2002), 20th Annual Activity Report of the African Commission on Human and Peoples' Rights (2005-6), in which the Commission found the Republic of Guinea to have, among other things, violated the 1969 OAU Convention's non-discrimination provision in Article 4. Also of relevance, Sharpe's review notes that the only refugee issue to ever come before the African Court on Human and Peoples' Rights was ruled inadmissible: *ibid* 291. This case was *Michelot Yogombaye v Republic of Senegal*, App No 001/2008 Af Ct HPR (2008).

<sup>148</sup> *ibid* 289.

<sup>149</sup> *ibid* see 289-292.

<sup>150</sup> Tal Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' (2008) 25 *Refugee* 53.

<sup>151</sup> Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (n 14).

<sup>152</sup> Wood, 'In Search of the African Refugee' (n 29).

<sup>153</sup> Cantor and Chikwanha (n 51).

<sup>154</sup> *ibid* 193.

<sup>155</sup> Drawing on both Wood and Cantor and Chikwanha's research.

<sup>156</sup> These are: Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, the Democratic Republic of Congo, Djibouti, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe. Burundi is the only state to make a significant modification to the phrase "events seriously disturbing public order" by removing the word "seriously": Cantor and Chikwanha (n 51) 194.

Article I(2) into their domestic legislation but, due to these countries' monist systems, domestic incorporation of international law (and therefore the Article I(2) definition) applies automatically as a matter of domestic law.<sup>157</sup> In their study of the domestic incorporation of the 1969 OAU Convention, Cantor and Chikwanha conclude that "Article I(2) is extensively incorporated by the national refugee laws of African States" with the more minor drafting changes made by several States not altering the legal scope or effect of the Article I(2) definition.<sup>158</sup>

The only identified case law that discusses the scope of the Article I(2) definition is a case of the South African High Court which provided some brief statements about the definition's criteria.<sup>159</sup> That case was *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs*, in which the High Court elaborated on the requirements of Article I(2) that relate to the "compelled to leave" requirement and the need for an objective determination of the flight-producing events.<sup>160</sup> The High Court also emphasized that when interpreting the South African legislation that incorporates the 1969 OAU Convention, the humanitarian object and purpose of that Convention must be given due regard in interpretation.<sup>161</sup>

Available research suggests that a lack of existing case law and general understanding of the scope of the Article I(2) refugee definition means that refugee status claims are, in many cases, decided under the 1951 Refugee Convention's universal refugee definition only.<sup>162</sup> The majority of refugee cases in Africa that are assessed against the Article I(2) criteria are decided on the basis of the ESDPO ground.<sup>163</sup> However, for the most part, African States do not report their refugee status determination (RSD) decisions,<sup>164</sup> and existing scholarship predominantly relies on unreported decisions as the basis for drawing conclusions.

VCLT article 31(3)(b) provides that state practice "which establishes the agreement of the parties regarding its interpretation" must be taken into account. The lack of available state practice on the interpretation of the Article I(2) refugee definition means that it is not currently possible to identify agreement between the State parties as to the meaning of the 1969 OAU Convention's terms.<sup>165</sup> This is significant as it means that, at present, the limited available evidence of African states applying the definition to climate change and disaster contexts carries little weight in the legal interpretation of the definition's scope and application. Without formal *travaux préparatoires* (official drafting records), and

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<sup>157</sup> Wood (n 21) 44, noting that the other three countries Wood references as having systems of direct incorporation of international law also have domestic refugee legislation that make reference to the Article I(2) definition (these are Benin, Mauritania, and Senegal). Egypt, a State party, has enacted domestic legislation on refugee law (see *Presidential Decree No 331-1980, Al-Jaridah Al-Rasmīyah*) but has not expressly included the Article I(2) refugee definition, however the country's 2014 constitution also provides, in article 93, for the direct incorporation of international human rights covenants where publication requirements are met.

<sup>158</sup> Cantor and Chikwanha (n 51) 195.

<sup>159</sup> Based on the author's own desktop analysis, and the research of Sharpe and Wood: Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (n 14) 8; Wood, 'In Search of the African Refugee' (n 29) 45.

<sup>160</sup> *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs* [2015] 1 All SA 100 (High Court) [6].

<sup>161</sup> *ibid* [7].

<sup>162</sup> Wood, 'Who Is a Refugee in Africa?' (n 13) 295-6; also Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (n 14) 19. This has also been recognized by the South African High Court: *Harerimana v Chairperson of the Refugee Appeal Board and Others* (10972/2013) [2013] ZAWCHC 209; 2014 (5) SA 550 (WCC) (11 December 2013) [41], quoting from the work of Roni Amit, 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23 *International Journal of Refugee Law* 458.

<sup>163</sup> Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (n 14) 14 and 19.

<sup>164</sup> Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 39; Wood, 'In Search of the African Refugee' (n 29) 46.

<sup>165</sup> As necessary under VCLT article 31(3)(b).

in the absence of widespread agreement in state practice, the ordinary meaning and context of the wording of the 1969 OAU Convention, informed by its protection-oriented object and purpose, must be the predominant focus as jurisprudence continues to develop.

While evidence of state practice does not currently demonstrate agreement between the parties to the 1969 OAU Convention, it is referred to in this paper where it provides “helpful guidance” that is consistent with the ordinary meaning and context of the terms in question, as well as the object and purpose of the Convention.<sup>166</sup>

The future development of jurisprudential guidance by States can, of course, play an important role in the ongoing and dynamic interpretation of the 1969 OAU Convention where it reaches the point of establishing the agreement of the State parties. For now, further guidance from UNHCR and the African Union will play an important role in supporting the consistent application of the 1969 OAU Convention to people in need of protection across the continent.

### 3.5.2 UNHCR’s guidance

To date, UNHCR has not provided a handbook on the Article I(2) refugee definition and its institutional guidance is limited to a handful of documents that provide brief, but important, guidance on the meaning of the phrase “events seriously disturbing public order” and, more recently, on the term “public order”. Two publications of UNHCR’s are particularly instructive: UNHCR’s 2016 ‘Guidelines for International Protection No. 12 on Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under the 1951 Refugee Convention and the Regional Refugee Definitions’ (GIP 12);<sup>167</sup> and UNHCR’s 2020 ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (Legal Considerations).<sup>168</sup> In GIP 12, UNHCR states that:

The phrase ‘events seriously disturbing public order’ should be construed, in line with the 1969 OAU Convention’s humanitarian object and purpose, to include events that impact the maintenance of public order (*ordre public*) based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are put in danger.<sup>169</sup>

UNHCR’s 2020 Legal Considerations builds on the GIP 12 guidance and states that “public order” in Article I(2) encompasses:

the prevailing level of the administrative, social, political and moral order as assessed according to the effective functioning of the State in relation to its population and based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are protected. A “disturbance” to public order occurs when there is a disruption to the effective, normal and stable functioning of this order.<sup>170</sup>

The GIP 12 and Legal Considerations’ references to the protection of the “life, security and freedom” of people accord with the reference in Article II(3) of the 1969 OAU Convention which prohibits

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<sup>166</sup> Richard Gardiner, *Treaty Interpretation* (1<sup>st</sup> ed, Oxford University Press, 2008) 11.

<sup>167</sup> UNHCR, ‘Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions’ <<https://www.refworld.org/docid/583595ff4.html>> accessed 5 January 2023.

<sup>168</sup> UNHCR, ‘Legal Considerations 2020’ (n 24). These Legal Considerations are intended to provide guidance for governments, legal practitioners, administrative and judicial decision-makers and UNHCR staff in undertaking refugee status determinations.

<sup>169</sup> UNHCR, ‘GIP 12’ (n 167) [56].

<sup>170</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [16].

Member States from returning or expelling a person to a place where their “life, physical integrity or liberty” would be threatened for any of the reasons in the Article I(1) or Article I(2) refugee definitions.<sup>171</sup>

UNHCR’s Guidelines on International Protection are formulated following a period of consultation with States, UN actors, non-governmental organizations, legal experts and other relevant bodies,<sup>172</sup> and are “subject to evaluation by States in the Executive Committee” (UNHCR’s governing body).<sup>173</sup> While UNHCR’s Legal Considerations are also issued pursuant to the High Commissioner’s mandate,<sup>174</sup> they do not have the same authoritative status and may be considered a softer form of guidance which does not reach the level of officially complementing the UNHCR Handbook.

### 3.5.3 Scholarly literature

There has been relatively little scholarly analysis of the Article I(2) definition when compared with the 1951 Refugee Convention refugee definition.<sup>175</sup> While several scholars have made important contributions to understanding the scope and application of the 1969 OAU Convention,<sup>176</sup> analysis of the Article I(2) refugee definition has, for the most part, relied on “general characterisations and assumptions rather than a close reading of [the definition’s] terms”.<sup>177</sup> Only a handful of scholars have engaged in comprehensive analysis of the terms of the phrase “events seriously disturbing public order” in the Article I(2) definition. These scholars include Sharpe,<sup>178</sup> Wood,<sup>179</sup> Adeola,<sup>180</sup> Ashenafi,<sup>181</sup> Rankin,<sup>182</sup> Edwards,<sup>183</sup> Schreier,<sup>184</sup> Weerasinghe<sup>185</sup> and, from a sociological perspective, Mkwanzani.<sup>186</sup> A number of scholarly works have also been published in French which discuss the 1969 OAU Convention and the French equivalent of “events seriously disturbing public order”, being *d’événements troublant gravement l’ordre public*. Francophone literature is rarely referred to in the existing English literature. However, reference to the francophone literature provides a valuable

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<sup>171</sup> Article II(3) states: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2”.

<sup>172</sup> UNHCR, ‘UNHCR Guidelines on International Protection – Consultation Process’ (November 2021)

<<https://www.unhcr.org/protection/globalconsult/544f59896/unhcr-guidelines-international-protection-consultation-process.html>> accessed 5 January 2023.

<sup>173</sup> Goodwin-Gill (n 115) 219.

<sup>174</sup> As, for example, expressed in UNHCR, ‘Legal Considerations 2020’ (n 24) fn 1.

<sup>175</sup> The first comprehensive book on African regional refugee law was only published in 2018 (Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43). Also see Wood, ‘Who Is a Refugee in Africa?’ (n 13) 297–8; Weerasinghe (n 12) 12–13. Scholarship on the Article I(2) refugee definition is, however, slowly growing.

<sup>176</sup> There are too many to specifically name, however their works are drawn on when relevant in this paper.

<sup>177</sup> Wood, ‘Who Is a Refugee in Africa?’ (n 13) 296.

<sup>178</sup> Sharpe, ‘The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination’ (n 14); Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43).

<sup>179</sup> Wood, ‘In Search of the African Refugee’ (n 29); Wood, ‘Who Is a Refugee in Africa?’ (n 13).

<sup>180</sup> Adeola (n 17).

<sup>181</sup> Ashenafi (n 43).

<sup>182</sup> Rankin (n 41).

<sup>183</sup> Edwards (n 40).

<sup>184</sup> Schreier (n 118).

<sup>185</sup> Weerasinghe (n 12) Weerasinghe’s analysis of public order predominantly focuses on evaluating and comparing UNHCR’s GIP 12 document, and Sharpe and Wood’s literature on public order.

<sup>186</sup> Mkwanzani (n 43).

contribution to the analysis of contentious issues of interpretation under the Article I(2) definition and, as such, this literature is discussed in Part 4 where relevant.<sup>187</sup>

### 3.6 The interpretation of domestic law

Before proceeding with the substantive analysis of the terms of the Article I(2) refugee definition, it is important to recognize that, despite appearing in an international (regional) treaty, the expanded refugee definition is most often interpreted and applied in the domestic refugee status determination procedures of African States.<sup>188</sup> While the VCLT does not explicitly require States to apply the VCLT rules to the interpretation of *domestic* law, each State has a duty to fulfill their international legal obligations in good faith<sup>189</sup> and “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.<sup>190</sup> State parties’ obligations under the 1969 OAU Convention to protect refugees so defined in that Convention cannot, therefore, be undermined or limited by the State’s own domestic laws.<sup>191</sup> In practice, these obligations require coherence between the State’s international obligations and its internal laws and practices. Such coherence requires that a term’s meaning in an international treaty should have a consistent meaning in State parties’ domestic law. This is not always apparent in practice, but this coherence and consistency is nevertheless required as a matter of international law. Adopting a principled approach to interpreting States parties’ obligations regarding who is entitled to protection under the Article I(2) definition should therefore support the interpretation of the definition in States’ domestic laws, particularly given the limited reported domestic jurisprudence. This is particularly the case given the high level of consistency between the expanded refugee definition in the majority of African States’ domestic laws and the Article I(2) definition wording.<sup>192</sup>

Where the 1969 OAU Convention does not apply as a matter of domestic law within a State party, the interpretation of the Article I(2) definition in accordance with the VCLT rules will nevertheless “help to ensure the state’s compliance with its international obligations, and the integrity of refugee protection regime as a whole” by providing guidance on the scope of their obligations under the treaty.<sup>193</sup>

## 4. LEGAL ANALYSIS: ARTICLE I(2) OF THE 1969 OAU CONVENTION

Article I(2) of the 1969 OAU Convention states:

The term ‘refugee’ shall... apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin

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<sup>187</sup> A review of literature in French on the phrase “*d’événements troublant gravement l’ordre public*” in the OAU Convention was undertaken by a French bilingual legal research assistant, Dr Manon Simon, as part of the author’s broader doctoral research. Where references in this paper rely on Simon’s interpretation of a source, “(unofficial translation)” is included in the footnote. A small number of francophone sources were translated using Google Translate and, where they have been relied on, the translations have been cross-checked with online translation sites DeepL, Reverso, PROMT One, and Translate Dict; these translations also include “(unofficial translation)” in the footnote.

<sup>188</sup> Wood, ‘In Search of the African Refugee’ (n 29) 84.

<sup>189</sup> VCLT, art 26.

<sup>190</sup> VCLT, art 27.

<sup>191</sup> A state can of course *add* to its treaty obligations.

<sup>192</sup> Cantor and Chikwanha (n 51) 195.

<sup>193</sup> Wood, ‘In Search of the African Refugee’ (n 29) 86.



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 ('the Article I(2) refugee definition').

In order to meet the Article I(2) definition of a refugee, a person must satisfy the following two components:

1. one (or more) of the four enumerated refugee-producing events—external aggression, occupation, foreign domination, or events seriously disturbing public order—exist in either part or the whole of the person's country of origin (the **collective component**); and
2. the refugee is compelled to leave their place of habitual residence (the compelled to leave requirement) in order to seek refuge in another place outside his country of origin or nationality (the **individual component**).

The individual component requires, as its name suggests, an individualized assessment of the predicament of each refugee applicant. This component is discussed in Part 4.6. However, the majority of Part 4 will be spent analyzing the meaning of the collective component, with a specific focus on "events seriously disturbing public order" (ESDPO), as the ground most applicable in the context of the adverse effects of climate change, environmental degradation and the impacts of disasters.

There is consensus within the literature that the phrase "events seriously disturbing public order" should be interpreted broadly and in a way that promotes the humanitarian objects and purpose of the 1969 OAU Convention.<sup>194</sup> Events seriously disturbing public order are frequently associated with situations of war, conflict, fighting and violence.<sup>195</sup> However, outside situations of civil war, existing scholarship shows disagreement on the exact circumstances and thresholds that must be met to satisfy the definition's requirements.<sup>196</sup> According to Wood's research, refugee decision makers vary in their understanding and application of the phrase "events seriously disturbing public order".<sup>197</sup> For example, decision makers appear to vary in their views of how severe the disturbance needs be to meet the definition, with views ranging from the need for a "disruption to almost everything in terms of life" to a more inclusive approach involving a lower disturbance threshold.<sup>198</sup> What is clear is that a disturbance to public order can arise from the actions of both State and non-State actors and can be international or purely domestic in character.<sup>199</sup> As Edwards notes, "the OAU Convention does not seek to apportion blame for the events in question, but rather seeks to grant protection to those caught within their path".<sup>200</sup>

In Part 4, the interpretive framework set out in Part 3 is applied to the key elements of the Article I(2) refugee definition. In Parts 4.1 – 4.4, a principled interpretation of each of the elements of the phrase

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<sup>194</sup> See *ibid* 103; Schreier (n 118) 81; Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 49; UNHCR, 'Legal Considerations 2020' (n 24) [14]-[16].

<sup>195</sup> Wood, 'The African War Refugee' (n 124) 197. Also, Mandal (n 42) 13. In the francophone literature, see Jérôme Karimumuryango, *Les réfugiés rwandais dans la région de Bukavu, Congo RDC: La Survie du Réfugié Dans les camps de secours d'urgence* (Editions Karthala 2000); Alain Didier Olinga, 'Les conflits et la question des réfugiés en Afrique Centrale' in *Paix et sécurité dans la CEEAC, Actes du colloque international* (Presses Universitaires d'Afrique 2007) <<https://library.fes.de/pdf-files/bueros/kamerun/05078.pdf>> accessed 20 May 2023; Robert Ebénézer Nsoga, *La protection des réfugiés en Afrique Centrale : quelle gouvernance des migrations forcées pour les États Centre-Africains ? : Le Cas Du Cameroun* (Université Michel de Montaigne 2020) <<https://theses.hal.science/tel-02997878/document>> accessed 25 May 2023.

<sup>196</sup> For example, see Wood, 'Who Is a Refugee in Africa?' (n 13) 197.

<sup>197</sup> Wood, 'The African War Refugee' (n 124) 197.

<sup>198</sup> *ibid* 197-198.

<sup>199</sup> Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 47; Edwards (n 40) 218 and 221; Wood, 'In Search of the African Refugee' (n 29) 176-177.

<sup>200</sup> Edwards (n 40) 221.

“events seriously disturbing public order” is undertaken: “events”, “disturbing”, “public order” and the “serious” threshold. Each of these terms is crucial to determining the scope of the ESDPO ground, though the meaning of “public order” is the most contentious. Part 4.5 draws together the preceding analysis to summarize the conclusions on the meaning of the ESDPO ground. Part 4.6 concludes by addressing the individual component of the Article I(2) definition, with a predominant focus on the compelled to leave requirement. Consideration is also given to whether the phrase “in order to seek refuge in another place outside his country of origin or nationality” within Article I(2) requires a refugee applicant to demonstrate that they did not have an internal flight alternative within their home country.

#### 4.1 ESDPO: meaning of “events” (and Article I(2)’s application to all categories of disturbing events)

The ordinary and everyday meaning of “event” is “something that happens”<sup>201</sup> or an “occurrence”.<sup>202</sup> The word “events” is used to identify the situation of the disturbance to public order and can involve one or more “events”. In the specific context of the Article I(2) definition, “events” is used as a very general term with its textual context emphasising the disturbance to public order rather than the origins or causal nature of the events.

Both the general nature of the term “events” in Article I(2) and its plural formulation implies “a wide-ranging understanding of justifications for movement”.<sup>203</sup> The concept of “events” is therefore general and captures a variety of acts or incidents. As such, decision makers should avoid taking a narrow approach to the term. While some have argued that the use of the plural “events” suggests that a disturbance must involve more than one-off incidents,<sup>204</sup> UNHCR explains that a serious disturbance to public order “may either be prompted by one-off acts or incidents, or a series of acts or incidents of a systematic or cumulative nature”.<sup>205</sup> As Wood notes, one-off acts or incidents may cause a significant risk of harm to affected people and have impacts “that last much longer than the event itself”.<sup>206</sup> An interpretation of “events” that excluded a serious disturbance to public order that was caused by a one-off event would not be consistent with the protection-oriented object and purpose of the 1969 OAU Convention. A serious disturbance to public order can thus develop rapidly in response to certain events within a society or may be the product of a slower accumulation of impacts from a number of acts or events.

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<sup>201</sup> Collins Dictionary, ‘event’ <<https://www.collinsdictionary.com/dictionary/english/event>> accessed 2 May 2023; with an equivalent meaning in the Macquarie Dictionary, ‘events’ <[https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=events](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=events)> accessed 2 May 2023, and Oxford Dictionary, ‘event’ <<https://www.oed.com/view/Entry/65287?rskey=D0DYf1&result=1&isAdvanced=false#eid>> accessed 2 May 2023.

<sup>202</sup> Larousse French-English bilingual dictionary <<https://www.larousse.fr/dictionnaires/francais-anglais/%C3%A9v%C3%A9nement/31767>> accessed 1 March 2023. The French “*événement*” has the equivalent meaning to the English term: Most relevantly defined in the Larousse French dictionary as: “Tout ce qui se produit, arrive ou apparaît” and “Fait d’une importance toute particulière”, with the synonyms *aventure*, *fait*, *incident*, and *affaire*: ‘*événement*’ <<https://www.larousse.fr/dictionnaires/francais/%C3%A9v%C3%A9nement/31839>> accessed 2 May 2023.

<sup>203</sup> Huckstep and Clemens (n 43) 67; Adeola (n 17) 368.

<sup>204</sup> Edwards (n 40) 220–221; Schreier (n 118) 83.

<sup>205</sup> UNHCR, ‘GIP 12’ (n 167) [57].

<sup>206</sup> See Wood, ‘In Search of the African Refugee’ (n 29) 190–191.

In the context of the Article I(2) definition, there is no evidence that the word “events” includes a consideration of the events’ origins or causative elements.<sup>207</sup> In simple terms, the ordinary and everyday meaning of “events” emphasizes the thing that is happening, not its cause. This conclusion is also supported by the emphasis in Article II(3) of the 1969 OAU Convention on the protection of people’s life, physical integrity and liberty as opposed to the causes of the events that give rise to the risk of harm.<sup>208</sup>

There are good reasons why a consideration of the cause of the disturbance should not influence the application of the Article I(2) definition. Identifying the exact origins or cause of events in situations of disorder can be complex due to the unstable, and often multi-causal, nature of some disturbances.<sup>209</sup> In practice, distinguishing between these different causal categories could also fail to recognise the social, economic and other “human” factors that contribute to disasters,<sup>210</sup> for example, and could result in erroneous classifications of events with profound consequences for those seeking protection. As Ben Wisner, Piers Blakie, Terry Cannon and Ian Davis wrote in 2004:

There is a danger in treating disasters as something peculiar, as events that deserve their own special focus. It is to risk separating “natural” disasters from the social frameworks that influence how hazards affect people, thereby putting too much emphasis on the natural hazards themselves, and not nearly enough on the surrounding social environment.<sup>211</sup>

Requiring a refugee decision maker to distinguish between categories of “natural” or “human-made” events, as opposed to focusing on the factual indicators of a disturbance to public order regardless of its cause, could therefore undermine the effectiveness of the definition in practice.

As noted in Part 1.2, research suggests that some African States have been more willing to acknowledge the Article I(2) refugee definition’s applicability where the adverse effects of climate change, environmental degradation and disasters interact with drivers of displacement such as conflict and violence (“nexus” situations). For example, this was the view of government representatives from Tanzania, Yemen, and six countries in the Greater Horn of Africa Region who, in regional consultations with The Nansen Initiative in 2014, noted the potential application of the Article I(2) definition in situations involving disasters where certain criteria were met, but stated that “the 1969 AU Refugee Convention may not extend to people displaced across borders in situations where elements of conflict and violence are absent”.<sup>212</sup> However, this approach would limit the conferral of refugee protection based on the cause of displacement rather than focusing on its effects on society and its citizens.

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<sup>207</sup> That is not to say that causation for climate-related displacement is not an important field of study more broadly, including in relation to human rights protections and for broader issues of climate justice and accountability. However, issues of causation for displacement are outside the scope of the current paper as they are not a legally relevant consideration under the Article I(2) refugee definition.

<sup>208</sup> Article II(3) states: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2”.

<sup>209</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement (n 60) 6 and 15; Huckstep and Clemens (n 43) 10.

<sup>210</sup> See Part 2.2.

<sup>211</sup> Ben Wisner, Piers Blakie, Terry Cannon and Ian Davis, *At Risk: Natural Hazards, People’s Vulnerability and Disasters*, 2nd edn (Routledge 2004) 4. See also the broader discussion in Scott (n 74).

<sup>212</sup> In The Nansen Initiative’s 2014 regional consultations, The Nansen Initiative, ‘Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move’ (Nansen Initiative Greater Horn of Africa Regional Consultation, Nairobi, Kenya 21 - 23 May 2014) 10.

Focusing on the distinction between a) situations of conflict and/or violence, b) situations involving disasters and the adverse effects of climate change, and c) “nexus” situations which involve interactions between the two, risks superimposing qualifications on the Article I(2) refugee definition beyond what is included in the text of the 1969 OAU Convention. In other words, this argument requires that the ESDPO ground be interpreted as implicitly excluding certain categories of disturbing “events” (those relating to the impacts of disasters and the adverse effects of climate change). Any suggestion of an implied exclusion of certain types of disturbances is not consistent with the plain wording of the Article I(2) definition and cannot be justified by reference to the drafting history of the Convention as a matter of international law, given that there are no formal drafting records.<sup>213</sup> Further, the exclusion of one category of events seriously disturbing public order would be inconsistent with the inclusive, protection-oriented object and purpose of the OAU Convention and the need for an evolutionary approach to interpretation as evidenced by its terms. It also does not accord with principles of fairness and equality in the interpretation and application of the law general.

The application of a principled interpretation therefore supports the view that the term “events” does not include an implied requirement that the cause of the events be identified and that certain disturbing events will be automatically excluded under the Article I(2) definition. The application of the Article I(2) refugee definition to people displaced in the context of the adverse effects of climate change, environmental degradation and disasters, whether in connection to “nexus” situations or on their own, is therefore supported by a principled interpretation of the definition, applying international law rules for the interpretation of treaties.<sup>214</sup>

For the reasons outlined above, the phrase “events seriously disturbing public order” should be interpreted as requiring a factual determining of a disturbance, regardless of whether any identifiable cause is due to predominantly human or “natural” factors. Thus, as UNHCR states in its Legal Considerations, “the principal inquiry at the time of assessing a claim for refugee status is whether a serious disturbance to public order exists as a matter of fact, based on an assessment of available evidence” at the time of the refugee status assessment.<sup>215</sup> There are two important practical effects of this conclusion:

1. where a serious disturbance to public order is multi-causal, or it is difficult to identify the cause or causes of the disturbance, this does not undermine the claim to refugee status as a decision-maker should focus on the effects of the serious disturbance itself (by reference to the factual indicators, discussed in detail in Part 5); and
2. where the cause of the serious disturbance can be identified, the characterisation of that cause as environmental, social, economic or political in nature can be noted but it does not in any way affect or limit the assessment of the serious disturbance; it is only relevant to the extent that it helps to identify the factual indicators of a serious disturbance to public order.

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<sup>213</sup> Ivor C. Jackson (n 14) 191.

<sup>214</sup> These rules are discussed in further detail in Part 3, and applied to the terms of the Article I(2) definition in Part 4.

<sup>215</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [16].

## 4.2 ESDPO: the emphasis on a disturbance to public order

The concept of a “disturbance” in Article I(2) denotes the threshold at which a state of public order no longer exists, whether temporarily or for a longer period. On its ordinary and everyday meaning, to “disturb” is to disrupt, agitate, break up, trouble, stir up or interfere with or hinder.<sup>216</sup>

In its Legal Considerations, UNHCR states that a disturbance to public order “occurs when there is a disruption to the effective, normal and stable function of this order”, with “this order” referring to the elements of public order as UNHCR interprets them.<sup>217</sup> This definition therefore has some inherent circularity in it, but nevertheless points to an important conclusion: the question of when a disturbance occurs can only be answered by understanding what “public order” means and how it can be identified. In other words, public order will be disturbed when the elements that make up a state of public order are undermined and manifest in a way that is identifiable.

There is an important distinction in this context between a *threat* to public order and a *disturbance* to public order. Clearly, the threat must precede the disturbance, though in some instances a disturbance may also occur without a preceding threat, such as in the event of an earthquake. A number of things might be said to threaten public order, but public order will only be *disturbed* when there is a manifest breach of its material elements that are capable of identification. In practical terms, public order will be disturbed when public peace, public safety and/or public security are breached such that societal stability is undermined, as discussed in Part 4.3 below.

## 4.3 ESDPO: meaning of “public order”

Central to an understanding of the phrase “events seriously disturbing public order” is the meaning of the term “public order”. In other words, Article I(2)’s emphasis is on the disturbance to public order, with the word “seriously” qualifying the scale and extent of the disturbance. While “public order” is arguably the most important term within the phrase ESDPO, it is also the most controversial. Of significance, the term’s ordinary and everyday meanings in English and French diverge. This complicates the task of interpreting “public order” as the English and French texts of the 1969 OAU Convention are equally authoritative.<sup>218</sup>

Public order is not defined in the 1969 OAU Convention and the term’s ordinary and everyday meaning is not self-evident. There are no official drafting records of the 1969 OAU Convention to assist in identifying the meaning of the term, and case law on its application is limited.<sup>219</sup> There is also no scholarly consensus on the meaning of the term “public order” in the 1969 OAU Convention, although there are some broad areas of overlap and coherence.

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<sup>216</sup> Oxford English Dictionary, ‘disturb’ <<https://www.oed.com/view/Entry/55820?rskey=0JeYQd&result=2#eid>> accessed 2 May 2023; Macquarie Dictionary, ‘disturb’

<[https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=disturb](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=disturb)> accessed 2 May 2023. The term used in the French text, “troublant”, has an equivalent meaning: disturbing, unsettling, disquieting: Larousse French-English Bilingual Dictionary, ‘troublant’ <<https://www.larousse.fr/dictionnaires/francais-anglais/troublant/79026>> accessed 2 May 2023.

<sup>217</sup> These are identified by UNHCR as “administrative, social, political and moral order as assessed according to the effective functioning of the State in relation to its population and based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are protected”: UNHCR, ‘Legal Considerations 2020’ (n 24) [16].

<sup>218</sup> Along with the Arabic text, as discussed in Part 3.4.

<sup>219</sup> See Part 3.5.1 above.

Scholars agree that, on its ordinary English meaning, public order is “a very general term”<sup>220</sup> and that identifying its meaning is a complex and difficult task.<sup>221</sup> In general terms, scholars’ approaches to interpreting “public order” in the Article I(2) refugee definition appear to sit on a spectrum from narrow to broad. Interpretations on the narrow end of the spectrum define “public order” by reference to terms such as “law and order”, peace and security, the rule of law and the operation of the judicial system.<sup>222</sup> Broader interpretations of public order encompass these concepts and extend to include a greater number of facets of society, including morality, social and political order, and respect for human rights and dignity; concepts that are more often associated with the French meaning of “*ordre public*”.<sup>223</sup> Differences in interpretation can be said to result from a number of factors which are methodologically based. Central amongst these factors are the variations in the respective authors’ positions on the meaning of the French “*ordre public*”, and the weight to be given to each of the French and English terms.<sup>224</sup> Another significant factor is the variations in the authors’ reliance on certain comparative legal instruments over others for the purposes of interpreting the 1969 OAU Convention (for example, Rankin, Sharpe and Schreier preference the 1951 Convention as an aid to interpretation,<sup>225</sup> Edwards implicitly preferences international human rights law and private international law,<sup>226</sup> and Wood preferences African human rights law<sup>227</sup>).

Resolving the apparent discrepancies in meaning between the English “public order” and the French “*ordre public*” requires close consideration of the terms’ ordinary meanings as well as their specific contextual meanings in relevant fields of law, in accordance with treaty interpretation rules.<sup>228</sup> Part 4.3.1 begins with an overview of the meanings of these terms in relevant legal fields which:

- demonstrate the various ordinary (conceptual) meanings of the terms (in domestic public law relating to a State’s police powers, and in private law); and
- have comparable objects and purposes (international refugee, human rights and humanitarian law).

Through an application of the VCLT rules, Part 4.3.1 concludes that conceptual harmony between the English and French terms can be found by interpreting “public order” in Article I(2) by reference to the maintenance of societal stability, demonstrated by a predominant state of public peace, public safety and public security, and underpinned by the effective operation of the rule of law and the protection of individuals’ rights and freedoms within the society. Part 4.3.2 then explores the concepts of public peace, public safety and public security, before separately addressing societal stability and the protection of individual rights and freedoms in Part 4.3.3. The analysis on public order concludes in Part 4.3.4 with some discussion of the concept of the rule of law, which is key to assessing public order in practice.

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<sup>220</sup> Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 49.

<sup>221</sup> For example, see Rankin (n 41) 424; Edwards (n 40) 218.

<sup>222</sup> For example, Wood’s position is that public order “refers to the level of law and order prevailing in a given country or region of origin” which ‘should be assessed according to the effective functioning of law and order mechanisms, including government, police, security, and judicial mechanisms’ (with a “reasonably stable and well-functioning state or region” acting as a benchmark for an assessment of law and order): Wood, ‘In Search of the African Refugee’ (n 29) Chapter 7, particularly 178. Schreier states that public order is “something more than the ordinary maintenance of law and order” and “is synonymous with public peace, safety and tranquillity, or in other words an absence of public disorder”: Schreier (n 118) 81–83.

<sup>223</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) para 16; Edwards (n 40) 220–221; Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 48–49.

<sup>224</sup> Whether explicitly or implicitly addressed by the scholars.

<sup>225</sup> Rankin (n 41) 425; Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 48; Schreier (n 118) 81–82.

<sup>226</sup> Edwards (n 40) 220–221.

<sup>227</sup> Wood, ‘In Search of the African Refugee’ (n 29) 194–5.

<sup>228</sup> As discussed in Part 3.1 – 3.4.

### 4.3.1 Comparing the meanings of “public order” and “ordre public”

Public order’s ordinary and everyday English meaning is sometimes described as the “absence of public disorder”,<sup>229</sup> a phrase that is itself vague. Neither the Oxford English, Collins, Macquarie or Meriam-Webster dictionaries specifically define the term “public order” (or “public disorder”). A review of the words “public” and “order” themselves must therefore be a starting point. Firstly, the word “public” provides the qualification to the term “order” – that is, relating to the public sphere of society and life as opposed to the private interactions of residents that do not impact on society more broadly.<sup>230</sup> A review of English-language dictionaries shows that the definition of “order”, as used in a public/civic context, includes the observance of the law, regulation of unlawful behaviour, and the protection of the public’s rights to physical integrity and freedom from interference, among others, and harmony, regularity and a sense of social cohesion.<sup>231</sup> The English “public order” is most commonly used in an ordinary everyday sense in the context of a State’s police powers and, in this context, encompasses the preservation of public peace, safety and security, with the aim of ensuring the public welfare and societal stability.<sup>232</sup>

The French term “*ordre public*” appears to have two predominant ordinary meanings. The first gives primary emphasis to the fundamental values and principles which underpin societal stability and harmony. This is the way that “*ordre public*” is used in international human rights law and in private law. The second way the French “*ordre public*” is used is to define the police powers of the State (public law), which emphasize public safety, public health/sanitation and public tranquillity (peace) and security, respect for human dignity, and in some instances public morality.<sup>233</sup> In fact, these two apparent uses of “*ordre public*” do not so much convey different meanings as give different emphases to relevant components. For example, French public law is underpinned by the fundamental principles that give society harmony but emphasizes the elements of good order that more directly threaten a disturbance.

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<sup>229</sup> Kiss (n 134) 299 and 302. Weis 1995 313.

<sup>230</sup> Merriam Webster Dictionary ‘public’ <<https://www.merriam-webster.com/dictionary/public>> accessed 2 April 2023; Oxford English Dictionary, ‘public’ <<https://www.oed.com/view/Entry/154052?rkey=96O4bi&result=1&isAdvanced=false#eid>> accessed 2 April 2023.

<sup>231</sup> Oxford English Definition, ‘order’, 17 <<https://www.oed.com/view/Entry/132334?redirectedFrom=public+order#eid33288297>> accessed 2 April 2023; Macquarie Dictionary, ‘order’

<[https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=order](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=order)> accessed 2 April 2023; Collins Dictionary, ‘order’, under the category ‘arrangements, situations, and groupings’, Definition 4, ‘in British English’, Definition 2, ‘in American English’, and Definition 9, ‘in American English’ <<https://www.collinsdictionary.com/dictionary/english/order>> accessed 2 April 2023; The Merriam-Webster Dictionary, ‘order’, under ‘nouns’, definition 7(a) <<https://www.merriam-webster.com/dictionary/order>> accessed 2 April 2023.

<sup>232</sup> Drawing on the author’s review of domestic laws on police powers to maintain public order across a number of jurisdictions, including: Kenya – The Public Order Act (*Cap.* 56); Malawi - Republic of Malawi (Constitution) Act 1994 (No. 20 of 1994), s 153(2) in particular; Nigeria - Constitution of the Federal Republic of Nigeria 1999, s11(1) in particular, and Police Act 2020; Seychelles - Seychelles’s Constitution of 1993 with Amendments through 2017 and Public Order Act 2013; South Africa - The Constitution of the Republic of South Africa 1996, Art 205(3), and the South Africa Police Services Act 68 of 1995; South Sudan - The Southern Sudan Police Service Act, 2009; Zimbabwe - Zimbabwe Constitution 2013 (rev. 2017), Criminal Law (Codification and Reform) Act 2006 and Maintenance of Peace and Order Act 2019 (noting that the latter Act has been criticized by some as failing to comply with human rights law: Asylum Research Centre, ‘Zimbabwe: Country Report’ (2022) <[https://asylumresearchcentre.org/wp-content/uploads/2022/10/Zimbabwe\\_ARC-COI-Report\\_October-2022\\_FINAL.pdf](https://asylumresearchcentre.org/wp-content/uploads/2022/10/Zimbabwe_ARC-COI-Report_October-2022_FINAL.pdf)> accessed 20 May 2023); and United Kingdom - Public Order Act 1986. Background context was also drawn from other anglophone public order laws, including in the Canadian, Australian, and some United States criminal codes and police offences legislation.

<sup>233</sup> Pierre Tifine, ‘Droit Administratif Français – Cinquième Partie – Chapitre 1, Chapitre 1 : Police Administrative’ <[www.revuegeneraledudroit.eu/?p=4649](http://www.revuegeneraledudroit.eu/?p=4649)> accessed 1 February 2023. See also Kiss (n 134) 300–301. These concepts are reflected in domestic laws, including: Benin - *Loi n. 97-029 du 15 janvier 1999 portant organisation des communes en République du Bénin*, Article 76 (unofficial translation); and Cameroon - *Loi n°90/054 du 19 décembre 1990 relative au maintien de l’ordre public*, Article 2 (unofficial translation).

Identifying the meanings of each of the terms “public order” and “*ordre public*” is further complicated by the fact that variations of the terms are used in different comparative legal contexts: in English, “public policy” is *ordre public*’s equivalent in the context of private international law, although the term “public order” is also used; in international human rights law, the composite phrase “public order (*ordre public*)” is used in a number of the English texts of human rights treaties to connote a broad meaning (though not as broad as “public policy”); and in international humanitarian law and international refugee law, “public order” and “*ordre public*” are used in a slightly narrower sense, in which “*ordre public*” has a meaning that is closer to its use in French public law.

It is apparent, then, that the English term “public order” and the French “*ordre public*” cannot be said to have exact conceptual equivalence, however there appears to be general agreement on their broadly harmonized meanings in the contexts of certain treaties, at least at a high level, as outlined in Table 1. It must be recalled, however, that the interpretations of “public order” and “*ordre public*” in Table 1 reflect the specific treaty/legal contexts in which they are used. For example, in both the 1951 Refugee Convention and international human rights law, the term “public order” is used to limit refugee protection and human rights, whereas the term’s usage in the 1969 OAU Convention provides a basis for conferring refugee protection. Further, in international refugee law, as well as in private international law, international human rights law and international humanitarian law, public order is assessed by the State which is considering a threat to its own public order (though this assessment will usually be subject to judicial oversight through domestic courts or international tribunals). By contrast, public order is assessed for the purposes of the 1969 OAU Convention by host States who are required to determine the existence of a disturbance to public order in a different State (the country of origin).

At a high-level, available literature suggests that the concept of “public order” in Arabic (“*nizāmu āmm*”) broadly aligns with the French “*ordre public*” in a number of countries.<sup>234</sup> This broad coherence is perhaps unsurprising given that Algeria, Djibouti, Mauritania, and Morocco’s legal systems were founded on French civil law and include civil codes that reflect French private law concepts of *ordre public*.<sup>235</sup> Egypt’s public order doctrine also derives from the French civil code and reflects the fundamental values on which society is based, including Islamic precepts (a common feature in Arabic-speaking countries).<sup>236</sup> Putting aside questions (and criticisms) regarding implementation, in Sudan, public order laws in the context of the state’s police powers are aimed at the preservation of

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<sup>234</sup> As noted in Part 3 above, a comprehensive analysis of the Arabic term has not been possible within the linguistic limitations of the author’s broader research project to date. The author’s research on the meaning of “public order” in Arabic is ongoing and will be explored in a future research project on this topic.

<sup>235</sup> Algeria (Arabic is the official language but the country has a civil code in French): *Code Civil (promulgué par l’ordonnance n° 75-58 du 20 Ramadhan 1395 correspondant au 26 septembre 1975, tel que modifié et complété par la loi n° 07-05 du 13 mai 2007)* <<https://www.wipo.int/wipolex/en/text/333716>> accessed 1 June 2023. Djibouti (Arabic and French are the official languages): see *Loi n° 003/AN/18/8 ème L du 12 avril 2018 portant Code civil* <[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=fr&p\\_isn=108919&p\\_classification=01.03](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=108919&p_classification=01.03)> accessed 1 June 2023. Morocco: Netty Butera and Kevashinee Pillay, ‘Introduction to the Moroccan Legal System’ (*GlobalLex*) <<https://www.nyulawglobal.org/globalex/Morocco1.html>> accessed 4 July 2023. Mauritania: ‘Islamic Republic of Mauritania’ (<https://www.pplaaaf.org/>, 2022) <<https://www.pplaaaf.org/country/mauritania.html>> accessed 4 July 2023.

<sup>236</sup> For example, see Mona Oraby, ‘Law, the State, and Public Order: Regulating Religion in Contemporary Egypt’ (2018) 52 *Law & Society Review* 574. In a number of countries aspects of sharia law are part of the legal system which provide a key aspect of the society’s values: John Bugnacki, ‘Four Maps That Explain Islam in Africa’ (*American Security Project*, 21 March 2015) <<https://www.americansecurityproject.org/four-maps-that-explain-islam-in-africa/>> accessed 4 July 2023.



public health, hygiene, law and order, social tranquillity, social values and public interests, and public morality.<sup>237</sup>

**Table 1**

Field	English term used	French term used
<b>Private international law</b>	Public policy <sup>240</sup>	<i>Ordre public</i>
In private international law (also known as “conflicts of laws”), an agreement made in another country and subject to its laws cannot be enforced in the forum State <sup>238</sup> if to do so would be contrary to <i>ordre public</i> . <sup>239</sup>	Public policy/ <i>ordre public</i> refers to “the basic values and fundamental principles upon which a society or legal system is founded”. <sup>241</sup> <i>Ordre public</i> in this context relates to political, administrative, social, moral and even religious order, <sup>242</sup> concepts that are intentionally indeterminate “because the needs of social order and public security are continually changing”. <sup>243</sup>	
<b>Human rights law</b>	public order ( <i>ordre public</i> ) <sup>245</sup> public order <sup>246</sup> law and order <sup>247</sup>	<i>Ordre public</i>
In international human rights law, “public order” provides a legitimate basis for the limitation of certain human rights, where such limitations are necessary and proportionate to the measures in question. <sup>244</sup>	Public order/ <i>ordre public</i> refers to “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order ( <i>ordre public</i> )”. <sup>248</sup> Fundamental principles of public order/ <i>ordre public</i> are not wholly specific to an individual State and should be assessed against international standards. <sup>249</sup> Human rights jurisprudence also shows that	

<sup>237</sup> Amin Mekki Medani, ‘The Draft Social Control Act, 2011, for Khartoum State: Flogging into Submission for the Public Order’ (*Project for Criminal Law Reform in Sudan*, November 2011) 4 <<http://www.pclrs.com/downloads/1206%20Draft%20Public%20Order%20Law%20November%202011%5b1%5d.pdf>> accessed 6 January 2023. The implementation of these laws in practice have, however, been significantly criticised, though in Sudan’s case their contentious public order laws were repealed in 2019: ‘Sudan Repeals Public Order Laws Unlocking Women’s Freedoms to Association and Expression’ (*Amnesty International*, 29 November 2019) <<https://www.amnesty.org/en/latest/press-release/2019/11/sudan-decision-to-repeal-public-order-laws-a-step-forward-for-womens-rights/>> accessed 6 January 2023; Reem Abbas, ‘Bring Back the Public Order Lashings?’ (*CMI - Chr. Michelsen Institute*, 2021) <<https://www.cmi.no/publications/7443-bring-back-the-public-order-lashings>> accessed 6 January 2023.

<sup>238</sup> That is, the state in which the dispute is being heard.

<sup>239</sup> Wyndham A. Bewes, ‘Public Order (*Ordre Public*)’ (1921) 37 *Law Quarterly Review* 315; Kent Murphy, ‘The Traditional View of Public Policy and *Ordre Public* in Private International Law’ 11(3) *Georgia Journal of International and Comparative Law* 591.

<sup>240</sup> While not the exact equivalent of *ordre public*, ‘public policy’ is the closest comparable term: Kent Murphy (n 239).

<sup>241</sup> Timothy McKenzie, ‘*Ordre Public* (Public Policy)’ in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights*, vol 3 (Edward Elgar 2022) 607 [1].

<sup>242</sup> Wyndham A. Bewes (n 239) 318.

<sup>243</sup> Kent Murphy (n 239) 596.

<sup>244</sup> McKenzie (n 241) [32].

<sup>245</sup> See, for example, in the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’) arts 12(3), 14(1), 19(3)(b), 21, 22(2). The European Convention on Human Rights uses the term “*ordre public*” in article 2(3) of Protocol No. 4, “public order” in articles 6(1) and 9(2), and the phrase “disorder or crime” in articles 8(2), 10(2), 11(2) in the context of rights limitations: Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, ETS No. 005.

<sup>246</sup> In the American Convention on Human Rights: ‘Pact of San José, Costa Rica, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) arts 13(2), 15, 16(2) and 22(3); ICESCR, art 8(1)(a) and (c).

<sup>247</sup> This is the phrase used in the African Charter on Human and Peoples’ Rights, signed 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) Arts 8 and 12(2).

<sup>248</sup> ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, UN Doc E/CN.4/1985/4, 28 September 1984 [22].

<sup>249</sup> William A. Schabas, *U.N. International Covenant on Civil and Political Rights; Nowak’s CCPR Commentary* (3rd edn, NP Engel 2019) 319.

	public order/ <i>ordre public</i> includes the absence of disorder, public safety and the prevention of crime. <sup>250</sup>	
	The African Commission has said that, in the context of the <i>African Charter on Human and Peoples' Rights</i> (Banjul Charter), public order refers to the “conditions that ensure the normal and harmonious functioning of institutions on the basis of an agreed system of values and principles”. <sup>251</sup>	
<b>International humanitarian law</b>  In international humanitarian law (IHL), also known as the laws of war, the term “public order” is used in the context of occupying powers’ obligations to restore and ensure public order in their occupied territories under Article 43 of the Hague Regulations. <sup>252</sup>	Public order	<i>Ordre public</i> Noting that the French text is the only authoritative version of the Hague Regulations.
	<i>Ordre public</i> refers to the preservation of public safety, peace and security, based on the protection of the rights of people collectively and individually, <sup>253</sup> as well as the protection of “fundamental humanitarian standards” necessary to the ongoing survival of the society in its existing form. <sup>254</sup>	
<b>1951 Refugee Convention</b>  Article 32(1) prohibits States from expelling a refugee lawfully in their territory except on the grounds of “national security or public order”. <sup>255</sup>	Public order	<i>Ordre public</i>
	Public order/ <i>ordre public</i> refers to “the preservation of peace and tranquillity in the society at large” and to threats “hurtful to the public welfare”, and may be disturbed through actions that “corrupt the morals of its citizens, or cause religious disturbances or any other form of disorder hurtful to the public welfare”. <sup>256</sup>	
<b>Domestic public law</b> <sup>257</sup>  In the domestic laws of anglophone and francophone	Public order	<i>Ordre public</i>  Key concepts: Public tranquillity/peace, health/hygiene,

<sup>250</sup> *ibid.* This is also reflected in the jurisprudence of the UN Human Rights Committee: Human Rights Committee, *General Comment No. 34 Article 19: Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (11-19 July 2011) 2011 [31]. Here, the Committee relies on *Coleman v. Australia*, which discussed the public order limitation at [7.3]: Human Rights Committee, *Coleman v Australia; Communication No. 1157/2003* (87th sess, UN Doc CCPR/C/87/D/1157/2003 (17 July 2006)). See also *Peltonen v Finland*, UN Doc CCPR/C/51/D/492/1992, 21 July 1994 [8.4]; *Coeriel & Aurik v Netherlands*, UN Doc CCPR/C/52/D/453/1991, 31 October 1994 [6.1].

<sup>251</sup> *Scanlen and Holderness v Zimbabwe (Communication No. 297/2005)* (n 90) [109] adopting the same wording as the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29)* (n 90) [64].

<sup>252</sup> The 1907 Hague Regulations are found in Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 36 Stat. 2277; Treaty Series 539.

<sup>253</sup> See, for example Andrew George, ‘We Had to Destroy the Country to Save It: On the Use of Partition to Restore Public Order during Occupation. Note’ (2007) 48 *Virginia Journal of International Law* 187, 199; Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 *European Journal of International Law* 661, 663; Kaiyan Homi Kaikobad, ‘II. Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004’ (2005) 54 *International & Comparative Law Quarterly* 253, 256–258.

<sup>254</sup> Michael J Kelly, *Restoring and Maintaining Public Order in Complex Peace Operations; the Search for a Legal Framework* (Kluwer Law International 1999) 188–189.

<sup>255</sup> Noting that a state’s expulsion of a refugee will always be constrained by article 33’s prohibition on *refoulement* to a country where the refugee faced a risk of being persecuted: see James C Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021) 520. The meaning of “public order” in article 32 of the 1951 Refugee Convention is considered to be most akin to the term’s meaning in the Africa’s expanded refugee definition: Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 48; Rankin (n 41) 425.

<sup>256</sup> Atle Grahl-Madsen, ‘Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)’ Article 32 [6], quoting from Vattel <<https://www.unhcr.org/3d4ab5fb9.pdf>> accessed 3 January 2023.

<sup>257</sup> The summary of key concepts within “public order” and “*ordre public*” as used in domestic public law is drawn from the author’s broader research, with key elements discussed in Parts 4.3.2- 4.3.4 below. The author’s boarder research reviewed the meaning of “public

<p>countries, “public order” and “<i>ordre public</i>” are most commonly used in reference to the police powers of the State.</p>	<p>Key concepts: Public peace, safety and security, societal stability, the rule of law and law enforcement. Public order powers operate, mostly implicitly but sometimes explicitly, within a legal framework that protects fundamental rights and freedoms of individuals within society, including freedom from interference with the rights to privacy, harassment, and assault.</p>	<p>safety, security, respect for human dignity and, in some cases, morality. Public order powers operate within a legal framework that respects human rights and the fundamental principles that reflect the public interest and ensure the public welfare.</p>
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The meaning of the terms “public order” and “*ordre public*”, as used in domestic public law contexts relating to the police powers of the State, have a high level of conceptual equivalence,<sup>258</sup> though “*ordre public*” remains broader than the English term. For example, while a threat to moral order is considered capable of disturbing public order in some francophone countries,<sup>259</sup> moral order is not generally included in the ordinary English meaning of the term as a standalone basis for a disturbance to public order.<sup>260</sup> Respect for human dignity is considered to be an aspect of *ordre public*, but whether it is included in the English concept of public order is unclear.

Applying the principles of article 33(4) of the VCLT, it is possible to permissibly reconcile the differences between the English and French terms by finding conceptual harmony between the ordinary meaning of “public order” in English public law and the ordinary meaning of “*ordre public*” in the context of French public law if: 1) the English “public order” is interpreted purposively to include respect for human dignity; and 2) “*ordre public*” is interpreted as including disturbances to moral order only to the extent that they involve a disturbance to public peace, safety or security. In their harmonized constructions, both the ordinary meanings of the English “public order” and French “*ordre public*” in domestic public law usages can therefore be said to refer to a state of societal stability, and the maintenance of public peace/tranquillity, public safety, public security, and public health (at least in the narrow sense where public health impacts on public safety and hygiene, and hence public health is from here on considered to be captured under the concept of “public safety”).

Interpreting “public order” in Article I(2) as characterized predominantly by reference to the concepts of public peace, public safety and public security aligns with the definition’s textual context which emphasizes the *disturbance* to public order and not the multivarious threats that *may lead to* a disturbance. It is also consistent with the general agreement in the scholarly literature and UNHCR’s guidance that “public order” in the Article I(2) refugee definition encompasses, as a minimum, the concepts of: “law and order”, the rule of law, public peace, public safety, public security, societal

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order” and “*ordre public*” in different anglophone and francophone jurisdictions with varying levels of depth, depending on the availability of materials; these jurisdictions included Benin, Cameroon, Nigeria, South Africa, Zimbabwe, the United Kingdom, Australia, Canada and the United States of America, with a more high-level review conducted of the laws of Côte d’Ivoire, Democratic Republic of Congo, Kenya, Malawi, Senegal and Seychelles.

<sup>258</sup> As defined in Part 3.4 as where the concepts inherent in the term are equivalent, though they may not be described using the same terminology.

<sup>259</sup> For example, in Benin: *Loi n. 97-029 du 15 janvier 1999 portant organisation des communes en République du Bénin*, Article 76 (unofficial translation); and in the bilingual jurisdiction of Cameroon: *Cameroon Loi n° 74/2 du 5 décembre 1974 portant organisation communale au Cameroun*, Article 71 (unofficial translation).

<sup>260</sup> With the exception in some jurisdictions regarding prostitution as a moral issue: see the discussion in Larry J Siegel, *Criminology: Theories, Patterns, and Typologies* (10th edn, Wadsworth) Chapter 14.

stability, and the effective, stable functioning of the State.<sup>261</sup> This interpretation also broadly accords with the interpretations of public order/*ordre public* in article 32 of the 1951 Refugee Convention, under IHL, and international human rights law as applied in practice.<sup>262</sup>

#### 4.3.2 *Public peace, public safety and public security*

The preservation of public peace, public safety and public security is aimed at ensuring an accepted level of public welfare and societal stability in the community or public at large, which involves the harmonious functioning of society's institutions in relation to its citizens; and operates within a legal framework that protects human rights.<sup>263</sup> The concepts of public peace, safety and security interact and overlap, though are rarely defined in practice. General conclusions can, however, be drawn from the contexts in which they are used in anglophone and francophone countries' public order policing laws.

The concept of **public peace** (sometimes referred to as "tranquillity") can be said to represent a state of calm or an absence of unrest, interference or turmoil that disturbs "the life of the community".<sup>264</sup> Examples of breaches to public peace include unreasonable noise, riots, violence, demonstrations, events causing widespread fear, interference with rights to privacy and general freedom from interference.<sup>265</sup> The concept of "public peace" often goes to the heart of public order in a public law context.<sup>266</sup> In Nigeria, a breakdown of "public safety and public order" can be assessed against what is necessary to "restore peace and security".<sup>267</sup> In Zimbabwe, breaches of the peace are considered public order crimes.<sup>268</sup> Kenya's Public Order Act includes provisions regulating public gatherings which provide for the maintenance of "peace and order".<sup>269</sup> Public peace and tranquillity is also central to the meaning of *ordre public* in the context of police powers in francophone countries which,

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<sup>261</sup> Drawing in particular on: UNHCR, 'GIP 12' (n 167) [56]; UNHCR, 'Legal Considerations 2020' (n 24) [16]; Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 48–49; Rankin (n 41) 424–427; Edwards (n 40) 220–221; Adeola (n 17) 368–370; Wood, 'In Search of the African Refugee' (n 29) Chapter 7, particularly 178. Wood's interpretation of "public order" as "law and order" in Wood's analysis has been interpreted by the author of this paper as also encompassing the other elements listed in the referenced sentence, based on comparative analysis across the literature and identified consistencies between Wood and other authors' reasoning regarding comparative public order meanings in the 1951 Refugee Convention context in particular.

<sup>262</sup> See the human rights jurisprudence set out in note 250 above.

<sup>263</sup> Kiss (n 134) 299–302.

<sup>264</sup> *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* (18205/2018) [2020] ZAGPJHC 146 (High Court). See also Oxford English Dictionary, 'peace' <<https://www.oed.com/view/Entry/139215?rskey=c8cXvw&result=1#eid>> accessed 2 April 2023. In common law jurisdictions, breach of the peace is often defined through reliance on the English Court of Appeal case of *R v Howell* [1982] QB 416 where Watkins LJ at page 427 stated "there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawfully assembly or other disturbance".

<sup>265</sup> For example, see Tifine (n 208) Ch 1, I.A; Benin - *Loi n. 97-029 du 15 janvier 1999 portant organisation des communes en République du Bénin*, Article 76 (unofficial translation); Cameroon *Loi n° 74/2 du 5 décembre 1974 portant organisation communale au Cameroun*, Article 71 (unofficial translation); South Africa - 'The Public Order Police: Crowd Regulation and Management during Public Gatherings and Demonstrations (The National Instruction 4 of 2014)' <<https://protestguide.org.za/national-instruction.pdf>> accessed 1 February 2023; United Kingdom - Public Order Act 1986, Part 1 offences.

<sup>266</sup> For example, UK Public Order Act 1986, Canadian Criminal Code (Criminal Code (R.S.C., 1985, c. C-46), Part II); Nigerian Constitution, s305(3).

<sup>267</sup> When considering whether to declare an emergency: Nigerian Constitution 1999, s305(3), emphasis added.

<sup>268</sup> Criminal Law (Codification and Reform) Act 2006 (Zimbabwe), Ch IV.

<sup>269</sup> For example, ss 5(7), (8) and (12) of Kenya's Public Order Act (CAP 56).

in the administrative law context, can be described as the quadrilogy of public safety, public health, public tranquillity (peace),<sup>270</sup> and the dignity of the human person.<sup>271</sup>

Public order laws also emphasize the aim of **public safety**.<sup>272</sup> Public safety is a duty of States<sup>273</sup> which implies the protection of individuals within its effective control from danger, harm and hazardous conditions,<sup>274</sup> whether that relates to threats of harm caused by the actions of individuals, groups, infrastructure, the environment, the State itself, or other States. Examples of breaches to public safety include damage to or unhealthy infrastructure, generalized violence, unsafe living conditions, unreasonable risk of injury or accidents, dangerous conditions that interfere with the capacity of individuals to meet their basic needs (including access to food, health, education, and the capacity to live with dignity), or other risks of serious physical or mental harm.

At times, public order laws explicitly include the term “public safety” alongside “public order”.<sup>275</sup> For example, Benin’s *Décret n° 2004-394* refers to “the fight against crime, the maintenance of public order and the safety of persons and property”.<sup>276</sup> At other times, the intention that public order capture the concept of “public safety” is clear from the characterisations of the public order offences: in Zimbabwe, crimes against public order include “public violence, obstruction of free movement of persons or traffic, breaches of the peace, disorderly conduct, possession of prohibited items, intimidating or causing offence to others, or causing a criminal nuisance”;<sup>277</sup> in Kenya, the government can declare certain regions to be “disturbed and dangerous areas” and consequently impose public order-based restrictions, such as curfews, under the Public Order Act.<sup>278</sup>

In the 2020 South African case of *Residents of Industry House and Others v Minister of Police and Others*, the High Court found that “public order” in the South Africa Police Services Act (SAPS Act)<sup>279</sup> referred to a breakdown of peace, tranquillity and safety of the public at large, and was informed by “the state of normality and security that is needed in a society and that should be pursued by the

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<sup>270</sup> Tifine (n 233). See also Kiss (n 134) 300–301. Benin - *Loi n. 97-029 du 15 janvier 1999 portant organisation des communes en République du Bénin*, Article 76 (unofficial translation); and Cameroon - *Loi n°90/054 du 19 décembre 1990 relative au maintien de l'ordre public*, Article 2 (unofficial translation).

<sup>271</sup> For example, as recognized by the Conseil d'Etat, Assemblée, 27 octobre 1995, *Commune de Morsang-sur-Orge, requête numéro 136727*, (France); and in Conseil d'Etat, Juge des référés, 9 janvier 2014, Décision N° 374508, *Ministre de l'intérieur cl Société Les Productions de la Plume et M. Dieudonné M'Bala M'Bala* (unofficial translation).

<sup>272</sup> Nigerian Constitution 1999, s305(3); *South Africa Police Services Act 68 of 1995* s13(7); Malawi Constitution s153(2).

<sup>273</sup> UN Office on Drugs and Crime, ‘Public Safety Should Be a Shared Responsibility’ (30 September 2011) <<https://www.unodc.org/lpo-brazil/en/frontpage/2011/09/30-unodc-apresenta-estudo-sobre-gestao-da-seguranca-publica-no-distrito-federal-e-entorno.html>> accessed 11 April 2023.

<sup>274</sup> Oxford English Dictionary, “safety” <<https://www.oed.com/view/Entry/169687?rskey=ihh69o&result=1#eid>> accessed 2 April 2023.

<sup>275</sup> As in the example of Nigeria’s new Police Act 2020 which, in section 4(b), provides that the police force “shall maintain public safety, law and order”. Similarly, the *South Africa Police Services Act 68 of 1995* refers in s13(7) to powers necessary to “restore public order or to ensure the safety of the public...”.

<sup>276</sup> Original French: “centraliser et redistribuer l’information pour une plus grande efficacité des actions entreprises ou à entreprendre dans le cadre de la lutte contre la criminalité, du maintien de l’ordre public et de la sécurité des personnes et des biens”. *Décret n° 2004-394*, Article 8 (unofficial translation). Benin’s *Loi n° 97-028 du 15 janvier 1999, portant Organisation de l’Administration Territoriale de la République du Bénin* provides a list of examples of acts relating to public order, tranquillity, safety and health matters, which include: ensuring the safe passage of people in public (including by reference to the cleanliness and lighting, and general hazards); regulation of public gatherings and assemblies, excess noises, and nocturnal disturbances to public peace; issues of public hygiene; responding to fires, floods, epidemics and contagious diseases; mitigating the consequences of accidents; threats to public morals; the management of stray animals: *Loi n. 97-029 du 15 janvier 1999 portant organisation des communes en République du Bénin*, Article 76 (unofficial translation).

<sup>277</sup> Criminal Law (Codification and Reform) Act 2006 (Zimbabwe), Ch IV.

<sup>278</sup> Under s 8(1) of the The Public Order Act (*Cap. 56*) (Kenya).

<sup>279</sup> South Africa Police Services Act 68 of 1995, s 13(7).

State in order to exercise constitutional rights and to thus benefit a harmonious development of society".<sup>280</sup> The High Court specifically defined public order in the SAPS Act as referring to:

something more than the maintenance of law and order but rather involves the peace, tranquillity and safety of the public at large. These three conditions are necessary to achieve a 'state of normality and security' in society... Public order could thus be affected by only such contraventions which affect the community or public at large. How does one determine whether an act or event affects public order or law and order? The test espoused requires a consideration of whether the act or event causes a disturbance to the life of the community, or whether it merely affects an individual whilst leaving the tranquillity of society.<sup>281</sup>

While "public order" is sometimes equated with "law and order" in the 1969 OAU Convention literature,<sup>282</sup> the term "law and order" has a narrower meaning in its ordinary and everyday sense than "public order" and includes not only observance of the law, but the strict enforcement of the law.<sup>283</sup> The primary emphasis of the term "law and order", therefore, is on the suppression of illegal activity and punishment of offenders (i.e. law enforcement). However, as recognized by the South African High Court in the *Residents of Industry House* case quoted above, police law enforcement is only part of the concept of public order, which has as its overarching aims societal stability.<sup>284</sup> Public order thus has a "public collective" element which means that individual or one-off disturbances that do not impact the public collective are more likely to fall into the category of law enforcement.

Finally, the concept of **public security** often focuses on the protection of the State or society itself, and by extension its people, from harms in relation to specific threats (such as terrorism, external aggression and war), and encompasses both internal and external threats.<sup>285</sup> In recent years, however, there has been an expansion of the traditionally narrow understandings of security by institutional actors and academics beyond the concepts of national security or territorial integrity ("State security") to directly focus on the security of individuals ("human security").<sup>286</sup> This human security paradigm is premised on the right of individuals to be free from want, free from fear, and free to take action on one's own behalf.<sup>287</sup> This perspective recognizes that fundamental to State security is that individuals within that State can live in safety and with dignity.<sup>288</sup> For the purposes of this paper, the term "public

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<sup>280</sup> Referring to a provision of 'The Public Order Police: Crowd Regulation and Management during Public Gatherings and Demonstrations (The National Instruction 4 of 2014)': *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* (18205/2018) (n 264) [82].

<sup>281</sup> *ibid* [83] (original references omitted).

<sup>282</sup> See in particular Wood, 'In Search of the African Refugee' (n 29) 178.

<sup>283</sup> See, for example, Merriam Webster Dictionary, 'law and order' <<https://www.merriam-webster.com/dictionary/law%20and%20order>> accessed 2 April 2023; Collins Dictionary, 'law and order' <<https://www.collinsdictionary.com/dictionary/english/law-and-order>> accessed 2 April 2023. The distinction between "public order" and "law and order" is recognized in the South African case of *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* at [83] relating to police powers. Further, in the context of human rights law, the UN Human Rights Committee has expressly observed that "public order" and "law and order" are not synonyms: Human Rights Committee, 'General Comment No. 37 on the Right of Peaceful Assembly (Article 21)', UN Doc CCPR/C/GC/37, 17 September 2020 [44] <<https://digitallibrary.un.org/record/3884725>> accessed 5 February 2023.

<sup>284</sup> Criminologist Willem de Lint defines public order policing as "the use of police authority and capacity to establish a legitimate equilibrium between governmental and societal, collective and individual, rights and interests in a mass demonstration of grievance": Willem de Lint, 'Public Order Policing: A Tough Act to Follow?' (2005) 33 *International Journal of the Sociology of Law* 179, 180.

<sup>285</sup> See Grahl-Madsen (n 247) Article 2, [8]; Paul Weis, *The Refugee Convention, 1951* (Cambridge University Press 1995) 38.

<sup>286</sup> See the discussion in H Lambert and T Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22 *International Journal of Refugee Law* 237, 258–8.

<sup>287</sup> UN Commission on Human Security, 'Human Security Now: Protecting and Empowering People' (1 May 2003) 10 <<https://digitallibrary.un.org/record/503749?ln=en>> accessed 11 April 2023; see also Lambert and Farrell (n 286) 258–9.

<sup>288</sup> UN Commission on Human Security (n 287).

security” reflects both traditional notions of State security as well as the newer paradigm of human security.

#### 4.3.3 Societal stability and the protection of individuals’ rights and freedoms

In the various contexts in which they are used, the concepts of public peace, safety and security are underpinned by the concepts of societal stability, and the inherent expectations of individuals to participate in public life with dignity and free from fear, violence and unreasonable interference. This state is one of harmony, regularity and an absence of instability. Inherent in stability is a state where individuals’ reasonable expectation of their engagement in civic life are met.

Across the different areas of international and domestic law, the term “public order” fundamentally relates to the stability and security of a State or society.<sup>289</sup> This is also reflected in the areas of agreement between scholars and UNHCR on the meaning of the term.<sup>290</sup> This is further evident in African case law, which uses the terms stability and instability to explain a state of public order for the purposes of the Article I(2) definition.<sup>291</sup> The basic values and fundamental principles that give society stability may vary between different countries and may change over time, though they are always limited by human rights law.<sup>292</sup> They may relate to moral, social, political, administrative and legal order, and to the general welfare of the population, and may capture key constitutional principles on which the State’s legal and political order is founded. How these concepts and values are defined will vary to some degree between States and, as such, are almost incapable of concrete or static definitions, given that each society’s fundamental values will continue to evolve as social and cultural norms themselves evolve. The difficulty in attempting to list these fundamental principles may be precisely why the term “public order” has escaped clear definition in the various legal contexts in which it is used.<sup>293</sup> However, a principled interpretation of the Article I(2) definition does not require the identification of all the various principles and values which, when threatened, may lead to a disturbance of public order, but merely to identify the material elements by which a disturbance can be assessed (that is, public peace, public safety and public security, underpinned by the rule of law and the protection of individual rights and freedoms).

The protection of individual rights and freedoms (a “vertical” relationship) and the obligation of citizens not to unlawfully interfere with the rights of others (a “horizontal” relationship), are inherent in the English “public order”, integral as they are to societal stability.<sup>294</sup> These rights and freedoms include the right to privacy, the right to be free from interference and harassment, assault, and the right to enjoy a life of dignity. This emphasis on the rights and freedoms of others in the community is explicitly recognized in a number of common law public order crimes that are defined by the impact of the specific actions on others, for example where “a person of reasonable firmness...[would] fear

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<sup>289</sup> We see this even from the plain wording of the term itself: public (relating to the state/society) and order (a lack of disorder, chaos or instability).

<sup>290</sup> See Part 4.3.

<sup>291</sup> Examples include *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs* [2015] 1 All SA 100 (High Court) (n 65) [38], noting that the relevant comments were obiter; *FNM v The Refugee Appeal Board and Others* (71738/2016) [2018] ZAGPPHC 532 (12 July 2018) (South Africa) [89]; *Mwamba v Chairperson of the Refugee Appeal Board and Others* (19483/2015) [2017] ZAWCHC 16 (28 February 2017); *Chihomba v Chairperson: Refugee Appeal Board and Others* (16418/2012) [2015] ZAGPPHC 444 (16 June 2015) [31]-[32], regarding an individual’s flight from Zimbabwe; and *Tshiyombo v Members of the Refugee Appeal Board and Others* (13131/2015) [2015] ZAWCHC 170 [35].

<sup>292</sup> *The Siracusa Principles* (n 248) [22].

<sup>293</sup> Prodrômou’s review of jurisprudence of the Inter-American and European human rights courts demonstrates, for example, the courts’ reluctance to substantiate the content of the concept of “public order”: Zena Prodrômou, *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes* (Wolters Kluwer 2020) 129.

<sup>294</sup> The characterisation of these relationships as “horizontal” and “vertical” in this context is drawn from Ashenafi (n 43).

for his personal safety”<sup>295</sup> or where a person engages in public violence, or acts in a way that can be characterized as “intimidating or causing offence to others”.<sup>296</sup>

Similarly, the protection of individual rights is fundamental to *ordre public* under French public law (explicitly in the constitutional context, and implicitly in the administrative law context).<sup>297</sup> *Ordre public* justifies the limitations of rights and freedoms of individual citizens in certain circumstances, while also reflecting “the principle that there are limitations on the State’s powers, especially as far as human rights are concerned”.<sup>298</sup> As such, *ordre public* inherently reflects a relationship of reciprocity between citizens and the State which is essential to societal stability.<sup>299</sup>

In domestic public law, the powers given to State officials to maintain public order/*ordre public* necessarily authorize the restriction of certain individual freedoms or rights (for example, restrictions on liberty, freedom of movement, freedom of expression, freedom of assembly) for the purpose of protecting other individuals’ freedoms and rights in a society (freedom from interference, harassment, physical assault, and so on). These rights and freedoms are found in countries’ constitutions, statutes, bills of rights or in case law, and may also reflect obligations under international human rights law. Common to and inherent in domestic public order/*ordre public* laws and their enforcement is a balance between the rights and freedoms of those directly involved in a disturbance and the rights and freedoms of the public more broadly. The protection of human rights is therefore an inextricable aspect of public order and societal stability. Human rights law also forms an important part of the broader context of the 1969 OAU Convention. The 1969 OAU Convention’s preamble notes that “the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”.<sup>300</sup>

The maintenance of public order, in both its English and French public law sense, can therefore be said to have two mutually reinforcing aims: 1) the maintenance of societal stability; and 2) the protection of individuals’ rights and freedoms, including the right to a life of dignity. These aims are interrelated, and indeed the protection of individuals’ rights and freedoms reinforce societal stability.

#### 4.3.4 Understanding public order by reference to the rule of law

Within the context of the 1969 OAU Convention’s Article I(2) refugee definition, public order, as demonstrated by a predominant state of public peace, public safety and public security, is largely evidenced by the effective operation of the rule of law.<sup>301</sup> In interpreting public order by reference to the normative environment of the 1969 OAU Convention, recourse can be made to relevant jurisprudence on the rule of law – a key concept that is inherent in maintaining public order, and one that is key to giving effect to societal stability and public order in practice. While there is no accepted definition of the rule of law, it can be described as a principle of governance in which equality,

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<sup>295</sup> *Public Order Act 1986* UK, Part 1 offences.

<sup>296</sup> See, for example, Ch IV of the Zimbabwean *Criminal Law (Codification and Reform) Act 2006*.

<sup>297</sup> Pierre Mazeaud, ‘Libertés et Ordre Public’ (*Conseil constitutionnel*, 2003) <<https://www.conseil-constitutionnel.fr/les-membres/libertes-et-ordre-public>> accessed 1 April 2023 (unofficial translation). See also Kiss (n 134) 300.

<sup>298</sup> Kiss (n 134) 301.

<sup>299</sup> *ibid.*

<sup>300</sup> OAU Convention, preambular para 6.

<sup>301</sup> This is evident from UNHCR’s GIP 12 and Legal Considerations guidance, from state practice (such as in the South African *Residents of Industry House and Others v Minister of Police and Others* case), and from the scholarship, as discussed in Part 4.3 above.



accountability, a system of participatory government, the protection of people's rights and freedoms, legal certainty, fairness and transparency are paramount.<sup>302</sup>

Guidance from UNHCR makes it clear that the Agency considers the rule of law to be inherent in the concept of public order in the 1969 OAU Convention.<sup>303</sup> The rule of law has also been recognized as "crucial to understanding and addressing the reasons for displacement" and as "the foundation of the humanitarian protection regime".<sup>304</sup> The impact of climate change and the environment on the security and livelihoods of people has also been recognized as a rule of law issue.<sup>305</sup>

In recent years, there has been growing recognition of the interlinkages and mutual reinforcement of the concepts of the rule of law, democracy (in various forms) and human rights.<sup>306</sup> These principles are essential to political stability, the social contract between people and the State, sustainable development,<sup>307</sup> and general peace and security.<sup>308</sup> The Preamble to the 1948 Universal Declaration of Human Rights,<sup>309</sup> for example, states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The rule of law, democratic participation by citizens in their society and respect for fundamental human rights are principles which are reflected in key legal instruments in Africa. For example, the Constitutive Act of the African Union includes in the African Union's objectives of promoting "popular participation and good governance".<sup>310</sup> In 1994, the OAU Assembly of Heads of State and Government recognized that the 1969 OAU Convention was adopted during a period of consolidation of democracy in Africa's newly independent States, noting the Assembly's "unflinching determination to... create a more dynamic African society characterized by the rule of law, tolerance, democracy and economic and social development".<sup>311</sup> In the 2007 African Charter on Democracy, Elections and Governance,<sup>312</sup> the majority of African States<sup>313</sup> committed to promoting the universal

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<sup>302</sup> UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies - Report of the Secretary-General', UN Doc S/2004/616, 23 August 2004 [6] (emphasis added); see also United Nations (n 276); see also Inter-American Democratic Charter, adopted by the General Assembly of the Organization of American States at its special session held in Lima, Peru, 11 September 2011.

<sup>303</sup> UNHCR, 'Legal Considerations 2020' (n 24) [16]; UNHCR, 'GIP 12' (n 167) [56].

<sup>304</sup> United Nations (n 302).

<sup>305</sup> *ibid.*

<sup>306</sup> UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', GA Res 67/1, UN Doc A/RES/67/1, 30 November 2012 [5]; UN Human Rights Council, 'Human Rights, Democracy and the Rule of Law - Resolution 28/14', UN Doc A/HRC/RES/28/14, 9 April 2015; Inter-American Democratic Charter, (n 278) 8th preambular paragraph.

<sup>307</sup> The rule of law has been recognised as integral to Sustainable Development Goal 16 of the United Nations, being 'Peace, Justice and Strong Institutions': 'Sustainable Development Goal 16' (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/sdg-16/>> accessed 23 November 2022.

<sup>308</sup> United Nations (n 302); 'Sustainable Development Goal 16' (n 307).

<sup>309</sup> UNGA, 'Universal Declaration of Human Rights', GA Res 217 A(III), UN Doc A/RES/3/217 A, 10 December 1948 <<https://www.ohchr.org/en/resources/educators/human-rights-education-training/universal-declaration-human-rights-1948>> accessed 2 April 2023.

<sup>310</sup> Constitutive Act of the African Union, adopted 11 July 2000, 2158 UNTS 3 (entered into force 26 May 2001) Article 3(g).

<sup>311</sup> OAU Assembly of Heads of State and Government, 'Tunis Declaration on the 1969 Convention Governing the Specific Aspects of Refugee Problems' (1994) 30th Ordinary Session, <<https://www.refworld.org/docid/58e49b7e4.html>> accessed 23 March 2023.

<sup>312</sup> African Charter on Democracy, Elections and Governance ('Democracy Charter'), opened for signature 30 January 2007 (entered into force 15 February 2012) <<https://au.int/en/treaties/african-charter-democracy-elections-and-governance>> accessed 1 March 2023.

<sup>313</sup> 36 states have ratified the Democracy Charter, and 13 additional states have signed but not ratified. The 36 states who have ratified the Democracy Charter are: Algeria, Angola, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Comoros, Djibouti, Ethiopia, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Seychelles, Sierra Leone, South Sudan, Sao Tome and Principe, Sudan, Togo, and Zambia. The 13 other states who have signed but not ratified the Democracy Convention are: Burundi, Cape Verde, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Mauritius, Senegal, Somalia, Eswatini,

principles of democracy, the rule of law and human rights,<sup>314</sup> principles that are recognized as being essential to “peace, security and development” and to avoiding “insecurity, instability and violent conflict”.<sup>315</sup>

The rule of law requires that for societal stability to be maintained, individuals must have access to lawful channels for expressing dissent peacefully without the fear of reprisals, to minimize the need for people to resort to violence in seeking to redress grievances.<sup>316</sup> Repression of dissent and the imposition of military rule in the name of ensuring or restoring public order can often have the inverse effect. One recent example of this can be found in the eastern provinces of the Democratic Republic of Congo where, following the declaration of a state of siege (emergency) in those provinces in 2021, there was *increased* activity by armed groups and a doubling in numbers of civilian casualties in the 18 months that followed.<sup>317</sup>

Elements of the rule of law, which underpin societal stability, form the basis of a number of indicia of disturbances to public peace, public safety and public security, as outlined in Part 5.

#### 4.4 ESDPO: The seriousness threshold

A disturbance to public order will only ground a claim for refugee status where that disturbance can be characterized as “serious”. The ordinary and everyday meanings of “serious” and “*gravement*” are grave, bad, or solemn.<sup>318</sup> However, this provides little help in identifying the exact threshold at which a disturbance to public order will be considered “serious”.

According to UNHCR in GIP 12, “the threshold of ‘serious’ refers to public disorder events likely to disrupt the normal functioning of the institutions of the State and affect internal and external security and stability of the State and society”.<sup>319</sup> Sharpe endorses UNHCR’s GIP 12 guidance but convincingly argues that the phrase “State and society” should be read as “State *or* society”, given that “State structures can be propped up through illegitimate means”.<sup>320</sup> Serious disturbances may be one-off or part of a series of events.<sup>321</sup> In its Legal Considerations, UNHCR elaborates:

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Tunisia, Uganda, and Zimbabwe: ‘status list’ <[https://au.int/sites/default/files/treaties/36384-sl-AFRICAN\\_CHARTER\\_ON\\_DEMOCRACY\\_ELECTIONS\\_AND\\_GOVERNANCE.pdf](https://au.int/sites/default/files/treaties/36384-sl-AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf)> accessed 20 March 2023.

<sup>314</sup> Articles 2, 4 and Preamble.

<sup>315</sup> Articles 2(4), 11, 12, 13, 38(1), and Preambular paragraphs 3 and 8.

<sup>316</sup> This is recognized as an aspect of the rule of law in the World Justice Project’s factors for assessing ‘order and security’ in each country: World Justice Project, ‘Rule of Law Index 2022’ (2022) 15 <<https://worldjusticeproject.org/rule-of-law-index>> accessed 25 January 2023.

<sup>317</sup> Amnesty International, ‘DRC: Stop Using Prolonged State of Siege as Excuse to Crush Protests’ (27 September 2022) <<https://www.amnesty.org/en/latest/news/2022/09/drc-stop-using-prolonged-state-of-siege-as-excuse-to-crush-protests/#:~:text=Military%20authorities%20must%20stop%20using,for%20East%20and%20Southern%20Africa.&text=%E2%80%9CPresident%20Tshisekedi%20must%20translate%20into,commitment%20to%20uphold%20human%20rights.>> accessed 20 May 2023.

<sup>318</sup> Larousse French-English Bilingual Dictionary, ‘*gravement*’ <<https://www.larousse.fr/dictionnaires/francais-anglais/gravement/37962>> accessed 30 November 2023; Collins Diction, ‘serious’, meaning 1 <<https://www.collinsdictionary.com/dictionary/english/serious>> accessed 2 December 2022; Macquarie Dictionary, ‘serious’, meanings 1 and 2 <[https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=serious](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=serious)> accessed 2 December 2022.

<sup>319</sup> UNHCR, ‘GIP 12’ (n 167) [56].

<sup>320</sup> Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 52. Similarly, Mkwanzani states that “dictatorial governments may conceal any manifestations of [political] instability through oppressive means”: Mkwanzani (n 43) 22.

<sup>321</sup> UNHCR, ‘GIP 12’ (n 167) [57].

The ‘serious’ threshold may embrace quantitative and qualitative dimensions and must be assessed on a case-by-case basis, taking account of the nature and duration of the disruption and its consequences for the security and stability of the State and society.<sup>322</sup>

Some examples of events seriously disturbing public order can be drawn from state practice and the guidance of UNHCR. For example, the following situations have been found by African host countries to constitute serious disturbances to public order for the purposes of the Article I(2) refugee definition:

- Somalis feeling continuing conflict, instability, drought and famine in central and southern Somalia;<sup>323</sup> and people fleeing South Sudan from 2014 onwards<sup>324</sup> – a country which has experienced ongoing civil conflict, general instability, and severe flooding in recent years;<sup>325</sup> (Kenya)
- People fleeing conflict between government and rebel groups in the eastern regions of the Democratic Republic of Congo, including due to: forced conscription of young men and aggression towards the local population, and “ongoing instability”;<sup>326</sup> “destabilisation” and “social and political turmoil”;<sup>327</sup> and political instability and unrest;<sup>328</sup> (South Africa, Benin and Uganda<sup>329</sup>) and
- armed rebellion in Côte d'Ivoire, and street demonstrations followed by police or military repression in Togo (Benin).<sup>330</sup>

UNHCR has recently suggested that refugee protection may be owed to “individuals originating from areas of Somalia that are affected by active combat between government-affiliated forces and Al-Shabaab as well as areas of Somalia that are under the full or partial control of Al-Shabaab”, on the basis of the ESDPO ground in the Article I(2) refugee definition.<sup>331</sup> In a 2022 report, UNHCR states that:

the Government has lost effective control to Al-Shabaab and is unable to provide protection to civilians. Available information indicates that the exercise of control over key aspects of people’s lives in these

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<sup>322</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [16]. In adopting this definition, UNHCR accepts and extends Wood’s position, which is that a serious disturbance should be assessed “on a case-by-case basis, taking into account the nature, extent and duration of the disturbance”: Wood, ‘In Search of the African Refugee’ (n 29) 178.

<sup>323</sup> Through the application of group-based *prima facie* refugee status determination procedures: Tamara Wood, ‘Fragile States and Protection under the 1969 OAU Convention’ (2013) 43 *Forced Migration Review* 17, 18. This *prima facie* status ceased in May 2016: Human Rights Watch, ‘Kenya: Protect Somalis Facing Conflict, Abuses, Drought’ (2017) <<https://www.hrw.org/news/2017/03/23/kenya-protect-somalis-facing-conflict-abuses-drought>> accessed 15 April 2023.

<sup>324</sup> The Kenya Gazette, ‘Declaration of Prima Facie Refugees’ (1 August 2014) <[http://kenyalaw.org/kenya\\_gazette/gazette/notice/164302/](http://kenyalaw.org/kenya_gazette/gazette/notice/164302/)> accessed 12 March 2023.

<sup>325</sup> Amnesty International, ‘Amnesty International Report 2022/23; The State of the World’s Human Rights; South Sudan 2022’ <<https://www.ecoi.net/en/document/2089609.html>> accessed 23 April 2023.

<sup>326</sup> *ENM v The Refugee Appeal Board and Others* (71738/2016) [2018] ZAGPPHC 532 (12 July 2018) (South Africa) [81] and [89].

<sup>327</sup> *Mwamba v Chairperson of the Refugee Appeal Board and Others* (19483/2015) [2017] ZAWCHC 16 (28 February 2017) (South Africa) [88]-[89].

<sup>328</sup> *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs* [2015] 1 All SA 100 (High Court) (n 113) [38], though these comments were obiter.

<sup>329</sup> South African references are listed in the preceding three footnotes; Benin Appeals Committee decision *CR, 2009, n° 058, D. Q* (2009), and see also the Committee’s decision in *CR, 2009, n° 042, U. Y* (2009); regarding Uganda, see Wood, ‘Fragile States and Protection under the 1969 OAU Convention’ (n 311) 18.

<sup>330</sup> Although in both cases the Appeals Committee stated that the applicants were not individually at risk: *CR, 2009, n° 013, K. V* (Côte d’Ivoire decision); *CR, 2009, n° 014, D. P* (Togo decision).

<sup>331</sup> UNHCR, ‘International Protection Considerations with Regard to People Fleeing Somalia’ (*Refworld*, September 2022) 11 <<https://www.refworld.org/docid/6308b1844.html>> accessed 13 April 2023.

areas is repressive, coercive and undermines a public order (*ordre public*) based on respect for the rule of law and human dignity.<sup>332</sup>

The ordinary meaning of the word “serious” as it is used in the context of Article I(2) of the 1969 OAU Convention to characterize the nature of a public order disturbance, informed by available state practice, UNHCR guidance and scholarship, suggests that a disturbance to public order will meet the threshold of “serious” where it involves a widespread or generalised threat to the rights to life, physical integrity and/or liberty of individuals in a society, such that the disturbance can be said to affect society at large, and the State is unable or unwilling to restore public order. For a disturbance to meet the threshold of a serious disturbance, and thus constitute ESDPO, it must meet all three of the following criteria:

1. The disturbance can be said to affect society at large, for example by being widespread (affecting a proportionately large number of people within a society) and/or generalized (where there is a risk to an indeterminate number of people within a society);
2. The State is unable or unwilling to restore and ensure public order; and
3. The disturbance involves a threat to the rights to life, physical integrity and/or liberty of individuals.

These three elements are discussed below.

#### 4.4.1 *The disturbance affects society at large*

Given that “public order” and “*ordre public*” emphasize a collective impact and are ultimately underpinned by the concept of societal stability, the seriousness of a disturbance to public order should ultimately be assessed against the nature, extent and duration of the disturbance on the society at large. Both UNHCR’s guidance and the scholarship emphasize that a serious disturbance to public order will impact the effective functioning of the State or society, as distinct from isolated events that do not impact society more broadly.<sup>333</sup> Edwards argues that ESDPO must be “prolonged, on a massive scale, or harmful to life, freedom or security”,<sup>334</sup> and gives the examples of “civil conflicts, coups d’états, militia or rebel group insurgencies and other similar actions”.<sup>335</sup> Rankin looks to the meaning of “public order” in the 1951 Refugee Convention (which appears to have an implied seriousness threshold<sup>336</sup>) to conclude that a serious disturbance must involve “violence or threats against an indeterminate number of people or to society at large”.<sup>337</sup> Adeola argues that the seriousness threshold requires determining whether the events are “capable of gravely interrupting the effective functioning of society in a political, social or economic manner”.<sup>338</sup>

It is clear from the general consensus within the scholarship and the examples of state practice mentioned above that a serious disturbance will be one that affects society at large. This does not require that all members of the society be affected by the disturbance, but instead that the impact of a public order disturbance can be described as widespread (affecting a proportionately large number

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<sup>332</sup> *ibid* 121.

<sup>333</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [16]; Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 52; Wood, ‘In Search of the African Refugee’ (n 29) 178; Adeola (n 17) 370. Wood, ‘In Search of the African Refugee’ (n 29) 178.

<sup>334</sup> Edwards (n 40) 220.

<sup>335</sup> *ibid* 221.

<sup>336</sup> see Grahl-Madsen (n 256) Article 32 [4], also at [6]; Paul Weis (n 285) 322.

<sup>337</sup> Rankin (n 41) 427.

<sup>338</sup> Adeola (n 17) 370.

of people within a society) and/or generalized (where there is a risk to an indeterminate number of people within a society). Serious disturbances need not affect the majority of individuals in a society, so long as enough individuals are affected in a way that it creates a general sense of instability in the society by undermining public peace, public safety or public security.

#### 4.4.2 *The State is unable or unwilling to restore and ensure public order*

Available evidence of state practice from Benin, Chad and South Africa supports the position that “events seriously disturbing public order” implies conflict “leading to loss of governmental control that threatens the civilian population, and the unwillingness or inability of the government to regain such control”.<sup>339</sup> For example, the South African Refugee Appeal Board considered a lack of effective government control as integral to a public order disturbance.<sup>340</sup> In a number of decisions, the Refugee Appeal Board described the test for the existence of events seriously disturbing public order as follows:

Where law and order has broken and the government is unwilling [sic] or unable to protect its citizens, it can be said that there are events seriously disturbing or disrupting public order. To determine when a disturbance had taken place involves weighing the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time. The test should be objective.<sup>341</sup>

The available evidence of state practice therefore suggests that a criterion for establishing a serious disturbance to public order is that the State in question is “unwilling or unable to protect” its citizens in the face of the disturbance. This requirement is consistent with the surrogate nature of refugee protection generally. Here the focus is not only on the State’s willingness to resolve serious disturbances, but also the effectiveness of the State’s attempts to do so (its “ability”).<sup>342</sup> In practice, the existence of a disturbance to public order that affects society at large will usually evidence the state’s inability or unwillingness to restore public order.

#### 4.4.3 *The rights to life, physical integrity and/or liberty of individuals are threatened*

Public order, as assessed against a predominant state of public peace, public safety and public security, underpinned by the effective operation of the rule of law, is aimed at protecting the rights to life, physical integrity and liberty of people within the society. Threats to the rights to life, physical integrity or liberty are therefore fundamental to assessing a disturbance to public order.<sup>343</sup> UNHCR’s guidance emphasizes that the rights to life, physical security and liberty are inherent in the concept of public order.<sup>344</sup> The protection of these rights is also reflected in the prohibition against refoulement captured in Article II(3) of the 1969 OAU Convention, which states that:

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<sup>339</sup> Sharpe here specifically relies on a review of available evidence of state practice in Benin, Chad and South Africa: Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 54 drawing in part from the research she undertook in a report commissioned by UNHCR; Sharpe, ‘The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination’ (n 14).

<sup>340</sup> Schreier (n 118) 85. The decisions Schreier refers to are not publicly available.

<sup>341</sup> Refugee Appeal Board decision number 729/06, quoted in Schreier (n 101) 61.

<sup>342</sup> Tal Schreier, ‘An Evaluation of South Africa’s Application of the OAU Refugee Definition’ (2008) 25 *Refugee* 53, 60.

<sup>343</sup> The threat to an *individual* refugee applicant’s rights to life, physical integrity or liberty is relevant under the “individual component” of the Article I(2) refugee definition) (see Part 4.6).

<sup>344</sup> UNHCR, ‘GIP 12’ (n 117) [56]; UNHCR, ‘Legal Considerations 2020’ (n 22) [16]; see also Edwards (n 135) 220; Sharpe (n 62) 54 relying on Nigerian refugee decisions which noted that “serious and indiscriminate threats to life, physical integrity or freedom” were the threshold

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

In this context, it is the *threat* to individuals' rights to life, physical integrity or liberty in society that is relevant (that is, a real risk of these rights being denied will be sufficient; an actual violation of rights need not be established). Individual threats to, or violations of, rights to life, physical integrity or liberty will not, on their own, amount to a disturbance to public order, although individual violations can point to a systemic or widespread denial of these rights. Such threats must go beyond individual instances and affect society at large (the "collective"), being either widespread or generalized in order to be classified as disturbing *public* order. That is not to say that a threat to an individual's rights to life, physical integrity or liberty could never disturb public order at large, but where this occurs it will be in connection with a public response (for example, through public outcry or demonstrations).

An assessment of whether there has been a serious disturbance to public order by reference to the denials of individuals' rights to life, physical security or liberty would require an assessment of whether the threats or denials were lawful and legitimate under international human rights law (which requires, for example, that derogations and limitations to human rights be reasonable, necessary and proportionate in the circumstances).<sup>345</sup> However, caution should be exercised in justifying derogations to human rights in such contexts given that denials of human rights on a widespread scale may give rise to a presumption of arbitrariness.

It is not the purpose of this paper to comprehensively define the rights to life, physical security and liberty, given that the standards by which these rights are measured will continue to evolve along with jurisprudential developments in human rights law. However, a few examples are discussed below to highlight the importance of a careful assessment of these rights in the particular circumstances of each case. The starting point is to recognize that, in the context of the 1969 OAU Convention, a narrow interpretation of the rights to life, physical integrity and liberty would be contrary to the Convention's protection-oriented object and purpose.

Firstly, the term "liberty" is commonly interchanged with "freedom" in different rights-related contexts.<sup>346</sup> The right to liberty includes, at a minimum, liberty in the narrow sense used in article 9(1) of the ICCPR – relating to physical liberty and security of the person and the prohibition against arbitrary detention – but may also be interpreted to include human rights freedoms more broadly, for example as encompassing freedom of movement, freedom of thought, conscience and religion, freedom of association and freedom of expression.<sup>347</sup>

In a number of contexts, the phrase "physical integrity" is used interchangeably with "security" and "safety".<sup>348</sup> Hathaway and Foster explain that risks to physical security commonly encompasses: risks

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for recognition under Article I(2), in a way that suggests the threats to life, physical integrity or freedom are relevant to both the societal and individual components of the definition. .

<sup>345</sup> See, for example, James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 206.

<sup>346</sup> For example, UNHCR's GIP 12 and Legal Considerations use the phrase "life, security and freedom": UNHCR, 'GIP 12' (n 167) [56]; UNHCR, 'Legal Considerations 2020' (n 24) [16]. The 1984 Cartagena Declaration on Refugees, whose Conclusion III(3) refugee definition was modelled on the OAU Convention's Article I(2) definition, uses the phrase "lives, safety or freedom".

<sup>347</sup> Hathaway and Foster (n 345) 239.

<sup>348</sup> See the examples given in note 346 above.

to life; torture; cruel, inhuman, or degrading treatment or punishment; slavery, including in its contemporary forms; or other forms of physical violence.<sup>349</sup> Hathaway and Foster also point out that courts have often recognized the fact that “physical security may also be threatened by critical risks to socio-economic rights, including in particular those that require the protection of core health concerns”<sup>350</sup> and to an adequate standard of living.<sup>351</sup> Certain threats to health will “amount to risks of torture or cruel, inhuman, or degrading treatment”.<sup>352</sup>

The UN Human Rights Committee has emphasized that the right to enjoy a life with dignity is inherent in the right to life,<sup>353</sup> and that the right to life should not be interpreted narrowly.<sup>354</sup> In its General Comment No 36, the Human Rights Committee detailed the nature of States’ duties to protect the right to life, including States obligations to:

- enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life;
- take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory;
- take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence, including persons with disabilities, including psychosocial or intellectual disabilities, to ensure their effective enjoyment of the right to life on an equal basis with others; and
- take any necessary measures to protect the lives of individuals deprived of their liberty by the State.<sup>355</sup>

The Committee stated that general conditions in society may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity, including violence, accidents, degradation of the environment, deprivation of indigenous peoples’ land, territories and resources, the prevalence of life-threatening diseases, extensive substance abuse, widespread hunger and malnutrition, extreme poverty, and homelessness.<sup>356</sup> The Committee further noted that promoting the right to life requires States to:

develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and manmade disasters that may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radioactive accidents and massive cyberattacks resulting in disruption of essential services.<sup>357</sup>

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<sup>349</sup> Hathaway (n 255) 208.

<sup>350</sup> Hathaway and Foster (n 345) 208.

<sup>351</sup> See the detailed discussion of examples and jurisprudence in *ibid* 228–235.

<sup>352</sup> *ibid* 235.

<sup>353</sup> Human Rights Committee, ‘General Comment No. 36: Article 6 (Right to Life)’, UN Doc CCPR/C/GC/36, 3 September 2019 [3]; *Ioane Teitiota v New Zealand (Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2728/2016)* [2020] UN Human Rights Committee CCPR/C/127/D/2728/2016, 23 September 2020 [9.4].

<sup>354</sup> Human Rights Committee, ‘General Comment No. 36: Article 6 (Right to Life)’ (n 325) [3].

<sup>355</sup> *ibid* [19]–[25].

<sup>356</sup> *ibid* [26].

<sup>357</sup> *ibid* (internal footnotes omitted).

This accords with the obligation of States, in promoting the right to life, to “protect people from the effects of natural hazards by reducing their vulnerability through climate change adaptation and disaster risk reduction”, in line with the Sustainable Development Goals.<sup>358</sup>

The Human Rights Committee also emphasized that to address adequate conditions for protecting people’s right to life, States should adopt measures to “ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation” and other measures including the provision of emergency health services, emergency response operations and social housing programmes.<sup>359</sup> This recognizes that the protection of substantive, minimum core socio-economic rights – which are obligations “of immediate effect”<sup>360</sup> – is essential to contributing to the right to life and to enjoying a life of dignity.<sup>361</sup> These rights are particularly important in the context of the adverse effects of climate change, environmental degradation and the impacts of disasters.

The impacts of climate change have been recognized as affecting the enjoyment of a broad range of human rights of millions of people, including the rights to food, to water and sanitation, to health, and to adequate housing.<sup>362</sup> Often, it is the most vulnerable within a society who are most affected, including children, women, indigenous peoples, persons of poor health, older persons, persons with disability, the poor, and those whose livelihoods rely directly on the environment, such as pastoralists and subsistence farmers.<sup>363</sup> The denial of minimum core human rights can contribute to instability in society and may lead to unrest, which is currently one of the concerns regarding water scarcity in South Africa at the time of writing.<sup>364</sup> As Hathaway and Foster explain, the Human Rights Committee and courts adjudicating refugee claims “have long recognized that life can be threatened by subjection to grave socio-economic conditions, at least where such actions ‘deprive [the applicant] of basic means of existence’”.<sup>365</sup>

A principled interpretation of the Article I(2) definition suggests that a widespread denial of minimum core socio-economic human rights that impact a person’s rights to life, physical integrity, liberty and to enjoy a life of dignity may constitute events seriously disturbing public order. Therefore, the circumstances of each applicant’s case must be assessed carefully and objectively. Refugee decision makers must also keep in mind that denials to individuals’ rights to life, physical integrity or liberty in a society may result from one-off situations or may be the result of cumulative

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<sup>358</sup> Report of the Office of the United Nations High Commissioner for Human Rights (n 77) [16]. See also UNGA, UN High Commissioner for Human Rights 2018 report (n 18) [10].

<sup>359</sup> Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)* (n 353) [26].

<sup>360</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’, UN Doc E/1991/23, 14 December 1990 [1]. This is further discussed in Ellen Nohle and Gilles Giacca, ‘Economic and Social Rights in Times of Disaster; Obligations of Immediate Effect and Progressive Realization’ in Flavia Zorzi Giustiniani and others (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

<sup>361</sup> See Office of the High Commissioner for Human Rights, ‘Frequently Asked Questions on Economic, Social and Cultural Rights; Fact Sheet No. 33’ 17 <<https://www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf>> accessed 25 May 2023. In Africa, for example, the African Commission on Human and Peoples’ Rights has held that “[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation”: *Decision Regarding Communication No. 155/96 (The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria)*, African Commission on Human and Peoples’ Rights, Case No. ACHPR/COMM/A044/1, 27 May 2002.

<sup>362</sup> Report of the Office of the United Nations High Commissioner for Human Rights (n 77) [7]. See also UNGA, UN High Commissioner for Human Rights 2018 report (n 18) [10].

<sup>363</sup> Report of the Office of the United Nations High Commissioner for Human Rights (n 77) [7], [36]-[37]; UN Human High Commissioner for Human Rights (n 20) Part II(B).

<sup>364</sup> ‘No Lights, No Water: South Africans Fume at Cascading Crisis’ (*AfricaNews*, 3 February 2023)

<<https://www.africanews.com/2023/02/03/no-lights-no-water-south-africans-fume-at-cascading-crisis/>> accessed 20 May 2023.

<sup>365</sup> Hathaway and Foster (n 345) 211.



impacts. For example, an accumulation of socio-economic harms may result in the denial of an adequate standard of living which compromises the physical integrity of individuals.<sup>366</sup>

It is not the purpose of this paper to comprehensively discuss the extent to which human rights may be affected in the specific context of climate change, environmental degradation and the impacts of disasters – a topic that is the subject of a growing body of scholarship.<sup>367</sup> For present purposes, an assessment of human rights – specifically relating to the rights to life, physical integrity and liberty – is important in informing the seriousness of the disturbance to public order, whether in the context of climate change, environmental degradation, the impact of disasters or other events. The evolving scholarship and jurisprudence on human rights in the context of climate change, environmental degradation and disasters will, of course, have an important influence on the development of human rights law as it applies to people seeking refugee protection in such contexts.<sup>368</sup> This includes through the jurisprudence of the African Commission on Human and Peoples' Rights which, in 2019, emphasised the impact that extreme weather events in Eastern and Southern Africa due to climate change had on human rights.<sup>369</sup> In its 2019 resolution, the Commission highlighted the human rights implications of cyclone Kenneth and Cyclone Idai, and strongly urged States to ensure that people were not subjected to “further violations resulting from lack of security institutions and health services as a result of the cyclones”.<sup>370</sup> Here we see the Commission's recognition of the impact disasters can have on the basic rights of individuals through the operation of essential services.

To conclude, threats to human rights will be relevant to an assessment of “events seriously disturbing public order” in two ways:

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<sup>366</sup> *ibid* See the discussion at 228-235.

<sup>367</sup> In the African context, see for example the work of Ademola Oluborode Jegede: AO Jegede, 'Should a human right to a safe climate be recognized under the AU human rights system?' in M Addaney & AO Jegede (eds) *Human Rights and the Environment under African Union Law* (Palgrave Macmillan, 2020); AO Jegede, 'Climate change in the work of the African Commission on Human and Peoples' Rights' (2017) 31(2) *Speculum Juris* 136; AO Jegede, 'Climate change displacement and socio-economic rights of the child under the African human rights system: The relevance of ETOs' in M Gibney, GE Turkelli, M Krajewski and W Vandenhoe (eds) *The Routledge handbook on extraterritorial human rights obligations* (Routledge, 2022); and AO Jegede, 'Arguing the right to a safe climate under the UN Human Rights System' (2020) 9 (2) *International Human Rights Law Review* 184. See also Addaney, Jegede and Matinda (n 43).

<sup>368</sup> This includes through decisions of the UN Human Rights Committee such as *Ioane Teitiota v. New Zealand (Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016)* (n 323); and resolutions adopted by the UN Human Rights Council, including the Council's resolution of 13 October 2020 recognising the human right to a clean, healthy and sustainable environment (see UN Doc A/HRC/RES/45/30, 13 October 2020). The Human Rights Council has also adopted resolutions relating to human rights in the context of climate change and the environment: 'Human rights and climate change', UN Doc A/HRC/RES/44/7, 23 July 2020; 'Human rights and the environment', UN Doc A/HRC/RES/46/7, 30 March 2021; and 'Rights of the child: realizing the rights of the child through a healthy environment', UN Doc A/HRC/RES/45/30, 13 October 2020. The International Law Commission's 2016 *Draft Articles on the Protection of Persons in the Event of Disasters with Commentaries* (available at <https://www.refworld.org/docid/5f64dc3c4.html>) are also being increasingly relied on: in the UNHCR context, for example, see UNHCR, 'Legal Considerations 2020' (n 24) 1, fn 3. In Africa, there has been less jurisprudential development that at the UN level on human rights and climate change and disasters, however some notable examples from the African Commission on Human and Peoples' Rights show increased recognition and discussion of human rights in this context; see in particular: 'Résolution sur le Changement Climatique et les Droits de l'Homme et la Nécessité d'une Etude sur son Impact en Afrique' 46th Ord Sess, CADHP/Res.153(XLVI)09 (25 November 2009); 'Resolution on Climate Change in Africa' 55th Ord Sess, ACHPR/Res.271 (LV) 2014 (12 May 2014); 'Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change' ACHPR / Res. 417 (LXIV) 2019 (19 May 2019); 'Resolution on Climate Change and Forced Displacement in Africa' ACHPR/Res. 491 (LXIX)2021 (31 December 2021).

<sup>369</sup> 'Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change' ACHPR / Res. 417 (LXIV) 2019 (19 May 2019). In this resolution, the African Commission highlighted the “right of peoples to economic, social and cultural development and the right of peoples to a satisfactory environment favourable to their development” and noted the connection between global warming and human activities (preamble para 4). Also, as noted in Part 1.2, in its 2021 resolution on 'Climate Change and Forced Displacement in Africa', the African Commission specifically reminded States of their obligations and commitments under the 1969 OAU Convention: African Commission on Human and Peoples' Rights, 'Resolution on Climate Change and Forced Displacement in Africa' ACHPR/Res. 491 (LXIX)2021 (31 December 2021) [1].

<sup>370</sup> 'Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change' ACHPR / Res. 417 (LXIV) 2019 (19 May 2019) [4].

1. as a factor to be weighed in determining whether a disturbance to public order (to public peace, safety and security as underpinned by the rule of law) has occurred; and
2. when assessing whether there has been a widespread, systemic or generalized denial of people's rights to life, physical integrity and liberty, for the purposes of assessing the seriousness of the disturbance.

#### 4.5 Conclusions on the meaning of ESDPO

For the purpose of the Article I(2) refugee definition in the 1969 OAU Convention, "public order" refers to the maintenance of societal stability, demonstrated by a predominant state of public peace, public safety and public security, and underpinned by the effective operation of the rule of law and the protection of individuals' rights and freedoms within the society, including the right to enjoy a life of dignity. When these public order elements are undermined, there will be a *disturbance* to public order. These elements therefore represent the yardsticks by which a public order disturbance can be measured.

The seriousness of a disturbance to public order should be assessed according to the nature, extent and duration of the disturbance. A disturbance to public order will meet the threshold of "serious" where it involves a widespread or generalised threat to the rights to life, physical integrity and/or liberty of individuals in a society, such that the disturbance can be said to affect society at large, and the state is unable or unwilling to restore public order. In other words, for a disturbance to meet the threshold of a serious disturbance, and thus constitute ESDPO, it must meet all three of the following criteria:

1. The disturbance to public order involves a threat to the rights to life, physical integrity and/or liberty of individuals;
2. The disturbance can be said to affect society at large, for example by being widespread (affecting a proportionately large number of people within a society) and/or generalized (where there is a risk to an indeterminate number of people within a society). Serious disturbances need not affect the majority of individuals in a society, so long as enough individuals are affected in a way that it creates a general sense of instability in the society by undermining public peace, public safety or public security; and
3. The State is unable or unwilling to restore public order. Where the disturbance involves a threat to the rights to life, physical integrity and/or liberty of individuals and affects society at large, it can be presumed that the State in question is unable or unwilling to restore and ensure public order.

Serious disturbances may be one-off or part of a series of events.<sup>371</sup> A series of events may, for example, create a cumulative effect that directly or indirectly creates a serious disturbance to public order. Because the Article I(2) definition provides for flight from the enumerated events occurring "in either part or the whole of [the person's] country of origin or nationality", an assessment of the geographic scope of an event, in light of available evidence, must also be undertaken.<sup>372</sup>

Finally, a comment should be made on the standards against which ESDPO should be assessed. The strength of State institutions and governance, or indeed their fragility, varies between countries on the continent. A refugee fleeing a situation in Somalia, South Sudan or the Democratic Republic of

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<sup>371</sup> UNHCR, 'GIP 12' (n 167) [57].

<sup>372</sup> Weerasinghe (n 12) 34.

Congo, three of the top five most fragile States in 2023 according to the Fragile States Index,<sup>373</sup> would arguably be fleeing a very different ‘baseline’ level of societal stability when compared to a person fleeing Botswana or Namibia.<sup>374</sup> In such a context, one might be tempted to assess a disturbance against a different base line of public order that uses as a benchmark the prevailing state of stability in a refugee applicant’s country of origin or nationality. Such an approach might look to the situation in a country of origin prior to a disturbance to assess the impact the disturbing events have had on the existing state of affairs.

The problem with adopting such an approach is that it results in the discriminatory application of a refugee law treaty, contrary to States’ obligations under the 1969 OAU Convention itself and their stated intentions to “establish common standards for [refugees’] treatment” on the continent.<sup>375</sup> Wood addresses this issue comprehensively in her monograph, an excerpt from which is worth setting out in full:

Assessing a disturbance to law and order relative to the historically prevailing level of law and order in a country such as Somalia would therefore result in the application of a higher threshold of disturbance than in a country where law and order mechanisms usually operate quite effectively. A differentiated approach such as this would be inconsistent with the context of the definition... in particular, with the 1969 Convention’s obligation on states parties to apply the Convention without discrimination, including as to race or nationality. It would also be inconsistent with the protection-oriented object and purpose of the 1969 Convention... Where public order is compromised for a long period of time, the vulnerability and protection needs of the population arguably increase, and so a higher threshold for refugee status should not be imposed on such a population.<sup>376</sup>

The importance of assessing all refugee applicants under the 1969 OAU Convention against consistent standards becomes even clearer when reflecting on the fact that the Article I(2) definition “applies to all persons within the jurisdiction of a State Party and is not limited to persons whose country of origin or nationality is in Africa”.<sup>377</sup> This is because the Article I(2) definition applies to “every person” who meets the definition’s criteria.<sup>378</sup>

The indicia proposed in Part 5 for assessing a serious disturbance to public order therefore reflect fundamental elements of societal stability, public peace, public safety and public security which find broad coherence in the international and domestic sources drawn from, including in the laws of African States reviewed, as discussed in Part 4.3. Where an assessment of individuals’ rights is relevant in applying the ESDPO indicia, international and regional human law standards on the rights to life, physical integrity and liberty of individuals provide the benchmark.

#### **4.6 Article I(2)’s “individual component”**

It is not enough for a person to establish that there is a serious disturbance to public order in their country of habitual residence to satisfy the Article I(2) refugee definition’s criteria. Article I(2) also requires that the person be “compelled to leave [their] place of habitual residence in order to seek

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<sup>373</sup> Who were respectively ranked 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> in the 2023 Fragile States index report: The Fund for Peace, ‘Fragile States Index 2023 – Annual Report’ (2023) 7 <<https://fragilestatesindex.org/2023/06/14/fragile-states-index-2023-annual-report/>> accessed 12 July 2023.

<sup>374</sup> Who were respectively ranked 122<sup>nd</sup> and 112<sup>th</sup> in the 2023 Fragile States index report: *ibid*.

<sup>375</sup> OAU Convention preambular paragraph 9, States obligations of non-discrimination are found in art 4.

<sup>376</sup> Wood, ‘In Search of the African Refugee’ (n 29) 196 (original footnotes omitted).

<sup>377</sup> UNHCR, ‘GIP 12’ (n 167) [47] (emphasis added).

<sup>378</sup> Discussed in Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 42–43.

refuge in another place outside [their] country of origin” *owing to* that serious disturbance to public order. As the South African High Court has explained, the effect of the compelled to leave requirements is that “it is conceivable that the existence of the same set of given circumstances might sustain a conclusion that they compelled A to leave, but not B”.<sup>379</sup> As Wood states, the compelled to leave component is “a key factor in maintaining the integrity of the definition’s protection, which could otherwise be broad enough to capture situations that pose little or no risk of harm to the affected population”.<sup>380</sup>

UNHCR’s GIP 12 guidance provides that a person will be compelled to leave their country of origin where “the situation in question is sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country”.<sup>381</sup> In its Legal Considerations, the Agency states that a person will be compelled to leave when the events in question put them at risk of serious harm, which can be assessed by reference to factors including “the geographical proximity of the [event] to the person’s place of habitual residence; how it affects their life, physical integrity, liberty and enjoyment of other human rights; and how the State responds”.<sup>382</sup>

To be able to assess whether a person was “compelled to leave”, it is first necessary to make a factual determination of the person’s habitual residence and the geographic scope of the events seriously disturbing public order. These factors must be assessed on the basis of available evidence, with the phrase “place of habitual residence” implying “more than mere presence or short-term residence”.<sup>383</sup>

Secondly, the words “owing to” indicate that a causal connection, or “nexus”, between the events in the country of origin and the individual’s flight is required.<sup>384</sup> The serious disturbance to public order may be the direct or indirect cause of the risk of harm the individual faces.<sup>385</sup> There is no evident suggestion that the enumerated events need to be the only, or even main, cause of flight, though the events must be a contributing factor.<sup>386</sup>

The compelled to leave component therefore requires an individualized assessment of the specific circumstances of the refugee applicant.<sup>387</sup> Despite the word “compelled” appearing in the past tense, the required assessment is “forward-looking” and assesses “the risk to the refugee if returned to one of the enumerated refugee-producing events”.<sup>388</sup> That the compelled to leave component be interpreted as forward-looking, and therefore as including *sur place* refugees, is required by the 1969 OAU Convention’s object and purpose which is to prevent *future* harm to refugees if returned.<sup>389</sup>

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<sup>379</sup> *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs* (n 113) [6].

<sup>380</sup> Tamara Wood, ‘The International and Regional Refugee Definitions Compared’, *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 631.

<sup>381</sup> UNHCR, ‘GIP 12’ (n 167) [50].

<sup>382</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [17].

<sup>383</sup> Wood, ‘In Search of the African Refugee’ (n 29) 226.

<sup>384</sup> Sharpe, *The Regional Law of Refugee Protection in Africa* (n 43) 57.

<sup>385</sup> Wood, ‘In Search of the African Refugee’ (n 29) 231.

<sup>386</sup> *ibid* 209.

<sup>387</sup> Appeal Committee refugee decisions in Benin provide examples of the Article I(2) definition requiring an individualised assessment of harm even where there is a recognized serious disturbance to public order: *CR, 2009, n° 013, K. V and Decree no. 2018-295, Article 35* (Benin).

<sup>388</sup> Wood, ‘The International and Regional Refugee Definitions Compared’ (n 380) 632.

<sup>389</sup> This is particularly evident from the OAU Convention’s non-refoulement provision in Art II(3). See also *ibid*. It is outside the scope of the current paper to consider the exact nature of the risk of harm an individual must face to satisfy the compelled to leave requirement, including whether the risk of harm is limited to threats to the rights to life, physical integrity or liberty or, for example, extends to ‘serious

Finally, the person must be “compelled to leave...in order to seek refuge”. As the assessment required by the Article I(2) refugee definition is objective,<sup>390</sup> the individual’s own state of mind is irrelevant to the assessment of whether their flight from the serious disturbance to public order was “objectively reasonable”<sup>391</sup> based on their risk of harm. Instead, Article I(2) requires an individual assessment of the person’s reasons for flight and corresponding risk of harm; that is, an objective assessment of the individual refugee’s predicament.<sup>392</sup> The refugee applicant need not establish that they are individually targeted in any way by the State, or that they face a real risk of serious harm because of a particular attribute they possess or are perceived to possess. This individualized assessment requires consideration of whether the person faces a real risk of serious harm connected to the serious disturbance to public order and the State’s ability and willingness to protect them from harm if they return. The appropriate test for assessing a “real risk” of harm in international refugee and human rights law is not the *imminence* of harm but the reasonable foreseeability of harm should the person be returned.<sup>393</sup> For example, if at the time of the refugee status decision an applicant faces a reasonably foreseeable risk of harm due to flooding that seriously disturbs public order in their country of origin (noting that the flooding may be one of numerous causes of the risk of harm), then the applicant will meet the Article I(2) refugee criteria.

#### 4.6.1 *The availability of an internal flight alternative as an element of the compelled to leave requirement*

There is some disagreement as to whether the requirement that the person be compelled to leave “in order to seek refuge in another place outside his country of origin or nationality” suggests the refugee applicant must demonstrate that they do not have an “internal flight alternative” within their home country due to a lack of effective State protection.

UNHCR in its GIP 12 guidance states that the Article I(2) refugee definition *excludes* the need for an assessment of the availability of an internal flight alternative,<sup>394</sup> with Sharpe and Rankin agreeing.<sup>395</sup> This argument is based on the fact that Article I(2) requires that the enumerated event (here, the serious disturbance to public order) occur “in either part or the whole of [the person’s] country of origin or nationality”.<sup>396</sup> However, Wood has argued that the compelled to leave component must be read together with the requirement that a refugee flees “in order to seek refuge in another place outside his country of origin or nationality” such that consideration of the availability of an internal flight alternative *is* relevant under the Article I(2) definition.<sup>397</sup> This argument is based on a principled interpretation of the text of the Article I(2) definition, and accords with the surrogate nature of refugee protection. This approach would require an assessment of whether a refugee applicant had effective

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harm’ as defined for the purposes of the 1951 Refugee Convention, as argued by Wood: see the discussion in Wood, ‘In Search of the African Refugee’ (n 29) Part 8.2.3.

<sup>390</sup> UNHCR, ‘Legal Considerations 2020’ (n 24) [17]; UNHCR, ‘GIP 12’ (n 167) [50]. See also Okoth-Obbo (n 7) 112.

<sup>391</sup> UNHCR, ‘GIP 12’ (n 167) [51].

<sup>392</sup> Wood, ‘In Search of the African Refugee’ (n 29) 220. This is also the view of the South African High Court, for example: *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs* (n 113) [6].

<sup>393</sup> 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, 982.

<sup>394</sup> UNHCR, ‘Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (HCR/GIP/03/04)’ [5].

<sup>395</sup> Sharpe, ‘The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination’ (n 14) 18; Rankin (n 41) 433–434.

<sup>396</sup> UNHCR, ‘GIP 4’ (n 357) [5].

<sup>397</sup> Wood, ‘The International and Regional Refugee Definitions Compared’ (n 380) 633.

protection from a real risk of harm in at least a part of their country, and whether it was reasonable in all the circumstances for them to relocate, in determining whether they are compelled to leave their home to “seek refuge elsewhere”.<sup>398</sup>

The question of whether Article I(2) requires an assessment of an internal flight alternative warrants further consideration, including by reference to an in-depth review of state practice, which is outside the scope of the current paper.

#### 4.7 A concluding note on the availability of State protection under Article I(2)

The inability or unwillingness of a State to protect individuals within its control from serious harms provides the foundation for the international refugee regime.<sup>399</sup> The preceding analysis in Part 4 shows that an assessment of State protection is relevant under both the collective and individual components of the Article I(2) definition:

1. When determining the capacity and willingness of the State to restore and ensure public order within the society and protect individuals from harm within a society generally (under the “seriousness” assessment of the collective component); and
2. When determining the capacity and willingness of the State to provide protection from a real risk of harm to individuals who have fled a serious disturbance to public order (under the individual component).

If Article I(2) is interpreted as *including* an assessment of an internal flight alternative, effective protection must be available in at least *some alternative part* of the country of origin. If Article I(2) is interpreted as *excluding* consideration of an internal flight alternative, an assessment of effective protection appears to only be required regarding the person’s place of habitual residence.

## 5. THE ESDPO INDICIA

The analysis in Part 4 of this paper has demonstrated the many and varied ways in which public order is used and interpreted across different areas of international law, and drew conclusions on the most legally relevant interpretation of ESDPO under the 1969 OAU Convention. It is clear, however, that the complexity of this analysis is neither feasible nor desirable for use within African states’ refugee status determination procedures, which are frequently constrained by limited resources and large caseloads.

In this context, ensuring the consistent and fair application of the Article I(2) refugee definition among African States, and in a manner which accords with a principled interpretation of its terms, requires concrete and practical guidance. This is particularly evident from research which shows that refugee decision makers vary in their understanding and application of the phrase “events seriously disturbing public order”.<sup>400</sup> As noted at the start of this paper, the desire for further guidance on the

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<sup>398</sup> *ibid.*

<sup>399</sup> Susan Kneebone, ‘Refugees as Objects of Surrogate Protection: Shifting Identities’ in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee protection and the role of law: conflicting identities* (Routledge 2014).

<sup>400</sup> Wood, ‘The African War Refugee’ (n 124) 197.

interpretation and application of the Article I(2) definition has been repeatedly expressed by decision makers “at all levels of refugee status determination processes in Africa”.<sup>401</sup>

With this in mind, Part 5.1 outlines a set of indicia of events seriously disturbing public order that decision makers can apply across all factual situations of displacement under Article I(2) of the 1969 OAU Convention. As noted at the outset, the ESDPO indicia include: 1) a set of factual indicators which decision makers can weigh and assess to determine whether public order has been disturbed; and 2) criteria for determining whether that disturbance meets the threshold of “serious”. The factual indicators of a disturbance to public order are those that fundamentally reflect the key aspects of public order/*ordre public* in the Article I(2) refugee definition; that is, societal stability, and a predominant state of public peace, public safety and public security, as underpinned by the effective operation of the rule of law and the protection of individuals’ rights and freedoms.

Part 5.2 provides a summary of key points of guidance to be considered by decision makers when applying the ESDPO indicia, including as they relate to the adverse effects of climate change, environmental degradation and the impacts of disasters.

## 5.1 The ESDPO indicia

The ESDPO indicia set out below can be applied within refugee status determination procedures to objectively assess whether a specific set of factual circumstances amount to ESDPO for the purposes of Article I(2) of the 1969 OAU Convention. The ESDPO indicia should be applied in two steps.

**Step 1** involves an assessment of a **disturbance to public order**. As established in Part 4, “public order” refers to the maintenance of societal stability, demonstrated by a predominant state of public peace, public safety and public security, and underpinned by the effective operation of the rule of law and the protection of individuals’ rights and freedoms. The indicia listed in Step 1 below are factual indicators of where there has been a disturbance to these elements. These indicators are often inter-linked, are mutually reinforcing, and can overlap in different circumstances.

As discussed at length in Part 4, the proposed indicia set out in Step 1 have been developed by drawing on understandings of these concepts as reflected in domestic and international law relevant to public order and the rule of law; this includes those domestic and international law sources mentioned in Part 4, including jurisprudence of the UN Human Rights Committee and the guidance of UNHCR,<sup>402</sup> as well as other sources reviewed by the author in her broader research. Of note, the reports of various non-governmental organizations and research bodies such as the World Justice Project and the Fund for Peace – who have respectively published comprehensive indices for characterising compliance with the rule of law and a State’s fragility and effective functioning – assist in identifying key public order indicia relevant to public peace, safety and security, and societal stability.<sup>403</sup>

Where an assessment of the indicia suggests, on balance, that a disturbance to public order exists, the criteria in **Step 2** (discussed in Part 4.4) can be used to determine whether the disturbance meets the threshold of “**serious**”.

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<sup>401</sup> See the examples discussed in Wood, ‘In Search of the African Refugee’ (n 29) 71.

<sup>402</sup> Particularly in UNHCR, ‘GIP 12’ (n 167) [56]-[59].

<sup>403</sup> The Fund for Peace (n 373) 51–59; and the World Justice Project (n 316) 16–19.

The full set of ESDPO indicia are below. Immediately following the ESDPO indicia is a summary of the individual component of the Article I(2) definition, as a reminder that both the individual and collective components must be satisfied for the definition to apply.

## Article I(2): collective component

Events seriously disturbing public order exist in either part or the whole of the person's country of origin.

### Step 1: Assessing a disturbance to public order

For the purposes of the Article I(2) refugee definition in the 1969 OAU Convention, “**public order**” refers to the maintenance of societal stability, demonstrated by a predominant state of public peace, public safety and public security, and underpinned by the effective operation of the rule of law and the protection of individuals' rights and freedoms, including the right to enjoy a life of dignity.

Public order disturbances can be assessed against the eight (8) indicators set out below. There is no hard and fast rule about the number of factual indicators that must be present for there to be a disturbance to public order. In some cases, a single indicator may be sufficient; in others, the disturbance may result from a combination of multiple indicators. The factual indicators which present themselves in a particular case can then be weighed up by decision makers to determine whether, **on balance**, they demonstrate a disturbance to public order; that is, they demonstrate that public peace, public safety, and/or public security has been disturbed and societal stability has been undermined in a particular situation. These factual indicators should not, therefore, be taken as a checklist, but instead provide guidance which decision makers can rely on in exercising their discretion as to whether a situation constitutes a disturbance to public order in either part or the whole of the person's country of origin or nationality.

This list of factual indicators is **not exhaustive**. The extent to which they evidence a disturbance to public order will depend on the nature, extent and duration of the indicators present in the case. The historical context of a situation may be relevant to informing the severity of the disturbance (that is, as a predictor of future disturbances based on past patterns). The more factual indicators that are present, the stronger the case for concluding that there is a disturbance to public order. However, in some situations the presence of just one indicator will be sufficient. An overall assessment of whether the indicators demonstrate a disturbance to public order must keep in mind the protection-oriented object and purpose of the 1969 OAU Convention. In other words, a restrictive approach to assessing the indicia is not compatible with the 1969 OAU Convention's protection-oriented objects.

#### INDICATORS OF A DISTURBANCE TO PUBLIC ORDER

1. **Government services** are failing to meet the basic needs of individuals in the society and therefore do not ensure that individuals are able to enjoy minimum core human rights. This may be evidenced by:



- 1.1. the closure of essential services such as hospitals and schools; or
  - 1.2. a lack of food, essential medical services and supplies, basic shelter and housing, and other vital services such as water, electricity and sanitation that may threaten the right to life, physical integrity and liberty, and the capacity of people to live a life of dignity.
2. **Government institutions** are weak and function ineffectively, as evidenced by:
    - 2.1. government services are delivered in an unequal, corrupt or discriminatory manner;
    - 2.2. inadequate laws, policies and practices for protecting civilians and restoring public infrastructure and services in response to emergency situations;
    - 2.3. the existence of paramilitary activity, active guerrilla forces or vigilante groups;
    - 2.4. intervention by foreign States, the United Nations and other actors; or
    - 2.5. other evidence of serious political, economic or social instability.
3. **Freedom from harm:** Individuals are unable to go about their daily lives with dignity and without fear for their lives, physical integrity or liberties, as a result of actions or omissions of the State, foreign States, non-State actors or other individuals. This may be evidenced by:
    - 3.1. indiscriminate and/or high levels of violence;
    - 3.2. riots or violent protests;
    - 3.3. the existence of an armed conflict as defined under international humanitarian law;
    - 3.4. the declaration of a state of emergency;
    - 3.5. a significant number of people killed, injured or displaced;
    - 3.6. significant human suffering, distress, tensions or fear within a community;
    - 3.7. large-scale displacement;
    - 3.8. State-sponsored violence;
    - 3.9. the occurrence of acts intended to spread terror within the society;
    - 3.10. individuals experiencing an unreasonable risk of injury, harassment, accidents, or other serious physical or mental harm; or
    - 3.11. widespread environmental degradation or destruction.
4. **Rule of law:** Judicial, security, and law enforcement bodies (including the courts, police, armed forces and other officials exercising public order powers) do not operate in accordance with the rule of law, and in a way that is fair, impartial, transparent and non-discriminatory. This may be evidenced by:
    - 4.1. the imposition of parallel or informal justice and administrative systems;
    - 4.2. widespread corruption, including bribery, forgery and the falsification of evidence;
    - 4.3. a failure to investigate and prosecute serious crimes;
    - 4.4. a failure to ensure due process;
    - 4.5. the unequal and discriminatory application of the law;
    - 4.6. a general lack of legal certainty; or
    - 4.7. a systemic or widespread failure to respect human rights generally.
5. **Management of public protests:** Authorities respond to public protests, strikes or demonstrations with coercive and repressive measures, contrary to human rights law and the rule of law. This may be evidenced by:
    - 5.1. arbitrary detention of individuals;
    - 5.2. the use of excessive force against protestors;
    - 5.3. intimidation and violence directed against the civilian population; or

- 5.4. the unlawful imposition of restrictions on individuals' freedom of movement, expression and association.
6. **Civil conflict** is not effectively limited, as evidenced by:
  - 6.1. large scale and/or regular civil conflicts;
  - 6.2. limited or no opportunities for civilians to seek redress for grievances or harms; or
  - 6.3. the failure of authorities to take effective action to respond to civil conflicts promptly while respecting people's human rights.
7. **Government accountability** is limited, as evidenced by:
  - 7.1. citizens having limited opportunities to participate in government, for example through direct citizen representation to government;
  - 7.2. limited or no checks on government powers; or
  - 7.3. a high level of media restrictions and government censorship; and
8. Other circumstances that result in a disturbance to general societal stability, public peace, public safety or public security.

## Step 2: Assessing the seriousness of the disturbance to public order

Once an assessment of the disturbance to public order has been made, Step 2 can be undertaken to determine whether the disturbance meets the threshold of "serious".

The seriousness of a disturbance to public order should be assessed against the nature, extent and duration of the disturbance to public order. A disturbance to public order will meet the threshold of "serious" where it involves a widespread or generalised threat to the rights to life, physical integrity and/or liberty of individuals in a society, such that the disturbance can be said to affect society at large, and the state is unable or unwilling to restore public order. For a disturbance to meet the threshold of a serious disturbance, and thus constitute ESDPO, it must meet all three of the following criteria:

1. The disturbance to public order involves a **threat to the rights to life, physical integrity and/or liberty** of individuals within the society;
2. The disturbance can be said to **affect society at large**, for example by being **widespread** (affecting a proportionately large number of people within a society) and/or **generalized** (where there is a risk to an indeterminate number of people within a society). Serious disturbances need not affect the majority of individuals in a society, so long as enough individuals are affected in a way that it creates a general sense of instability in the society by undermining public peace, public safety or public security; and
3. The **State is unable or unwilling to restore and ensure public order.**  
*Note: Where the disturbance involves a threat to the rights to life, physical integrity and/or liberty of individuals and affects society at large, it can be presumed that the State in question is unable or unwilling to restore and ensure public order.*

The "seriousness" criteria should be assessed against the *overall* determination of a disturbance to public order (that is, it is not necessary to assess each apparent public order indicia in Step 1

against the seriousness criteria, only those that are present in the particular circumstances of the case being assessed).

### **Article I(2): individual component**

Where ESDPO is determined to exist, the individual component of the Article I(2) refugee definition must also be met.<sup>404</sup> That is, the refugee must be compelled to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality, owing to the serious disturbance to public order. The key question is whether the person faces a real risk of serious harm connected to the serious disturbance to public order and the State is unable or unwilling to protect them from harm if they return.

The individual component therefore requires that a causal connection be established between the serious disturbance to public order and the individual's flight, though the disturbance may be one of a number of causes. This requires an individualized, objective, and forward-looking assessment of the risk of reasonably foreseeable harm the individual refugee applicant faces at the time of the refugee status assessment.

## **5.2 General guidance on the use and application of the ESDPO indicia**

An assessment of events seriously disturbing public order must be forward-looking.<sup>405</sup> To assess the events from which the person claims to be at risk of harm retrospectively would fundamentally undermine the object and purpose of the 1969 OAU Convention to give protection to those who are in present need of it. This means that an assessment of the ESDPO indicia must be done at the time when the refugee status determination is being undertaken. That is, the refugee status determination officer must assess whether, if the person was returned at the time of undertaking the assessment, they would face a real risk of harm due to a serious disturbance to public order. This has certain consequences for an assessment of ESDPO and means, for example, that sur place claims are captured by the Article I(2) definition.<sup>406</sup> The ESDPO indicia are capable of application in individual or group-based *prima facie* refugee status determination procedures.

Further, an assessment of the existence of events seriously disturbing public order must be made objectively by the person or body undertaking the refugee status determination. Similarly, an assessment of whether a person was compelled to leave their country due to the serious disturbance to public order must be made objectively, by determining whether the person faces a real risk of harm if they are returned. This means that it is not a person's stated reasons for fleeing that have primary relevance, but the objective assessment of the situation in the person's country of origin and the person's individual connection to it.

<sup>404</sup> Whether through individual or group-based procedures.

<sup>405</sup> As evident from article II(3) of the OAU Convention; see also Wood, 'The International and Regional Refugee Definitions Compared' (n 380) 632.

<sup>406</sup> See the discussion in Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (n 14) 18.

It is important to recall that, despite being developed in the context of UNHCR's broader project which aims to ultimately develop normative guidance on displacement in connection with the adverse effects of climate change, environmental degradation and the impacts of disasters, the ESDPO indicia are capable of applying to all situations of displacement. This is because they have been developed from a principled interpretation of Article I(2) of the 1969 OAU Convention relying on established rules for the interpretation of treaties. This means that the ESDPO indicia can be applied whether the person has been displaced due to 1) the adverse effects of climate change, environmental degradation or the impacts of disasters, 2) more "traditional" contexts of displacement such as conflict and violence, or 3) an interaction between the two. Noting the context of this report, some guidance on applying the ESDPO indicia in connection with the adverse effects of climate change, environmental degradation and the impacts of disasters is set out below.

### 5.2.1 *Applying the ESDPO indicia in the context of climate change, environmental degradation and the impacts of disasters*

While the ESDPO indicia can be applied to all situations of displacement, some indicia may be more likely to be present for displacement in the context of the adverse effects of climate change, environmental degradation and the impacts of disasters. It is outside the scope of the current paper to examine various examples of how public order may be seriously disturbed in connection with the impacts of disasters, environmental degradation and the adverse effects of climate change. This will be explored in the second stage of UNHCR's broader project which will consider when the ESDPO indicia are present in specific case studies in Africa for the purpose of their further illustration and refinement. With these caveats, a few very brief comments are made regarding the application of the ESDPO indicia in these contexts. These comments are not a comprehensive assessment of the way the ESDPO indicia may apply, but merely seek to highlight a few pertinent points of consideration going forward.

The adverse effects of climate change, environmental degradation and the impacts of disasters may disturb public order by disrupting public peace, safety and/or security, and undermining societal stability. Indeed, by definition, disasters seriously disturb the functioning of a society, recalling that the UN Office for Disaster Risk Reduction defines a disaster as:

a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.<sup>407</sup>

Similarly, the International Law Commission's *draft articles on the protection of persons in the event of disasters* define disaster to mean:

a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.<sup>408</sup>

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<sup>407</sup> UN Office for Disaster Risk Reduction (n 53). UNHCR also adopts this definition in its Legal Considerations: UNHCR, 'Legal Considerations 2020' (n 24) [15].

<sup>408</sup> International Law Commission, 'Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries' (2016) Vol II, Part Two Yearbook of the International Law Commission, 2016, 25, draft art 3(a).

A serious disturbance to public order can develop rapidly in response to certain events within a society or may be the product of a slower accumulation of impacts from a number of acts or events. Events in the former category include conflict, generalized violence or flash flooding, to give a few examples. Events in the latter category could include soil erosion that impacts on farmers' livelihoods, increasing political instability, and increasingly detrimental weather patterns. However, the identification of the specific nature of the "event/s" is not strictly required for the purposes of the Article I(2) refugee definition.<sup>409</sup>

Both slow and sudden-onset disasters may also result in a serious disturbance to public order in a society. A sudden-onset disaster such as an earthquake or cyclone, for example, can have widespread adverse impacts that affect essential services and the availability of clean water and adequate food, and damage road, telecommunications and health infrastructure. These impacts may undermine societal stability and result in a denial of individuals' rights to physical integrity, liberty or even life. Slow-onset disasters can result in or contribute to a serious disturbance to public order where, for example, they cause widespread environmental degradation or destruction which impacts public safety and human security, which the State may be unable or unwilling to address.

The adverse effects of climate change, environmental degradation and disasters may directly or indirectly disturb public order either on their own or in combination with other factors. This may include through the diversion of police and army resources away from regular public peace and security matters to emergency-response operations, which may diminish the State's capacity to respond to social unrest, looting and violence. Disasters may also present challenges for the State's capacity to protect the human rights of its people and the capacity of people to obtain essential provisions and services necessary to live a life of dignity. As noted in Part 2 of this paper, it is not, therefore, the disaster, environmental degradation or effects of climate change *per se* that give rise to refugee protection, but the inadequacy of State protection in response to these effects that is central to determining refugee protection.<sup>410</sup> This raises an important temporal element.

In circumstances where a sudden-onset event causes a serious disturbance to public order, often a State will implement efforts to restore public order following the event. Where the State is successful at doing so, the serious disturbance to public order no longer exists. This means that an application for refugee status based on that event, where the assessment for refugee status is made following the State's restoration of public order, would fail (absent other criteria being met).

It must be recalled, however, that when applying the indicia, decision makers need not focus on the specific characterisation of a disaster situation as slow or sudden onset, or to identify any cause(s) of the disturbance at all, because that is not what the Article I(2) definition requires. This, in fact, makes the refugee status decision maker's job much simpler. The requirement in Article I(2) of a factual assessment of the disturbance to public order, regardless of its cause, has two important practical consequences, as noted in Part 4.1:

1. where a serious disturbance to public order is multi-causal, or it is difficult to identify the cause or causes of the disturbance, this does not undermine the claim to refugee status as a

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<sup>409</sup> This paper recognises that questions of causation for climate change and climate-related displacement are important in the context of broader questions relating to States' responsibilities for human mobility and the protection of human rights, as well as for achieving climate justice and accountability. However, issues of causation for displacement are outside the scope of the current paper as they are not a legally relevant consideration under the Article I(2) refugee definition.

<sup>410</sup> McAdam (n 79) 836.

decision-maker should focus on the effects of the serious disturbance itself, by reference to the ESDPO indicia; and

2. where the cause of the serious disturbance can be identified, the characterisation of that cause as environmental, social, economic or political in nature can be noted but it does not in any way affect or limit the assessment of the serious disturbance; it is only relevant to the extent that it helps to identify the factual indicators of a serious disturbance to public order.

For example, a refugee applicant claiming to have fled a pattern of cyclones in Mozambique need not identify whether one particular cyclone caused the serious disturbance to public order. Instead, the refugee status determination officer must assess whether, if the person was returned at the time of undertaking the assessment, they would face a real risk of harm due to a serious disturbance to public order, howsoever caused.

## 6. CONCLUDING COMMENTS

The increasing awareness of the complex and multi-causal relationship between disasters and human mobility has led to a more nuanced understanding of the potential application of refugee law.<sup>411</sup> In this context, and given the significant vulnerabilities to climate change and environmental degradation on the African continent,<sup>412</sup> the 1969 OAU Convention forms an important part of regional protection frameworks for people displaced in the context of climate change, environmental degradation and the impacts of disasters.

Not everyone displaced in such contexts will be a refugee. For one thing, the majority of displacement occurs *within* countries.<sup>413</sup> Where a person does leave their country, they will only be a refugee under the Article I(2) refugee definition in the 1969 OAU Convention where they have fled due to circumstances that can factually be characterized as a serious disturbance to public order – whether the adverse effects of climate change, environmental degradation or the impacts of disasters were a direct or indirect contributing factor – and where the person individually faces a real risk of harm owing to those events. A principled and individualized assessment of the circumstances of each case must therefore be undertaken.<sup>414</sup>

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<sup>411</sup> See Foster, Lambert and McAdam (n 5) 120.

<sup>412</sup> IPCC, 'Climate Change 2014: Impacts, Adaptation, and Vulnerability: Part B Regional Aspects' (n 80) 1205 and 1502.

<sup>413</sup> Huckstep and Clemens (n 43) 10.

<sup>414</sup> Or a group-based assessment of individuals where *prima facie* group recognition procedures are appropriate.

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## **Malawi**

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## **Nigeria**

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## 8. CASE LAW

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