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Conflict, Disaster, and Regional Refugee Definitions

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Introduction

This year celebrates the 50th anniversary of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Forty-five years have passed since a regionally attuned refugee definition became international law and an integral component of the global refugee regime. Relative to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1969 OAU Convention and its regional refugee definition has received limited scholarship and commentary. The regional counterpart in the 1984 Cartagena Declaration on Refugees, developed amidst movements prompted by political unrest and violence, has suffered a similar fate, notwithstanding 15 States in the Americas drawing on it in domestic law. What scope do these regional refugee definitions have for extending admission and legal status to people fleeing complex crises? Could they fortify the protection architecture for people fleeing situations where disaster or adverse effects of climate change interact with violence or conflict? This Brief explores these questions and provides three recommendations.

Disaster, Adverse Effects of Climate Change and Displacement

The magnitude of internal displacement linked to disasters is difficult to comprehend. Between January and June 2019, more than 950 disasters (mostly linked to storms, floods or droughts) in 102 countries and territories, newly displaced about 7 million people.ⁱ This is the highest recorded mid-year figure.ⁱⁱ In fact, since 2008, new internal displacements associated with disasters outstripped new displacement linked to conflict and violence.ⁱⁱⁱ Comparable data on cross-border displacement linked to disasters (or adverse effects of climate change) is unavailable, but is a certain, and perhaps growing, reality. Concerns about normative gaps for admission and status has meant that cross-border movements linked to disasters and climate change received greater scrutiny. These debates stimulated calls to expand the 1951 Refugee Convention, adopt a new protocol to it, or create a whole new treaty. While the Convention is ill suited to address the full scale and spectrum of cross-border movements, and the term ‘climate refugee’ is legally flawed, scholars and courts recognize certain circumstances in which people fleeing in the context of disaster or adverse effects of climate change may establish its definition. Recent jurisprudence from New Zealand explains how ‘generalised assumptions about environmental change and natural disasters and the applicability of the Refugee Convention can be overstated.’^{iv} Comprehensive analyses of the scope and applicability of regional refugee definitions by scholars and decisions makers however, are a conspicuous gap.^v

In many locations, moreover, origin situations cannot be reduced simply to disaster or adverse effects of climate change. These phenomena and their impacts interact with the incidence and consequences of (protracted) conflict or violence. Some of the locations most vulnerable to adverse effects of climate change are conflict zones. Between 2004 and 2014, an estimated 34 per cent of disaster-affected people and 54 per cent of disaster-related deaths occurred in the top 30 countries listed in the Fragile States Index.^{vi} In countries and regions around the world, including in parts of Africa, the Middle East and the Americas, interactions between disaster and/or adverse effects of climate change and conflict and/or violence continue to play out. These so-called ‘**nexus situations**’ create risks and experiences of harm that may satisfy criteria in regional refugee definitions. As such, a deeper examination of their potential for alleviating protection challenges related to admission and status is essential.

Nexus Situations and Regional Refugee Definitions

The 1969 OAU Convention's regional definition states the 'term "refugee" shall also apply to every person who, owing to ... *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'^{vii} The 1984 Cartagena Declaration's definition is similar in including 'among refugees persons who have fled their country because their lives, safety or freedom have been threatened by ... *other circumstances which have seriously disturbed public order*.'^{viii} Among other criteria, eligibility for refugee status turns on 'public order', which does not have a single meaning under international law. Some commentary intimates the outer boundaries of public order may diverge under the African and Latin American instruments. UNHCR guidance on armed conflict and violence elaborates a non-exhaustive list of situations reflecting serious disturbances to public order, and a non-exhaustive list of factual indicators.^{ix} In general however, there is little guidance on the scope or interpretation of serious disturbances to public order or the other elements of the regional refugee definitions. This limitation is one impediment to their implementation in practice, including in the context of complex and diverse interactions between disaster and/or adverse effects of climate change and conflict and/or violence.

Nexus situations may affect public order through impacts on government institutions, justice systems, and availability and access to food, water, medical or other vital services. Nexus situations lead to deaths, injury and displacement. States may even declare an emergency. In its guidance on armed conflict and violence, UNHCR lists these factors as indicators of serious disturbances to public order.

While the dynamics may be context specific, many nexus situations present risks of serious harm. Droughts, storms and floods may create, reinforce or sustain complex conditions at origin, compounding the effects of pre-existing or contemporaneous impacts of conflict, violence or fragility on individual, community and societal resilience. Orientated towards protection, and steering away from individualized persecution, the regional refugee definitions offer refugee status to those at risk of serious harm on account of generalized conditions. As such they have the potential to augment normative gaps in admission and status.^x

In Harm's Way

A 2018 UNHCR study, *In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change*, examined State practice on the use of refugee law to protect claimants fleeing nexus situations.^{xi} It described Kenya and Ethiopia's responses to the cross-border movement of Somalis in 2011 when famine, drought, conflict and insecurity intermingled in Somalia. It also examined the responses of Brazil and Mexico to the cross-border movement of Haitians into their territories in the aftermath of the 2010 earthquake in Haiti when insecurity, violence and human rights violations prevailed in Haiti.

In Kenya and Ethiopia, which used their refugee frameworks to respond, refugee status was recognized predominantly based on broader refugee criteria. In Mexico too, a small number of Haitians received refugee status on the basis of criteria consistent with the regional refugee definition.

In Harm's Way demonstrated that government authorities and others appreciated the relevance of refugee law, particularly regional refugee criteria for providing international protection in nexus situations. The study also acknowledged that refugee law, including regional refugee definitions, may not support admission and status rights for many who cross borders in the context of disasters or adverse effects of climate change, or, nexus situations. Other mechanisms based in law or policy are essential to promote comprehensive, timely and protection- and needs-sensitive responses. At the same time, the study identified the importance of sustained efforts to ensure access to refugee status determination procedures and to overcome misconceptions regarding the scope and applicability of regional refugee definitions, especially when a disaster is prominent or proximate trigger of movement.

The Global Compact on Refugees and the New York Declaration

The Global Compact on Refugees (GCR) states ‘[w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.’^{xiii} Recognizing ‘in certain situations, external forced displacement may result from sudden-onset natural disasters and environmental degradation’, within a narrative that appreciates the ‘composite character’ of human movements, the GCR acknowledges the ‘complex challenges for affected States’.^{xiii} It highlights the need for fair and efficient determination of individual international protection claims to duly determine status in accordance with applicable international and regional obligations, in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.^{xiv} Earlier, in the 2016 UN General Assembly negotiated New York Declaration for Refugees and Migrants, States acknowledged that many people move for a combination of reasons, which may include conflict, adverse effects of climate change and disasters.^{xv} States recognized refugees are among such complex movements, that efforts are needed to strengthen their protection, and agreed to respect international refugee law, where applicable.^{xvi} Within the section on commitments for refugees, States reaffirmed that ‘international refugee law, [*inter alia*], provide[s] the legal framework to strengthen the protection of refugees’ and committed to ‘ensure, in this context, protection for all who need it.’^{xvii} States took ‘note of regional refugee instruments, such as the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa and the Cartagena Declaration on Refugees’^{xviii} affirming the significance of regional refugee instruments for protecting refugees.

While many people displaced in the context of disaster or adverse effects of climate change may not be refugees, consistent with the commitments in the New York Declaration and the GCR, it is crucial to ensure that those who are refugees under refugee law, have the opportunity to access that legal status and to benefit from attendant rights. Where disaster or adverse effects of climate change interact with conflict or violence, the applicability of regional refugee criteria for example, is becoming more readily apparent. Allegiance to international cooperation and responsibility sharing demands that binding legal obligations are not set aside, disregarded or undermined by States, intergovernmental actors and practitioners dedicated to protecting the displaced.

Recommendations

As such, the below three recommendations are important steps in collective efforts to address protection gaps for people displaced in the context of disaster, climate change, conflict and violence.

1. Prepare guidance, tools and capacity building initiatives to support States, decision makers and practitioners to understand the scope and applicability of regional refugee definitions and to apply them in practice.
2. Promote research on nexus situations to build knowledge on: (a) the diversity of interactions between conflict and/or violence and disaster and/or climate change; (b) effects on public order, and (c) risks and experiences of harm.
3. Consistent with the New York Declaration and the GCR’s commitments to uphold existing obligations under refugee law and ensure fair and efficient determination of individual claims for international protection, promote, maintain and support access to refugee status determination and the rigorous adjudication of claims.

Endnotes

ⁱ Internal Displacement Monitoring Centre (IDMC), ‘Mid-Year Figures: Internal Displacement from January to June 2019’, September 2019, http://www.internal-displacement.org/sites/default/files/publications/documents/2019-mid-year-figures_for%20website%20upload.pdf.

ⁱⁱ Ibid.

ⁱⁱⁱ IDMC, ‘GRID 2018: Global Report on Internal Displacement’, May 2018, <http://www.internal-displacement.org/global-report/grid2018/downloads/2018-GRID.pdf>. See also, IDMC, ‘GRID 2019: Global Report on Internal Displacement’, May 2019, <http://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf>. Global figures are unreported before 2008.

^{iv} *AF (Kiribati)* [2013] NZIPT 800413, paragraph 64. The Tribunal adds ‘While in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case.’

^v See eg. Tamara Wood, *In Search of the African Refugee: A Principled Interpretation of Africa’s Expanded Refugee Definition*, (Unpublished PhD Thesis, 2018); and Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (Oxford University Press, 2018), as two exceptions.

^{vi} Overseas Development Institute (ODI), ‘When Disasters and Conflict Collide: Facts and Figures’, May 2016, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10537.pdf>.

^{vii} *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45, Article I(2). Emphasis added.

^{viii} *Cartagena Declaration on Refugees, Colloquium on International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, Conclusion III(3). Emphasis added.

^{ix} 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’, UN Doc HCR/GIP/16/12 (2 December 2016) <https://www.refworld.org/docid/583595ff4.html>.

^x Whether a given disaster situation could, on its own, also amount to a serious disturbance to public order within the scope of the regional refugee definitions, may also merit further research and inquiry.

^{xi} UNHCR, *In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change*, December 2018, <https://www.refworld.org/docid/5c2f54fe4.html>.

^{xii} UNHCR, *Report of the United Nations High Commissioner for Refugees: Part II: Global Compact on Refugees*, UN GAOR, 73rd sess, Supp No 12, UN Doc A/73/12 (13 September 2018) https://www.unhcr.org/gcr/GCR_English.pdf [8].

^{xiii} Ibid [12].

^{xiv} Ibid [61]. See also, [63].

^{xv} *New York Declaration for Refugees and Migrants*, UN GAOR, 71st sess, Agenda Items 13 and 117, UN Doc A/RES/71/7 (3 October 2016) http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf [1].

^{xvi} Ibid [5].

^{xvii} Ibid [66].

^{xviii} Ibid. Internal citations omitted.