State fragility, refugee status and 'survival migration'

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State fragility poses a challenge to the refugee regime. Rather than just placing the emphasis on the need to protect people fleeing the acts of states against their own populations, it also demands the protection of people fleeing the omissions of states, whether due to states' unwillingness or to their inability to provide for their citizens' fundamental rights.

The designation of states as 'fragile' or 'failed' is frequently criticised for lacking clarity, encompassing a disparate variety of situations and being an over-used political label that measures states against a range of idealised Western standards of governance.[1] Nevertheless, we can use the concept of state fragility to understand some important things about the changing nature of displacement and the adequacy or inadequacy of existing international protection responses when the assumed relationship between state and citizen breaks down and states are unable or unwilling to provide for the rights of their citizens.

The international society of states drew up the Refugee Convention in 1951 in the aftermath of the Second World War to address the reality that some states fail to provide for the fundamental human rights of their citizens. Yet, since the creation of the refugee regime in the 1950s, the circumstances that shape flight have changed. Although many of the current academic and policy debates focus on 'new drivers of displacement' (such as generalised violence, environmental change and food insecurity), what ultimately determines whether international protection is needed is the quality of governance in the country of origin. In states with weak governance, the only available means to acquire protection may be to leave the country.

From persecution to deprivation
While there are now fewer repressive or authoritarian states than in the Cold War era, there has been an increase in the number of fragile states since the end of the Cold War. This trend means fewer people are fleeing persecution resulting from the acts of states, while more are fleeing human

rights deprivations resulting from the omissions of weak states that are unable or unwilling to ensure fundamental rights.

Although the creators of the refugee regime foresaw that the definition of a refugee would evolve over time – either through the jurisprudence of particular states or supplementary agreements – there is still little legal precision over states' obligations to people fleeing deprivations that fall outside the conventional understanding of persecution. The 1969 OAU Refugee Convention may be argued to cover aspects of state fragility as a cause of cross-border displacement (under the heading of 'events seriously disturbing public order'[2]); its patchy use and weak jurisprudence, however, continue to make its application to fragile states unreliable. Furthermore, although complementary protection standards have been developed through the application of international human rights law to extend international protection, jurisprudence is developing slowly and in a geographically uneven way. The result is that the protection of people fleeing deprivations that fall outside the conventional understanding of persecution is inconsistent and conditioned by politics rather than law.

The consequence is that, today, many people who are forced or who feel forced to cross international borders do not fit the categories laid out in 1951. Many people fleeing human rights deprivations in fragile or failed states such as Zimbabwe, Somalia, the Democratic Republic of Congo, Haiti, Afghanistan or Libya look very much like refugees and yet most fall outside the definition of a refugee, often being denied protection. They are not fleeing state persecution, though many are

fleeing state incompetence. They are not migrating for economic betterment, unless you call finding enough to eat an economic motive. Yet the protection they occasionally receive is patchy and inconsistent and unpredictable and at best terribly inadequate. They are more likely to be rounded-up, detained and deported than to receive protection.

From an individual's perspective, whether one's source of human rights deprivation comes from a persecuting state or another source makes no difference. If one cannot survive or maintain the fundamental conditions of human dignity without leaving a country, then distinguishing between persecution and other causes is meaningless.

The gaps in protection for people fleeing failed and fragile states matter for human rights. To take one prominent example, large numbers of Zimbabweans fled their country between 2000 and 2010 (with an estimated two million Zimbabweans entering South Africa alone during that period). They were fleeing a desperate situation characterised by economic and political collapse, in which there were almost no viable livelihood opportunities to sustain even the most basic conditions of life. Yet because only a tiny minority had faced individualised persecution on political grounds, the overwhelming majority have fallen outside the 1951 Convention's definition of a refugee. Rather than receiving protection, the majority have therefore received limited access to assistance in neighbouring countries; hundreds of thousands have been rounded up, detained and deported back to Zimbabwe.

These protection gaps also matter for international security. We know that there is a relationship between cross-border displacement and security, and that where international responses are inadequate, displacement can exacerbate conflict or create opportunities, for example for recruitment by armed groups. In the 1950s states' motivation for creating a refugee regime was not exclusively rights-focused. It was also based on the recognition that a collective failure to provide sanctuary to people whose own states were unwilling or unable to provide their most fundamental rights would have potentially destabilising effects. A similar logic applies to people fleeing serious rights deprivations. Without coherent collective action, forced population movements – not least from failed and fragile states – can have implications for regional security with the potential to create wider spill-over effects.

Survival migration

Beyond identifying people as refugees or voluntary economic migrants, we lack the terminology to clearly identify people who should have an entitlement not to be returned to their country of origin on human rights grounds. People who are outside their country of origin because of an existential threat for which they have no access to a domestic remedy or resolution – whether as a result of persecution, conflict or environmental degradation, for example – might be referred to as 'survival migrants'.[3] What matters is not the particular cause of movement but rather identifying a threshold of fundamental rights which, when unavailable in a country of origin, requires that the international

A displaced child helps his family to rebuild a shelter made of cardboard on the outskirts of Bossaso, Somalia.

community allow people to cross an international border and receive access to temporary or permanent sanctuary. The difference in rights and entitlements available to refugees compared with survival migrants fleeing serious deprivations is arbitrary. In theory, all survival migrants have rights under international human rights law. Yet, in contrast to refugees, the institutional mechanisms do not exist to ensure that such rights are made available in practice. No international organisation has formal responsibility for protecting people with a human rights-based entitlement not to be returned home if they fall outside the refugee definition. The arbitrariness of distinguishing between persecution and other serious human rights deprivations as a cause of displacement is implicitly recognised in other areas of the practice of the international community. For example, since the late 1990s states have developed a normative and institutional framework to protect internally displaced persons (IDPs). In the case of IDPs, rather than limiting the definition to those fleeing persecution, the international community chose a more inclusive approach.

In some cases, the refugee regime has 'stretched' to provide protection to survival migrants, and in other cases it has not. Despite host states having sometimes adopted, signed and ratified broadly similar refugee norms, there is nevertheless significant variation in what happens in practice. And in spite of sometimes common underlying causes of population movements, the response of different host states to those populations has varied radically. While all of the responses have been imperfect from a human rights perspective, some have been far more imperfect than others.

In Kenya, for example, all Somalis have been recognised as though they were refugees, irrespective of the immediate cause of flight. This was even the case during much of the famine and drought of 2011. In Tanzania, there has been resistance by the government and UNHCR to invoke the cessation clause for Congolese from South Kivu, not because of the

risk of persecution if they return but because of weak governance in DRC. Yet elsewhere the response has been far more restrictive. At the extreme, Angola has rounded up, detained and deported – often brutally – hundreds of thousands of Congolese. At the height of the crisis in Zimbabwe, Botswana continued to deport Zimbabwean migrants while South Africa at least instituted a belated temporary moratorium on the deportation of Zimbabweans.

In the absence of legal clarity, states have exercised significant discretion in their responses. Meanwhile, international organisations' roles have largely been determined by the willingness or otherwise of host governments to extend protection to populations fleeing forms of deprivation that are not defined as persecution.

These inconsistencies highlight important gaps in the normative and institutional framework that protects people fleeing fragile and failed states. The challenge is to make existing institutions work better rather than to create new ones. It needs to begin with better implementation of existing standards, which in turn requires better understanding of the local and national political incentives that shape implementation. However, there are still normative gaps, for which some kind of authoritative set of guiding principles might help to consolidate understanding of what existing human rights law standards imply for survival migrants who are at the margins of the refugee regime. At the moment, responses to people fleeing serious human rights deprivations in fragile and failed states are simply too arbitrary and too inconsistent.

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1. The Fund for Peace's Failed States Index, for example, ranks states according to a range of social, political and economic indicators. http://ffp.statesindex.org

2. Article I.2 www.unhcr.org/45dc1a682.html

3. See Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, Cornell University Press, 2013.