

# Applying refugee law in Africa and Latin America: disasters, climate change and public order

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**When the effects of climate change and disasters seriously disturb public order in Africa or Latin America, those forced to flee across borders may be refugees. More work needs to be done, however, to help decision-makers apply regional refugee definitions in this context.**

Africa and Latin America have expanded on the definition of a 'refugee' from that used in the 1951 Convention Relating to the Status of Refugees to include people who have fled certain events, including events or circumstances that seriously disturb public order. These expanded definitions are found in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees in Latin America.<sup>1</sup>

As a result, asylum seekers who have been compelled to leave their countries

due to a serious disturbance to public order will be legally entitled to refugee protection in 48 African countries and 14 Latin American countries. The question is: can a serious disturbance to public order occur in connection to climate change and disasters, for the purposes of the expanded refugee definitions?

Some States have already applied the expanded refugee definitions in Africa and Latin America to people displaced in the context of climate change and disasters. Where this has occurred, it has been on the

basis of the disaster's impact on public order. For example, Somalis fleeing drought, food insecurity, famine and violence in 2011–2012 were recognised as refugees in Kenya under Africa's expanded refugee definition. In Latin America, Mexico applied the Cartagena refugee definition to some Haitians affected by the 2010 earthquake. Other States have been reluctant to do so, however, on the basis that protection under Africa and Latin America's regional refugee instruments is only available to those fleeing 'human-made', as opposed to 'natural', events. This approach mistakenly assumes that the causes of a person's flight can be neatly identified and categorised using such labels. In recent times, there has been increased recognition that environmental disasters are not 'natural' but are the combined effect of natural hazards and human elements which cause a "serious disruption of the functioning of a community or a society at any scale".<sup>2</sup>

The effects of climate change and disasters can have wide-ranging impacts on a society, including through destruction to land and livelihoods, public infrastructure, and health and education facilities. Often, there will be consequences for food security and the physical safety of people. Such impacts can cause chaos, confusion, and reduced internal security and stability generally. The adverse effects of climate change and disasters can compound existing vulnerabilities and factors such as poor governance, socio-economic inequality, internal tensions and scarce natural resources – all factors which undermine public order.<sup>3</sup>

When people move across borders and seek asylum, it is the responsibility of States and, where relevant, UNHCR to decide who is a refugee. At present, however, a lack of case law and practical guidance on the regional refugee definitions impedes their use by decision-makers. Given the lack of guidance on the meaning of 'public order' and how it might be seriously disturbed in the context of climate change and disasters, more work needs to be done to help decision-makers determine when people are entitled to protection in such circumstances.

In 2020, UNHCR published its first official guidance on the application of refugee law in the context of disasters and climate change in *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, in which it emphasised that people fleeing in the context of climate change and disasters may be refugees under both the African and Latin American expanded refugee definitions.

UNHCR's guidance makes an important contribution to the interpretation of the two regional refugee definitions by confirming the agency's view that serious disturbances to public order may occur in connection with the effects of climate change and disasters. However, questions remain. In what circumstances will a serious disturbance to public order exist as a matter of fact? How should a decision-maker determine the existence of a serious disturbance to public order? And what evidence will be sufficient to establish this?

### The need for practical guidance

Practical and principled guidance for decision-makers is needed to ensure that the effective implementation of these regional instruments can be fully realised and in a way that reflects the changing circumstances in which people are in need of protection.<sup>4</sup> Such guidance should include two key things:

#### 1. Public order indicators

In order to understand when climate change and disasters might seriously disturb public order, it is first necessary to have a clear understanding of what public order means for the purposes of the regional refugee definitions, and how it can be measured and assessed in practice.<sup>5</sup> These questions are complicated by the fact that the meaning of the term 'public order' in African and Latin American refugee law remains ambiguous, with a divergence of views on whether public order should be interpreted narrowly (as 'law and order', for example) or broadly (to include concepts such as moral and social order).

While the full scope of the concept of public order remains uncertain, the term is accepted as fundamentally relating to

the stability and security of a State and society. It would be impossible to compile an accurate and comprehensive list of all the situations that may give rise to a public order disturbance in all countries. However, it is possible to identify common 'indicia' of public order that can be used to measure how public order/disorder manifests.

Public order indicia – that is, particular facts or evidence that, when present, indicate that public order is being upheld – could be used by decision-makers to weigh up the circumstances in a particular country or region in making an overall assessment of whether public order has ultimately been disturbed, and whether that disturbance can be classified as serious.

The term public order is a technical one, found in legal instruments, and the indicia of public order must therefore be identified through the application of established legal interpretation principles. Preliminary research suggests that, at a minimum, such indicia could be grouped into two main, but interlinked, categories: the effective operation of, and respect for, the rule of law; and respect for human rights, dignity and fundamental freedoms of people. Importantly, any public order indicia must be clear and capable of consistent, practical application in different circumstances on the basis of objective evidence.

## 2. Case-studies

Practice-oriented case-studies would apply the identified public order indicia to events that have occurred in the context of climate change and disasters. These case-studies could provide guidance to judges and decision-makers when assessing whether a person has fled a serious disturbance to public order and could also be used by practitioners and legal advocates to support refugee applications. A number of recent climate-related events and disasters could form the basis for these case-studies, such as the following two examples. In 2021, severe flooding in South Sudan affected over 800,000 in a country whose people are already experiencing severe hunger from the combined effects of recurring conflict,

drought and floods. In November 2020, heavy rains, storm surges and landslides caused by Hurricanes Eta and Iota had massive impacts on food insecurity, public health, public infrastructure and people's livelihoods in a number of Central American countries that are already experiencing significant internal violence.

## Conclusion

The development of public order indicia and case-studies would promote two crucial aims. The first is to provide greater clarity and certainty to States, decision-makers and legal practitioners on when a person who moves across borders in the context of climate change and disasters will be a refugee (and therefore entitled to refugee protection) and when they will not be a refugee. The second aim is to ensure that refugee law in both Africa and Latin America remains relevant to current and emerging causes of displacement, and therefore continues to be effective in fulfilling the purpose of the refugee protection regimes in both regions.

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1. Africa [www.refworld.org/docid/3ae6b36018.html](http://www.refworld.org/docid/3ae6b36018.html); Cartagena [www.refworld.org/docid/3ae6b36ec.html](http://www.refworld.org/docid/3ae6b36ec.html)  
While the Cartagena Declaration is a non-binding instrument, the following countries have directly or indirectly incorporated the public order ground into their domestic law: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay and Uruguay. Belize and Peru have incorporated the wording of the public order ground in Africa's expanded refugee definition. Brazil has not directly adopted Cartagena's public order ground in its domestic legislation but has implemented it in its domestic practice.
2. UN Office for Disaster Risk Reduction [www.undrr.org/terminology/disaster](http://www.undrr.org/terminology/disaster)
3. UNHCR (2020) *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* [2] [www.refworld.org/docid/5f75f2734.html](http://www.refworld.org/docid/5f75f2734.html)
4. As recognised in a Research Agenda for Advancing Law and Policy Responses to Displacement and Migration in the Context of Disasters and Climate Change (outcome document of a workshop series held in 2021; see box p74 for more details and visit: <https://disasterdisplacement.org/portfolio-item/research-agenda>)
5. This is the subject of the author's doctoral thesis. See also Wood T and Hansen-Lohrey C (2021) 'Disasters, Climate Change and Public Order: A Principled Application of Regional Refugee Definitions', RLI Blog on Refugee Law and Forced Migration (24 May 2021) [bit.ly/RLI-blog-disasters-public-order-2021-05-24](http://bit.ly/RLI-blog-disasters-public-order-2021-05-24)