

Disasters, displacement and a new framework in the Americas

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There is a startling range of positive examples of national law, policy and practice all across the Americas that states have used to respond to the migratory consequences of disasters.

In the Americas, as elsewhere in the world, neither universal nor regional standards presently exist to determine whether migrants or displaced persons affected by a disaster in their country are eligible for travel or admission to, or stay in, the territory of another state.

There are two types of population movement from countries in the Americas affected by rapid-onset disasters. Firstly,

there are hasty and often temporary migrations across a land border to avoid a disaster or its more immediate negative consequences ('trans-border displacement'). Secondly, there are longer-term migrations over a greater distance provoked by a disaster's extensive damage including to infrastructure ('displacement abroad'). Both flows tend to take place from poorer countries in the region and follow traditional migration routes for that nationality.

A study on the Americas about the seemingly intractable problem of developing appropriate legal responses to cross-border displacement in the context of disasters caused by natural hazards was conducted for a Nansen Initiative-sponsored workshop in February 2015, attended by representatives from the eleven member states of the Regional Conference on Migration (RCM).¹

The Nansen Initiative study does not seek to infer an applicable legal framework from existing international law but rather is a pragmatic review of national laws, policies and practices from across the Americas in order to assess how they actually deal with the protection and assistance needs of disaster-affected displaced persons at present, or would do if faced with an alien (a foreign national) in this situation. Moreover, the study does not limit the inquiry to human rights or refugee protection law only but considers them alongside the broader range of national immigration laws of each country.

Immigration law as the principal tool

It is evident that most states in the region view immigration law (rather than refugee law) as the principal tool for responding to the situation of aliens affected by disasters. Such situations may arise with people who are fleeing a disaster in their own country and seek permission to travel to, enter or stay in another country. Equally, a disaster overseas may affect non-nationals present on the territory of a third state by affecting their migratory situation or rendering their removal unsafe. Finally, aliens face particular vulnerabilities in the event of a disaster occurring in the country in which they are present.

In many cases, states in the Americas facilitate the travel, entry and/or stay of aliens in their territories through the application of regular migration categories, in order that the affected persons may benefit from as stable a migratory status as possible. For example, expedited consideration of immigration applications may take place or a requirement of the immigration rules (e.g. relating to

stay as a student or as a family member) may be waived on humanitarian grounds for persons affected by a disaster overseas.

For those persons affected by a disaster and whose migratory situation cannot be resolved easily by application of the regular migration categories, many states in the region do make recourse to exceptional migratory categories in their national law in order to allow travel, entry or stay. These categories tend to confer a more precarious and temporary form of stay than the regular categories do, and permission is often required in order to be able to work. Even so, they play a useful role in responding to the immediate aftermath of a disaster.

In these contexts, the grant of permission to travel, enter or stay in the country is usually based on some form of decision-making discretion that a state official exercises on humanitarian grounds. Often the law confers this power in broad, non-specific terms. However, in a number of countries in the Americas, national law and/or policy expressly mentions disasters as a basis on which this discretion should normally be positively exercised.

In this regard, state officials across the Americas are calling to be provided with clearer guidance on when this humanitarian discretion in migration law should be exercised positively for the disaster migrant's benefit. In response, the participants at the RCM workshop recommended developing a Guide to Effective Practices on Admission and Stay for Moving across Borders in the Context of Disasters (Effective Practices Guide, in short). Building on regional practices, such a guide could be based on the principle that humanitarian discretion should usually be exercised positively where an alien is personally and seriously affected by the disaster overseas.

However, there is a range of situations in which the negative exercise of this humanitarian discretion should be exercised within strictly defined limits. For disaster migrants, this is most often the case in

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relation to admission and non-removal decisions. Thus, for example, where the effect of the negative decision would be to expose a migrant to a real risk to life or personal safety due to the disaster or its consequences, then the negative exercise of discretion would be contrary to binding human rights rules. Here, the discretion must rather than should be exercised positively.

The migratory impact of disasters may manifest itself not only for migrants from the affected country but also for migrants living in a disaster-affected country (e.g. Central American migrants in the United States at the time of Hurricane Katrina). An Effective Practices Guide could thus build on existing practice in the Americas to make targeted recommendations about the ways in which these migrants should be afforded special consideration during relief efforts. This challenge is particularly acute for undocumented or irregular migrants, especially if they are in transit to another destination.

The role of refugee law

On the question of protection under refugee law for disaster migrants, states in the Americas do not generally view a disaster caused by natural hazards as in itself a ground for refugee status. Cuba is presently the only exception to this in that its national migration legislation includes among refugees those who flee their country “due to cataclysm or other phenomena of nature”.

Even so, it is recognised across the Americas that the destruction wrought by disasters can generate risks of persecution and/or interrupt national protection in the affected state, as happened in Haiti after the 2010 earthquake. An Effective Practices Guide could suggest that questions of entry, non-removal and stay for some disaster migrants may be resolved by reference to refugee law and national laws of complementary protection.

Role of regional cooperation

Regional and sub-regional bodies in the Americas play a role in promoting the

adoption of special migratory measures on humanitarian grounds by their member states; where such practices already exist, they have been encouraged or endorsed. Drawing on this, an Effective Practices Guide might include a series of proposals as to how the RCM can be used by member states to develop a more coordinated and cooperative legal approach when the migratory consequences of a disaster have a severe impact on one or more RCM states.

Adoption of such a guide by the RCM later this year would position the organisation as a world leader in responding to the humanitarian consequences of disasters. Moreover, such a guide would offer an intriguing new model for states in the Americas – and perhaps in other regions of the world – for resolving this humanitarian challenge.

Overall, the Nansen Initiative study identifies an important range of existing national law, policy and practice relating to disaster-affected migrants in the Americas. Promoting a consistent and harmonised application of these national frameworks in the disaster context may at present be more effective than seeking to supersede them with new international ‘protection’ law.

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1. Cantor DJ (2014) *Existing State Law, Policy and Practice on Temporary Protection Mechanisms for Natural Disasters: States of the Regional Conference on Migration and Others in the Americas*, Nansen Initiative.

The RCM is comprised predominantly of North and Central American States: Belize, Canada, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States.