

Fragile states and protection under the 1969 African Refugee Convention

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Current practice in African states highlights both the potential and the limitations of the 1969 African Refugee Convention in providing protection to persons displaced from fragile states.

In the most recent Failed States Index, 16 of the 20 most fragile states in the world are in Africa.¹ States such as Somalia, Sudan, Democratic Republic of Congo (DRC) and Zimbabwe consistently top the list. Perhaps unsurprisingly, these states are also major sources of refugee flows on the African continent. The protracted civil war in Somalia, for example, has resulted in the displacement of over a million people across international borders, to neighbouring Kenya and further afield. In South Africa, over half of the more than 100,000 asylum applications received each year are from Zimbabwe.

The legal status of individuals displaced from fragile states is often ambiguous. Those who can establish a “well-founded fear of persecution” for one of five reasons (race, religion, nationality, membership of a particular social group or political opinion) will be entitled to protection under the international 1951 Convention Governing the Specific Aspects of Refugees (1951 Convention). However, individuals fleeing the many other symptoms of state fragility, including poor governance, widespread insecurity, poverty and lack of basic services, will often fall outside the 1951

Convention as they are unable to establish either an individual risk of persecution or the requisite link between the risk and one of the five Convention reasons.

In Africa, this gap in the protection of the 1951 Convention might be expected to be filled by its regional counterpart, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 Convention), which expands refugee protection to cover persons who are compelled to leave their homes “owing to external aggression, occupation, foreign domination or events seriously disturbing public order”.² The breadth of situations covered by the 1969 Convention has led to extensive praise for the Convention and it is generally thought to provide legal protection to persons fleeing the very kinds of widespread, generalised and indiscriminate forms of harm that typically characterise conditions in fragile states. What is less well known is the effect that the 1969 Convention has had on African refugee protection in practice.

Protection for persons fleeing fragile states

Experience in refugee-hosting states such as South Africa, Kenya and Uganda suggests

that, in certain circumstances, the 1969 Convention has played an important role in extending protection to persons displaced from fragile states across international borders. In Kenya, for example, persons fleeing continuing conflict and instability in central and southern Somalia are granted refugee status on a *prima facie* basis under the broader terms of the 1969 Convention. In 2011, when drought and famine forced many more thousands of Somalis across the Kenyan border, this practice continued, with both UNHCR and the Government of Kenya recognising the interrelationship between so-called 'natural' causes of displacement, such as drought, and the broader Somali context, including conflict, insecurity and lack of effective government.

The 1969 Convention has also played an important role in the protection of persons fleeing conflict between army and rebel groups in DRC, in particular in the eastern regions of North and South Kivu. In Uganda, persons displaced from these regions are granted refugee status under the 1969 Convention as a matter of course. In South Africa, a number of refugee status decision-makers also recognise that the situation in eastern DRC amounts to "events seriously disturbing public order" under the 1969 Convention. Even UNHCR, which has sometimes been cautious in its application of Africa's expanded refugee protection regime, has suggested that persons from eastern DRC are likely to meet the 1969 Convention's criteria for protection.

In relation to displacement from fragile states such as Somalia and DRC, therefore, the 1969 Convention has been instrumental in providing legal protection to persons who may not otherwise qualify for it under the 1951 Convention. In both cases, however, one of the defining features of state fragility has been the presence of armed conflict. The extension of protection to persons fleeing the many other symptoms of state fragility – including weak governance, food insecurity and lack of basic services – has not been so forthcoming.

In South Africa, applications for asylum by persons from Zimbabwe are almost universally rejected. The view taken by government, decision-makers and even many advocates is that most Zimbabweans crossing the border to South Africa, often with the stated intention of accessing better employment and education opportunities, are 'economic migrants'. According to the South African Refugee Appeal Board, despite ongoing and widespread deprivation of people's basic socio-economic rights in Zimbabwe the relative stability of law and order in the country means it falls outside the scope of the 1969 Convention.

Persons fleeing the new state of South Sudan also challenge the capacity of the 1969 Convention to protect persons fleeing non-conflict related symptoms of state fragility. While significant parts of South Sudan continue to be blighted by violence and insecurity, across the border in north-western Kenya, at Kakuma refugee camp, there is a widespread view that the majority of South Sudanese have come to Kenya primarily to access the education, health and food services that remain close to non-existent in their home country. To date, the 1969 Convention has not been applied to persons fleeing South Sudan at all, and several UNHCR officials have expressed doubt about whether such persons could really be considered refugees.

While the above examples do not provide a comprehensive assessment of the implementation of the 1969 Convention or its role in protecting persons fleeing fragile states across the whole of Africa, they are suggestive of both the potential and the limitations of the Convention in responding to displacement from fragile states. In particular, they suggest that states may be more willing to apply the 1969 Convention to persons in situations where the perceived cause of displacement is the existence of armed conflict and a breakdown in law and order. Where persons flee the many other symptoms of state fragility – including poor governance, food insecurity and lack of access to basic services – such application is less straightforward.

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“Events seriously disturbing public order”

One of the reasons for ambiguity in state responses to the different aspects of state fragility is lack of clarity in the scope of the 1969 Convention itself. Unlike the 1951 Convention, which has been the subject of extensive interrogation by scholars, practitioners and international institutions, analyses of the 1969 Convention are few and guidance on the scope of its terms is simply not available. Of particular relevance to displacement from fragile states is the 1969 Convention’s extension of protection also to persons fleeing “events seriously disturbing public order”.

As the element of the 1969 Convention that most expands the scope of the term ‘refugee’, this phrase is also the most contested. It is generally accepted to cover human-caused events which undermine the existence of law and order, such as conflict or generalised violence. What is less clear is whether it also extends to so-called natural causes of displacement, such as drought, flood or earthquake, or to people fleeing deprivation of their human rights, including socio-economic rights such as the right to food, education and health care.

Regardless of the view one takes on these questions, neat conceptual distinctions between ‘human’ and ‘natural’ causes of displacement do not always reflect realities, as conditions in Somalia and South Sudan well demonstrate. For example, while the 2011 Horn of Africa drought forced hundreds of thousands of Somalis across international borders in search of safety, food and other assistance, the majority of similarly drought-affected Kenyans stayed put, aided by the relatively higher levels of security and assistance in the country. Likewise, the distinction between ‘economic migrants’ on the one hand and refugees or ‘forced migrants’ on the other is blurry at best. People’s reasons for movement are complex and often multifarious, not least in the case of fragile states.

Against the legal and practical background of displacement from fragile African states, the concept of state fragility itself might provide a useful reference point for distinguishing between those who are deserving of international protection under the 1969 Convention and those who are not. Fragile states are by definition ones in which the government’s capacity to fulfill its basic duties towards its citizens – including the duty of protection – is compromised. It is the citizen’s concomitant inability to have those duties fulfilled that gives rise to his or her claim to the protection of the international community. This idea is not a new one. The concept of ‘surrogate protection’ has been used to describe and to justify the international refugee protection regime almost since its inception.

This is not to say that every person who leaves a fragile state is necessarily a refugee; for a start, symptoms of state fragility frequently have differential impacts on particular individuals and communities within a state. Rather, it is to suggest that the characteristic inability of fragile states to protect their citizens might provide a relevant and useful framework for giving content to the otherwise seemingly boundless phrase, “events seriously disturbing public order”. Put another way, the incapacity of a state to fulfill its basic duties towards its citizens might be the determining factor in deciding whether or a not a particular set of circumstances – whether human or natural in cause – gives rise to other states’ international protection obligations. Where an individual’s home state is unable to provide the most basic protections, a legitimate claim to protection under the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa may be made.

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1. The Failed States Index is published each year by Fund for Peace and is available at: <http://fpf.statesindex.org>

2. <http://tinyurl.com/AfrRefugeeConvention>