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IN HARM'S WAY

INTERNATIONAL PROTECTION IN THE CONTEXT OF NEXUS DYNAMICS

Between Conflict or Violence & Disaster or Climate Change

OVERVIEW

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International Protection in the Context of Nexus Dynamics Between Conflict or Violence & Disaster or Climate Change

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OVERVIEW

INTRODUCTION

Recent history bears witness to cross-border movements in the context of conflict and/or violence *and* disaster and/or the adverse effects of climate change (nexus dynamics). Countries and regions affected range from South Sudan to Syria, the Lake Chad basin and Horn of Africa, to Central America and Haiti. Despite this reality, the recognition that multiple factors underlie human movements and the enduring relevance of refugee law for providing international protection, research examining State practice on refugee law-based international protection in the specific context of nexus dynamics is limited. The present study begins to address this knowledge gap.

This overview (which summarizes a longer report available on UNHCR's website) sets out recommendations, based on the present study, to strengthen implementation of refugee law-based international protection when cross-border movements occur in the context of nexus dynamics. The recommendations are framed to advance reflection and discussion on legal, policy and practical solutions, against the backdrop of commitments in the United Nations High Commissioner for Refugees (UNHCR) Strategic Directions 2017–2021, the New York Declaration on Refugees and Migrants, and the Global Compact on Refugees, as well as priorities outlined in the Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.

The report describes *international* protection that is: (1) based on *refugee law* frameworks; (2) provided by *destination* States; (3) to people who have *crossed international borders* in the context of *nexus dynamics* in their origin country. It does so by examining four case studies, which concern:

1. Kenya and Ethiopia's responses, primarily during 2011–2012, to the cross-border movement of *Somalis* in the context of drought, food insecurity and famine, when conflict and violence also prevailed in southern and central Somalia; and

2. Brazil and Mexico's responses, primarily during 2010–2012, to the cross-border movement of *Haitians* in the aftermath of the 2010 earthquake in Haiti, when insecurity, violence and human rights violations also prevailed in Haiti.

While not the only examples of nexus dynamics, Somalia and Haiti were selected as origin situations partly because some destination States applied refugee law frameworks to respond to cross-border movements and because regional refugee instruments were applicable. As the emphasis is on destination State responses, the report does not describe the nexus dynamics in Somalia or Haiti in detail. Each situation does represent distinct nexus dynamics. Arguably, Somalia can be characterized, in reductionist, imperfect terms, as a situation in which pre-existing conflict, and responses related to it, exacerbated the impacts of disaster and adverse effects of climate change. By contrast, Haiti can be characterized in reductionist and imperfect terms as a situation in which a disaster exacerbated pre-existing State fragility.

Admittedly, the ensuing conditions in each country would have supported different scales and types of claims for refugee status.

The research was undertaken through 4- to 6-day field visits to Kenya, Ethiopia, Brazil and Mexico between February and April 2018, informant and expert interviews, questionnaires to field operations, email correspondence and desk review of grey and academic literature, UNHCR documents and data. In addition, the country case studies were shared with government informants and the overall report benefited from review and comments from UNHCR staff and other experts.

The overarching purpose of the study is to provide recommendations to UNHCR, States and others on strengthening the implementation of refugee law when cross-border movements occur in the context of nexus dynamics. Therefore, although State responses are discussed, the aim is not to explain, compare or draw causal inferences. Rather, the report describes how refugee law frameworks featured in destination State responses in order to robustly inform recommendations to strengthen responses at national, regional and international levels.

This overview first highlights the responses of the four destination States: Kenya, Ethiopia, Brazil and Mexico. Next, it identifies pertinent observations and their potential implications. In conclusion, it presents 12 recommendations for UNHCR, States and others on strengthening the implementation of refugee law-based international protection in the context of nexus dynamics.

DESTINATION STATE RESPONSES IN BRIEF

As it has done historically, ***Kenya*** continued to grant refugee status to Somalis who arrived in 2011–2012, maintained territorial access and permitted Somalis to reside in the country, predominantly in camps in the Dadaab region. At the time, UNHCR was responsible for refugee status determination (RSD), which it undertook pursuant to its mandate. Most Somalis were recognized under broader refugee criteria through a group-based approach, with registration as the primary modality by which status was recognized. Informant views on the reasons for recognition reflected two schools of thought. It appears that some saw the influx as driven by drought and its consequences for livelihoods and food security, and characterized the response as humanitarian, in the sense that Somalis were registered as 'refugees' for humanitarian reasons rather than on the basis that they qualified for refugee status under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (together the Refugee Convention). Another group considered that Somalis who arrived in the context of drought and food insecurity were refugees: the Somalis fled underlying conflict, generalized insecurity or disruption to public order that brought them within the broader refugee criteria under the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).

In July 2014, Kenya assumed authority for taking RSD decisions. However, UNHCR remained engaged, including during an extended transition process. Registration in the Dadaab camps was suspended in October 2011, although intermittent opportunities for registration continued until coming to a stop in mid-2015. This change in policy has meant more recent Somali asylum seekers (close to 10,000 at mid-year 2018), including those who have arrived in the context of nexus dynamics, are unable to access procedures that would determine their claim to refugee status. Consequently, they have limited access to the humanitarian assistance available to recognized refugees. Since April 2016, the processing approach for Somali asylum seekers has also changed: they are no longer eligible for status determination through a group-based approach. In what can be characterized as a circumscribed protection environment, close to 80,000 Somalis have repatriated within the framework of a voluntary repatriation agreement signed in late 2013.

Ethiopia also maintained its historical stance, with territorial access, refugee status and encampment in the Dollo Ado camps for Somalis who arrived in 2011–2012. The declaration of famine in parts of Somalia in July and August 2011 does not appear to have been a key marker for recognition of refugee status. Through a tiered process, the Administration for Refugee and Returnee Affairs (ARRA) and UNHCR conducted RSD through a group-based approach. Somalis were recognized within the framework of Ethiopia's domestic refugee law, predominantly pursuant to broader refugee criteria. Since that time, the *status quo* has remained unchanged and more recent Somali asylum seekers have continued to be recognized on the same basis, with ongoing efforts by ARRA and UNHCR to stay abreast of developments in Somalia.

Informants rarely considered Somalis who arrived in 2011 and 2012 as anything other than refugees. Informants discussed the applicability of the "events seriously disturbing public order" ground in the OAU Convention to the situation in Somalia in 2011. They suggested that Somalis were fleeing areas affected by regular conflict or insecurity or that these aspects contributed to their fear of return. In general, informants appeared to recognize that multiple root causes prompted Somali flight. The discussions highlighted the complexity of identifying a sole or dominant cause. Ethiopia may view the impacts of serious 'natural' disasters, even in the absence of nexus dynamics, as potentially giving rise to claims that could satisfy the broader refugee criteria under the OAU Convention.

Brazil's response to the movement of Haitians into its territory in the aftermath of the 2010 earthquake in Haiti was based on an *ad hoc* administrative mechanism, which by mid-2018 had benefited at least 100,000 Haitians.
The domestic refugee law featured in Brazil's response to the extent that it permitted Brazil


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to regularize the status of Haitians who had entered irregularly, pending a resolution under the administrative mechanism. Between 2010 and 2015, however, not a single Haitian was recognized as a refugee, even though tens of thousands applied, raising questions regarding effective access to RSD procedures.

Refugee status was considered as an option to respond to Haitian arrivals. However, it appears there was a general perception that refugee status was unsuitable or inapplicable, as Haitians did not face a well-founded fear of persecution on Refugee Convention grounds. Recognition of the mixed nature of Haitian movements seems to have been limited, even though there was some recognition of evolving conditions in Haiti. Broader refugee criteria as reflected in the 1984 Cartagena Declaration (Cartagena Declaration), which had been incorporated into domestic law in a circumscribed manner, was also dismissed, although domestic litigation, which ultimately failed, sought to argue its applicability.

Mexico also implemented *ad hoc* measures within the architecture of its migration framework to exceptionally permit certain categories of Haitians to enter and stay on a temporary and humanitarian basis. Access to RSD procedures was also maintained. However, informants raised concerns regarding the availability and accuracy of information on such procedures. Research indicates that in Mexico, some Haitians affected by the 2010 earthquake were recognized under broader refugee criteria on the ground of disruptions to public order.

In the aftermath of the 2010 earthquake in Haiti, it appears that Mexico's refugee authority had discussions on how to assess Haitian claims under refugee law, including on how to apply broader refugee criteria. Informants indicated that assessing claims under the Refugee Convention was difficult because Haitians were suffering from serious psychosocial harms and struggling to articulate coherent claims. Some informants opined that while a 'natural' disaster *per se* could not ground claims in refugee status, in principle, the impacts and consequences of a disaster may do so, including, and perhaps particularly, based on broader refugee criteria.

Observations by Destination State

OBSERVATION	KENYA	ETHIOPIA	BRAZIL	MEXICO
Use of refugee law frameworks	Key framework used for international protection.	Key framework used for international protection.	Refugee law framework used only to regularize status of irregular entrants.	Refugee law framework available but secondary to use of other mechanisms.
Access to refugee status determination (RSD) procedures	Yes. Limited from October 2011. Stopped in Dadaab camps in mid-2015.	Yes.	Questions raised regarding effective access to RSD procedures.	Yes. However, questions raised regarding availability and accuracy of information on RSD procedures.
Group or individual process	Largely group-based approach to recognition of refugee status.	Largely group-based approach to recognition of refugee status.	Intervention favoured a group mechanism with low administrative burdens.	Intervention focused on particular 'categories'.
Recognition under the Refugee Convention's criteria	Yes. Very limited relative to use of broader refugee criteria.	Yes. Very limited relative to use of broader refugee criteria.	No. None were recognized as refugees between 2010 and 2015.	Unclear. Information could not be obtained.
Recognition under broader refugee criteria in regional refugee instruments	Yes. Main basis for recognition.	Yes. Main basis for recognition.	No. Limited domestic incorporation of broader refugee criteria.	Yes. Due to the consequences of the earthquake/disaster.
Views on relevance of refugee law frameworks	Yes. Mixed. References particularly to relevance of broader refugee criteria.	Yes. References particularly to relevance of broader refugee criteria.	Limited recognition of relevance of Refugee Convention or broader refugee criteria.	Yes. Broader refugee criteria potentially applicable due to the consequences of the hazard/disaster (cf. hazard/disaster *per se*).
Rights and benefits	Encampment architecture.	Encampment architecture.	Refugees entitled to *non-refoulement* and protection from extradition. Facilitation of family reunification and travel doc., but travel restrictions.	Refugees offered greater certainty through a path to naturalization with certain requirements waived. Family reunification facilitated.
UNHCR engagement	Mandate RSD. Recognition of refugee status predominantly through registration.	Recognition of refugee status predominantly through registration by UNHCR and government.	Engaged in collective RSD process with right to voice opinions but not vote.	Engaged in collective RSD process until 2011. Limited engagement afterwards.
UNHCR guidance relevant to Somalis/Haitians	2010 Eligibility Guidelines but limited references to nexus dynamics.	2010 Eligibility Guidelines but limited references to nexus dynamics.	UNHCR/OHCHR letters in 2010 and 2011, primarily requesting suspension of returns and temporary protection on humanitarian grounds.	UNHCR/OHCHR letters in 2010 and 2011, primarily requesting suspension of returns and temporary protection on humanitarian grounds.
Changes in landscape including legal reform	Somalis subject to individual approach to RSD beginning April 2016.	New draft refugee proclamation addressing gaps in extant law under consideration.	New 2017 migration law permits humanitarian visas and residencies and contains broader *non-refoulement* protection.	Reformed migration law permits visitor cards for humanitarian reasons.

OBSERVATIONS AND IMPLICATIONS

The following ten observations, drawn from the responses of destination States to cross-border movements in the context of nexus dynamics, raise a number of implications.

>>Refugee law frameworks played primary or secondary roles in international protection.

IMPLICATIONS:

The other legal and policy options available to States may be relevant to how and when refugee frameworks are used in response to cross-border movements in the context of nexus dynamics.

Refugee law frameworks may form part of a 'toolbox' of options, when multiple frameworks are available to provide international protection.

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When only one framework (refugee, migration, other) is operational, the potential to tailor appropriate and differentiated international protection responses is constrained.

In regions with pre-existing conflict and histories of refugee influxes, destination States may have normative and institutional frameworks and established practices for admitting and recognizing refugees. In this context, mischaracterization or misunderstanding of root causes and human factors underpinning flight may be a particular challenge.

In other destination States, such frameworks and practice may be limited. In this context, barriers to effective access to RSD procedures and refugee protection may be a challenge.

>>Access to, and availability of, RSD procedures, varied.

IMPLICATIONS:

When refugee law frameworks are secondary to other interventions used to support admission and stay in the context of nexus dynamics, directed efforts may be needed to promote effective access to RSD procedures. If timely, targeted and accurate information on RSD procedures is unavailable, the priority accorded to other interventions may become entrenched such that refugees cannot effectively access international protection based in refugee law. Administrative interventions may become necessary to minimize barriers to access and to promote the potential to recognize refugees.

Guidance on procedures for handling claims for refugee status may be important, particularly when refugee claims are not examined or finally determined, but are resolved through migration or other frameworks.

>>States favoured use of mechanisms that permitted group- or category-based interventions.

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IMPLICATIONS:

When cross-border movements in the context of nexus dynamics are large scale, or are relatively so compared to historical practice, States may favour mechanisms that facilitate the timely and efficient grant of international protection, with minimal administrative burdens.

For States to consider refugee law frameworks within efforts to fashion appropriate responses to large-scale movements in the context of nexus dynamics, functional, group-based approaches for undertaking RSD may be necessary. The absence of such mechanisms may incline States towards other frameworks when political will exists to accommodate admission and stay.

Understanding why States choose to pursue other frameworks to support admission and stay (including how the viability of extant refugee law frameworks and RSD procedures are considered) may provide insights on necessary policy and operational reforms.

>> A small number of claims were recognized under the Refugee Convention.

IMPLICATIONS:

The Refugee Convention will continue to be relevant for responses to cross-border movements in the context of nexus dynamics, but its relevance may vary based on the particular characteristics of the nexus dynamics.

The occurrence of a disaster does not detract from the possibility that pre-existing conditions in the country of origin, including conditions that relate to conflict or violence, may continue to underpin claims pursuant to the Refugee Convention. Marginalized groups who were persecuted prior to a disaster may continue to face pre-existing forms of persecution. Some individuals or groups may be differentially treated in the aftermath of a disaster. Indeed, the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention.

Guidance on the types of claims that may satisfy the Refugee Convention's criteria may facilitate recognition of refugees on this basis. Guidance may be especially important in situations where the most prominent or proximate trigger prompting flight is a disaster. In situations where pre-existing conflict exacerbates the impacts of disasters or adverse effects of climate change (as was arguably the case in Somalia), it may be important to explain human factors and root causes. It may be necessary to also explain how the consequences of a disaster or adverse effects of climate change are linked to conflict or violence and could potentially underpin refugee claims. In the absence of conflict, when disasters exacerbate pre-existing State fragility (as was arguably the case in Haiti), again, it may be important to identify the human dimensions that may support claims under the Refugee Convention. Explanation of disproportionate impacts on marginalized groups may also be important.

>>When refugee law frameworks were used and regional refugee definitions were applicable, status was recognized largely pursuant to broader refugee criteria.

IMPLICATIONS:

Where regional refugee definitions are applicable at the domestic level, they may facilitate recognition of refugee status in the context of nexus dynamics.

Guidance on the applicability of broader refugee criteria and their relevance to claims in the context of nexus dynamics may be necessary to enhance understanding and robust, regionally-coherent implementation of regional refugee instruments. In situations where pre-existing conflict exacerbates the impacts of disaster, which become a prominent or proximate trigger for flight, it may be important to counter any perceptions that claimants are *solely* victims of disaster. This imperative is also relevant when, in the absence of conflict, disaster exacerbates pre-existing State fragility, and is the most prominent or proximate trigger for flight. In both types of nexus situations, identifying how the combined consequences of conflict and/or violence and disaster and/or adverse effects of climate change support claims under broader refugee criteria, particularly on the basis of disruptions to public order, may be valuable.

>>Various stakeholders recognized the relevance and applicability of refugee law frameworks for providing international protection in the context of nexus-related movements, even when the most prominent/proximate triggers were disaster, food insecurity or famine.

IMPLICATIONS:

Informants from governments, UNHCR and civil society recognized that refugee law frameworks, and in particular broader refugee criteria, are relevant for providing international protection in the context of nexus dynamics.

Sometimes, popular perceptions and narratives on the 'causes' prompting flight may lead to the disregard of refugee law frameworks. This may be more likely when prominent or proximate triggers relate to root causes, which are not regarded as traditional causes of refugee flight. In this context, ensuring refugee law frameworks remain within a 'toolbox' of responses to address cross-border movement in the context of nexus dynamics may be a key policy challenge.

Guidance to enhance understanding of the pertinent inquiry and evidentiary burdens in determining claims for refugee status under broader refugee criteria may be useful to mitigate preoccupation with prominent factors for flight that may prejudice the decision-making process. In certain nexus contexts, the relevance of


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refugee law frameworks may become apparent only as time passes and as conditions in countries of origin evolve.

>>International protection pursuant to refugee law frameworks offered different and unique entitlements, but also certain limitations in comparison to protection through other channels.

IMPLICATIONS:

When multiple frameworks (e.g. refugee or other) are available to support international protection in the context of nexus-related movements, entitlements and limitations under each applicable framework may need to be communicated effectively so claimants can make informed decisions about whether to lodge or continue with refugee claims.

>>Although UNHCR's engagement and access varied, in each domestic context UNHCR had scope to inform, advise, support and in some cases, recognize refugee status.

IMPLICATIONS:

When UNHCR has presence, it has scope to inform, advise and assist decision makers to understand how individuals or groups may satisfy the definitions in the Refugee Convention or regional refugee instruments. Where UNHCR is integrally involved in RSD procedures, UNHCR's potential to inform and advise States on the relevance and application of refugee law and to support the grant of refugee status is much greater. When UNHCR is able to observe and advise, UNHCR's guidance, technical support and training may be crucial to building the proficiency and capacity of decision makers on the relevance and application of refugee law frameworks and thereby fostering the robust grant of refugee status in the context of nexus-related movements.

>>Targeted UNHCR guidance on the application of refugee law frameworks to persons seeking international protection in the context of nexus dynamics in Somalia and Haiti was unavailable at the relevant time periods.


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IMPLICATIONS:

Decision makers and practitioners may hold UNHCR guidance, including its legal interpretive guidance and its country- or profile-specific eligibility guidance, in high regard. Documents that fall into the latter suite may need to be updated regularly to account for prevailing conditions and evolving nexus dynamics to enhance their utility and promote reliance.

UNHCR advisory letters issued in the aftermath of disasters (as occurred following the 2010 earthquake in Haiti) may be taken into consideration in State decisions on responses. Such letters may need to be issued as a matter of course, whenever UNHCR learns of cross-border movements in the context of disasters, and be crafted to support the grant of international protection under refugee law frameworks.

Global- and/or regional-level UNHCR legal interpretive guidance may be necessary to promote clarity, coherence, consistency on the application of broader refugee criteria to movements in the context of nexus dynamics, especially given domestic efforts to develop commentary on the relevance of regional refugee definitions to 'natural' or ecological disasters.

>>In some countries, domestic migration frameworks have been adopted and/ or amended to support the provision of temporary, humanitarian forms of international protection.

IMPLICATIONS:

A deeper analysis of domestic refugee law frameworks in destination States, as well as migration and other relevant frameworks may be necessary to understand opportunities and limitations for granting international protection in the context of nexus-related movements. Such an analysis may also be necessary to appreciate how domestic migration or other frameworks affect, support or constrain the provision of international protection on the basis of obligations pursuant to domestic, regional or international refugee law.

RECOMMENDATIONS

Within the contemporary policy and institutional landscape, drawing on the destination State responses, observations and implications, and guided by UNHCR's mandate, strategic priorities and activities, the following 12 recommendations are offered within four broad themes.

ON GUIDANCE

1. UNHCR should develop legal interpretive guidance in the form of UNHCR Guidelines on International Protection to inform States, practitioners, decision makers and UNHCR personnel regarding the relevance and application of the Refugee Convention and regional refugee instruments to international protection in the context of nexus dynamics, and to apply them in practice.

2. In UNHCR's country- or profile-specific Guidelines on Eligibility (and the related suite of guidance documents), UNHCR should explain explicitly how the combined effects of a hazard, disaster or the adverse effects of climate change *and* conditions of conflict or violence on social, political, economic, security, human rights and humanitarian conditions, relate to criteria in applicable refugee definitions. UNHCR should also provide information on the processes and timing of updates and revisions to promote reliance.

3. UNHCR should ensure other guidance issued to States, such as specific letters requesting non-return, includes reference to international protection pursuant to refugee law to ensure States are abreast of its potential applicability, even in situations where the most prominent or proximate trigger may be a disaster. UNHCR should consider the issuance of such letters systematically, and as a matter of course, when it becomes aware of cross-border movement in the context of disasters.

4. UNHCR (and States and regional actors, as appropriate) should develop tailored regional- (and subregional-) level strategies to inform and promote the interpretation and application of the Refugee Convention and broader refugee criteria to nexus-related cross-border movements.

ON RSD AND ACCESS

5. In keeping with the affirmations made in the New York Declaration, States (and other stakeholders, as appropriate) should ensure effective access to domestic RSD procedures, including in the context of nexus-related movements where the most prominent or proximate trigger may be a disaster or other factors not ordinarily considered as supporting refugee claims.

6. UNHCR and other stakeholders should create or update training packages to build the proficiency of RSD decision makers, including UNHCR personnel, to apply the Refugee Convention and broader refugee criteria to movements in the context of nexus dynamics.

7. UNHCR should provide technical support to States to develop domestic refugee law frameworks with the scope and operational capacity to undertake group-based approaches to RSD, in order to foster the use of refugee law frameworks in the context of (relatively) large-scale movements.

ON A 'TOOLBOX' OF INTERNATIONAL PROTECTION MEASURES

8. UNHCR, States and other stakeholders, as applicable, should analyse domestic legal frameworks, including refugee laws and policies to determine opportunities and limitations for providing international protection in the context of nexus dynamics. When applicable, States should develop or reform—and UNHCR and other stakeholders should promote the development of or reforms to—domestic frameworks to support the grant of international protection based on refugee law.

9. In the context of nexus-related cross-border movements, UNHCR should advocate with destination States and other stakeholders to ensure refugee law frameworks are consistently considered and remain available and accessible in a 'toolbox' of responses to address international protection needs, even if other frameworks are used or prioritized.

ON DATA, KNOWLEDGE GAPS AND COMMUNICATION

10. UNHCR and other stakeholders should build knowledge and data by documenting domestic practice at points in time when refugee law frameworks have underpinned international protection for persons fleeing in the context of nexus dynamics.

11. UNHCR and other stakeholders should conduct comparative research on multiple destination State responses to nexus-related movements from a single origin country to gather region- or subregion-specific insights on the use, opportunities and limitations of refugee law frameworks.

12. UNHCR should scrutinize the ways in which it communicates publicly about movements that relate to nexus dynamics and frame communication to avoid and negate singular inferences on the 'causes' prompting flight in the context of nexus dynamics (e.g. by avoiding use of terminology such as "drought displacement").


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