

# **EVENTS SERIOUSLY DISTURBING PUBLIC ORDER: The OAU Convention and displacements as a result of the impacts of climate change and disasters.**

## **Displacements due to Climate Change and Disasters**

- **"Climate Change" refers to immense, long-lasting changes in how the weather works all around the world. It refers to any change in climate over time, whether due to natural variability or as a result of human activity.**
- **Climate change in International Panel on Climate Change (IPCC) usage refers to a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer.**

- The United Nations Framework Convention on Climate Change (UNFCCC) defines the same term “as a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.”
- Impacts of climate change: (a) environmental degradation, (b) disasters, (c) human mobility around the world, therefore, “**environmental migration.**”
- “**Environmental migration**” is the movement of persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are forced to leave their places of habitual residence, or choose to do so, either temporarily or permanently, and who move within or outside their country of origin or habitual residence. (International Organization for Migration (IMO)).

- Each year, millions of people are driven into displacement as a result of disasters related to natural hazards, the adverse effects of climate change, and environmental degradation.
- People displaced by climate change and other natural disasters are also often unable to access justice due to the irregular and precarious conditions they face during and after displacement.
- **Environmental migration** can take many complex forms including: forced and voluntary, temporary and permanent, internal and international, individual and collective, of proximity and of long distance.

- The adverse effects of climate change and disasters therefore contribute to vulnerability, human mobility and displacement and pose increased risk to the human rights of displaced persons, many of whom live in countries most affected by climate change.
- By their nature, such events can impact on the prevailing level of public order within a society— for example, in situations involving sudden-onset disasters, such as storms or flooding – or through interaction with other factors affecting societal instability, such as conflict, violence, and serious human rights violations.
- Slow-onset climate change impacts, such as drought, can exacerbate conflict and instability in a society, while also diminishing a State’s capacity to protect its population from harm.

- The question is whether the existing legal frameworks protect people forcibly displaced in such contexts.

## Legal Protection of People Displaced as a Result of Climate Change and Disasters in Africa

- In Africa, the key legal framework is the continent's regional refugee treaty – *the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, (1969 OAU Convention)*.
- Article I(2) of the 1969 OAU Convention expands the scope of refugee protection beyond the international definition of a “*refugee*”, found in the 1951 Refugee Convention, to protect people fleeing events which can be characterized by their widespread and indiscriminate nature.

- These events include *external aggression, occupation, foreign domination, and “events seriously disturbing public order” (ESDPO)*.
- This definition in Article I(2)- **(ESDPO)** is broad. Properly construed, this Article has the potential to protect people fleeing from adverse effects of climate change, environmental degradation, and the impacts of disasters.

### HOW DO WE ASSESS A SERIOUS DISTURBANCE TO PUBLIC ORDER

- Public order is a condition characterized by the absence of widespread criminal and political violence, such as kidnapping, murder, riots, arson and intimidation against targeted groups or individuals.

Public Order: means the situation that exists when people obey the laws, rules or authority of the State.

**Public Order:** individual or group acts which interfere with society and the ability of others to function effectively.

**Disasters and climate change will meet the relevant threshold – that is, when will they seriously disturb public order.**

**ESDPO** can be assessed in two steps. *(a) the first step is determining whether there is disturbance to public order in a refugee applicant's home country. For the purpose of the Article I(2) refugee definition, "public order" refers to the maintenance of societal stability, demonstrated by a predominant state of public peace, public safety and public security, and underpinned by the effective operation of the rule of law and the protection of individuals' rights and freedoms within the society.*

■ A disturbance to public order can be assessed by reference to eight factual indicators which decision makers can weigh up to determine whether, on balance, public order has been disturbed in a particular case. These factual indicators can often overlap in practice and can be evidenced by a number of sub-factors. The eight indicators of a disturbance to public order are set out below:

a). **Government services** are failing to meet the basic needs of individuals in the society and therefore do not ensure that individuals are able to enjoy minimum core human rights.

b). **Government institutions** are weak and function ineffectively.

c). **Freedom from harm:** Individuals are unable to go about their daily lives with dignity and without fear for their lives, physical integrity or liberties, as a result of actions or omissions of the State, foreign States, non-State actors or other individuals.

d. **Rule of law:** Judicial, security, and law enforcement bodies (including the courts, police, armed forces and other officials exercising public order powers) do not operate in accordance with the rule of law, and in a way that is fair, impartial, transparent and non-discriminatory.

e).**Management of public protests:** Authorities respond to public protests, strikes or demonstrations with coercive and repressive measures, contrary to human rights law and the rule of law.

f).**Civil conflict is not effectively limited.**

g).**Government accountability is limited.**

h).Other circumstances that result in a disturbance to general societal stability, public peace, public safety or public security.

■ The **second step** is to assess the *seriousness* of the disturbance to public order, by considering the nature, extent and duration of the disturbance. A disturbance to public order will meet the threshold of “serious” where it involves a *widespread or generalised threat to the rights to life, physical integrity and/or liberty of individuals in a society, such that the disturbance can be said to affect society at large, and the state is unable or unwilling to restore public order.*

■ For a disturbance to meet the seriousness threshold, and thus constitute ESDPO, it must meet the following considerations:

*(1) The disturbance to public order involves a threat to the rights to life, physical integrity and/or liberty of individuals;*

*(2) The disturbance can be said to affect society at large, for example by being widespread (affecting a proportionately large number of people within a society) and/or generalized (where there is a risk to an indeterminate number of people within a society). Serious disturbances need not affect the majority of individuals in a society, so long as enough individuals are affected in a way that it creates a general sense of instability in the society by undermining public peace, public safety or public security.*

- The ESDPO indicia can be applied whether a person has been displaced: (1) in the context of the adverse effects of climate change, environmental degradation or the impacts of disasters, (2) in more traditional contexts of displacement such as conflict and violence, or (3) where disasters and conflict interact.
- The Article I(2) refugee definition has been incorporated into the domestic law of 37 of the 48 States, and is also reflected in the domestic law of two countries who are not States parties to the 1969 OAU Convention (Somalia and Namibia). Thirty-five of those 37 State parties incorporate all or a slightly modified version of the definition in their domestic legislation.

## Paucity of case law on the expanded definition

- The only identified case law that discusses the scope of the Article I(2) definition is a case of the South African High Court which provided some brief statements about the definition's criteria, i.e. *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs*, in which the High Court elaborated on the requirements of Article I(2) that relate to the “*compelled to leave*” requirement and the need for an objective determination of the flight-producing events.
- The Court also emphasized that when interpreting the South African legislation that incorporates the 1969 OAU Convention, the humanitarian object and purpose of that Convention must be given due regard.
- The other 2 of the 37 countries (Congo and Côte d'Ivoire) have not incorporated Article I(2) into their domestic legislation but, their legal systems domesticate incorporation of international law (and therefore the Article I(2) definition) applies automatically as a matter of domestic law.

- However, available research suggests that lack of existing case law and general understanding of the scope of the Article I(2) refugee definition means that refugee status claims are, in many cases, decided under the 1951 Refugee Convention's universal refugee definition only.

## **CONCLUSION**

- Increased awareness of the complex and multi-causal relationship between disasters and human mobility has led to a more nuanced understanding of the potential application of refugee law.

- Considering the significant vulnerabilities to climate change and environmental degradation on the African continent, the 1969 OAU Convention forms an important part of regional protection frameworks for people displaced in the context of climate change, environmental degradation and the impacts of disasters.

■ Where persons leave their country, they will only be refugees under the Article I(2) refugee definition in the 1969 OAU Convention *where they have fled due to circumstances that can factually be characterized as a serious disturbance to public order* – whether the adverse effects of climate change, environmental degradation or the impacts of disasters were a direct or indirect contributing factor – and where the person individually faces a real risk of harm owing to those events. A principled and individualized assessment of the circumstances of each case must therefore be undertaken.

**The end.**

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