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Migrants and natural disasters: National law, policy and practice in the Americas

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Introduction

The question of how to regulate international migration-related challenges in the context of rapid-onset natural disasters is attracting increasing interest from academics and policymakers alike. However, the fact that the issue is not addressed directly by international law or policy has sometimes led to the erroneous conclusion that no

law or policy exists. Against this backdrop, this paper points to a range of applicable law, policy and practice that exists at the national level in the Americas and which offers a prospective basis for further legal and policy development in this area.



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Concept definitions, observations and challenges related to data

The paper succinctly presents research published elsewhere by the author (Cantor, forthcoming; 2015a; 2015b). It starts by considering the fragmentary empirical data from the Americas on migration-related challenges in the context of natural disasters, before proceeding to analyse the laws, policies and practices of States concerned. It concentrates on three specific categories of migrants:

- (a) Migrants who leave their country due to a natural disaster;
- (b) Migrants who are affected by a natural disaster in their home country; and
- (c) Migrants who are affected by a natural disaster in the country in which they find themselves.

As such, the analysis addresses only “international migrants”, a term that here encompasses both voluntary and forced movements of persons. Similarly, the phrase “natural disasters” is used herein as a shorthand to refer specifically to rapid-onset disasters caused by natural hazards.¹

Migrants and natural disasters: Data from the Americas

Migrants who leave their country due to a natural disaster

Population movement caused by natural disasters in the Americas is predominantly internal.² Yet existing studies show increased outmigration from affected countries in the context of volcanic eruptions (such as Montserrat eruption in 1995), tropical storms in the

¹ The United Nations International Strategy for Disaster Reduction (UNISDR) defines *disaster* as a “serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources” and *natural hazards* as “[n]atural process or phenomenon that may cause loss of life, injury or other health impacts, property damage, loss of livelihoods and services, social and economic disruption, or environmental damage” (see www.unisdr.org/we/inform/terminology).

² See, for example, N. Rodríguez Serna, *Human Mobility in the Context of Natural Hazard-Related Disasters in South America*, Background paper for the Nansen Initiative South America Consultation, Quito, Ecuador, 15–16 July 2015 (Nansen Initiative Secretariat, Geneva, 2015). Available from www.nanseninitiative.org/wp-content/uploads/2015/12/14122015_FINAL_BACKGROUND_PAPER_SOUTH_AMERICA_screen.pdf.

Caribbean and Central America (such as Hurricane Mitch in 1998) (Andrade Afonso, 2011; Reichmann, 2013) and earthquakes (such as the earthquake in El Salvador in 2000 and the one in Haiti in 2010) (Attzs, 2008; Fagan, 2013). At least in the first instance, such migration appears to follow well-established regular and irregular routes for migrants from that nationality.

Two main migratory patterns can be inferred from this data: (a) short-term immediate movements across a contiguous land border by individuals fleeing or directly affected by a natural disaster, most often by persons living in a part of the country from which the border is accessible; and (b) longer-term movements, often towards more distant countries, by individuals from across a country very severely affected by a natural disaster. Both patterns may, of course, be evident in relation to any particular disaster. Such movements of persons raise questions about whether there is a legal basis that allows the entry and stay of such persons and, if so, under what legal conditions.

Migrants who are affected by a natural disaster in their home country

Natural disasters also impact upon the situation of migrants from the affected country who are already present – whether regularly or irregularly – on the territory of another State in the Americas. The destruction wrought on the home country may suddenly stop the flow of resources from family members and leave migrants unable to support themselves financially. This, in turn, can diminish the migrants’ ability to comply with immigration rules that require self-financing or prohibit access to public funds and paid work (such as in the case of students).

The situation on the ground after the disaster may also present protection challenges for migrants who are about to return – whether voluntarily or through enforced return – to their home country. These scenarios raise questions about whether a legal basis exists for continuing or extending the stay of such persons in the host country and whether forced removals can lawfully be undertaken.

Migrants who are affected by a natural disaster in the country in which they find themselves

Finally, migrants in the Americas are also affected by natural disasters that occur on the territory of a State where they find themselves as residents or in transit. Such migrants can be more vulnerable to the impact of disasters than nationals of the affected State due to the following: (a) language issues; (b) lesser familiarity on



Torrential rains and floods hit Nicaragua in the third quarter of 2010 displacing more than 13 thousand people. Displaced residents were evacuated to relocation camps such as this one in Managua. © IOM 2010 (Photo: Alessandra Pirera)

how to respond; and (c) specific difficulties in accessing shelter/aid due to discrimination or their own fear of the authorities, especially among irregular migrants.³

These migrants can also face obstacles in contacting their families in the home country and accessing consular services necessary to facilitate their repatriation, negotiate release from an employment contract in order to return home, or provide general consular assistance in the case of irregular migrants.⁴ Overall, migrants in a country affected by a disaster can encounter legal and practical challenges in accessing assistance and protection, especially if they are present irregularly.

³ See Permanent Council of the Organization of American States (OAS), Special Committee on Migration Issues, "Migrants in Disaster Situations", OAS Doc no. OEA/Ser.G CE/AM-X/09 (21 January 2009); Permanent Council of the Organization of American States, Special Committee on Migration Issues, "International Federation of Red Cross and Red Crescent Societies: Cooperation on Needs and Contributions of Migrants in Disaster Situations" (Presented by the International Federation of Red Cross and Red Crescent Societies for the meeting of January 27, 2009", OAS Doc No OEA/Ser.G CE/A</INF.50/09 (27 January 2009).

⁴ Ibid.

Governmental responses in the Americas: Law, policy and practice

Governments in the Americas use a diverse range of national law, policy and practice to respond to the legal challenges of entry, stay and assistance for migrants in these three scenarios. For each scenario, selected examples are provided from the large number identified by the original research.

Migrants who leave their country due to a natural disaster

States in the Americas do not generally treat this form of migration as engaging refugee law, even under the broader refugee definition in the 1984 Cartagena Declaration (although a few persons have been recognized as refugees due to a disaster's effects in exacerbating insecurity, that is, not directly due to the disaster itself). Rather, they usually resolve requests for entry from migrants caught up in such flows using their own domestic immigration laws and policies.

In general, States in the Americas try to “regularize” the status of persons affected by disasters by trying to fit them into “regular” migration categories. Such persons may already be eligible to enter on this basis and, where this is not the case, States also apply the eligibility criteria flexibly to allow the person to benefit from that regular migratory category. However, a surprising number of countries in the Americas have provisions in their national law and policy on “exceptional” migratory categories that are used to permit the non-removal, entry or stay of individual migrants, or even whole groups of migrants that do not fall under the regular migration categories.

As an example of the use of regular migration categories, Canada has adopted certain special measures in the face of serious disasters overseas (Omeziri and Gore, 2014), which apply to applicants who self-identify as “directly and significantly affected”.⁵ The measures principally involve expedited processing of existing – and often new – applications for sponsorship or permanent residence under the Family Class by persons overseas but with immediate family members in Canada.⁶ The formal and procedural requirements pertaining to these immigration categories are often maintained. However, special measures have sometimes been used to adjust one or more of the normal requirements for a particular category of applicants.⁷

As an example of the use of exceptional migration categories, Mexico can grant foreigners outside Mexico a visa for humanitarian reasons.⁸ This visa must be solicited by a Mexican or a temporary or permanent resident in Mexico on behalf of a relative overseas for whom the family link is not sufficiently close to allow them to be admitted on the basis of family reunion.⁹ The humanitarian aspect specifically requires that

“the foreign national [...] finds herself in a situation of danger to her life or integrity owing to violence or a duly accredited natural disaster”.¹⁰ More recent policy includes situations where the foreign national is merely the “victim of a natural catastrophe”.¹¹

Migrants who are affected by a natural disaster in their home country

Governmental responses to migrants affected by a disaster in their home country follow a similar pattern. Thus, in the United States, “temporary relief measures” are used in the face of natural disaster overseas to encourage officials to use their discretion, where appropriate, to engage in expedited processing of applications under regular migration categories, apply fee waivers to them, allow students to work off-campus where their financial support from overseas is curtailed by a disaster.¹² US legislation also provides for the exceptional migratory category of “temporary protected status” for nationals of a country affected by a natural disaster, but only following designation of that country (or part of it) by the US authorities under the relevant legal criteria.¹³

Extraordinary measures have also been used by countries in the Americas to regularize migrants who are affected by a disaster in their home country. For instance, after the 2010 Haiti earthquake, both Ecuador and Venezuela initiated regularization programmes for Haitians in their territories.¹⁴ Similarly, post-earthquake, the Brazilian authorities used well-established administrative norms concerning migration applications based on “humanitarian reasons” to grant stay to Haitians for up to five years.¹⁵ Many States also suspended removals to Haiti, including those in the Caribbean, such as the

⁵ Canada, Department of Citizenship and Immigration, *Special Measures in Response to the Earthquake in Haiti*, Operational Bulletin No. 179 (2010).

⁶ See, for example, Canada, Department of Citizenship and Immigration, *Fact Sheet: Citizenship and Immigration Response to Asian Tsunami*; Canada, Department of Citizenship and Immigration, *Special Measures in Response to the Earthquake in Haiti*, Operational Bulletin No. 179A (2010); Canada, Department of Foreign Affairs, Trade and Development, *Humanitarian Crisis in the Philippines: Canada's Response to Typhoon Haiyan*.

⁷ This was the case for new application processing fees and Permanent Resident application fees in the Asian tsunami special measures (CIC, ‘Fact Sheet: Asian Tsunami’) and also for Haitian nationals applying in Haiti and Haitians applying for a work permit in Canada and who were temporarily destitute as a result of their inability to return to Haiti. See Canada, Department of Citizenship and Immigration, *Special Measures in Response to the Earthquake in Haiti*, Operational Bulletin No. 179A (2010).

⁸ Mexico, Ley de Migración, Article 41.

⁹ Mexico, Ley de Migración, Article 116(I)(a). A “humanitarian visa” may also be solicited by certain branches of the Mexican authorities to allow the entry of a foreign relief worker coming to Mexico’s aid in emergency situations (Article 116(II)).

¹⁰ Mexico, Ley de Migración, Article 116(I)(b).

¹¹ Lineamientos Generales para la expedición de visas que emiten las secretarías de Gobernación y de Relaciones Exteriores, published in *Diario Oficial de la Federación*, eighteenth general provision, procedure 9, second resolution criteria, insert (a)(ii) (2014).

¹² See, in general, USA, USCIS, “Special Situations”. Available from www.uscis.gov/humanitarian/special-situations. For a detailed description of how such measures may be applied in the context of a particular disaster, see USA, USCIS, *USCIS Reminds Chilean Nationals of Immigration Benefits Available: Questions and Answers* (2013). Available from www.uscis.gov/humanitarian/special-situations/previous-special-situations/uscis-reminds-chilean-nationals-immigration-benefits-available-questions-and-answers.

¹³ USA, INA section 244(b)(1)(B).

¹⁴ Ecuador, Decreto No. 248 (2010). Available from RNV, 2010.

¹⁵ Brazil, Comitê Nacional para os Refugiados, Resolução Normativa No. 13, Articles 1 and 2 (2007); see P. Sérgio de Almeida, “La política de migraciones brasileña y la migración haitiana a Brasil”, II.5, *Migration Policy Practice* 5, 15 (2012).

Bahamas, the Dominican Republic, Jamaica and Turks and Caicos British Overseas Territory (United Nations Human Rights Council, 2012).

Finally, it is important to mention the example of Argentina, where the law allows for a “transitory resident” status to be granted to individual migrants falling under the exceptional “special cases” category. In applying this category, officials are instructed to take into account “the situation of those persons who [...] temporarily cannot return to their countries of origin [...] due to the consequences generated by natural or man-made environmental disasters”.¹⁶

Migrants who are affected by a natural disaster in the country in which they find themselves

States in the Americas generally do not discriminate between the access of nationals and non-nationals to emergency assistance during a disaster, nor is there a general practice of curtailing stay or instituting removals of migrants simply due to the disaster. However, in some countries, assistance appears to be reserved for individuals with appropriate documentation,¹⁷ raising questions about whether undocumented migrants have access.¹⁸ Indeed, some legislation makes it unlawful for any individual or organization to give humanitarian assistance to an irregular migrant.¹⁹

Some States in the Americas expressly recognize that a disaster on their territory can prevent compliance with immigration law by regular migrants and irregular migrants applying to regularize. For instance, where a person has fallen out of status as a direct result of the disaster or has failed to appear at an immigration interview or respond to a request for documentary evidence, US officials have the discretion to give special consideration to applications for extension or change of migratory status, especially where “special situation” notices are issued.²⁰ Similarly, where “the loss of life, devastation of businesses, or depletion of personal assets” affect the ability of certain migrants to meet the eligibility criteria for stay or a visa, the US authorities will have to issue specific guidance in this context, although the broader legal issues remained unresolved (Wasem, 2006).

Equally, a number of important practices exist in the Americas that aim to address the situation of migrants through the action of their consular authorities. In this region, it appears that the emphasis of these practices is on assistance in the context of liaison between the migrant, her/his consular authorities and the authorities of the country where s/he is present. For example, in Chile, the authorities have launched a disaster information campaign directed at foreign tourists (ONEMI, 2015). Official manuals about how to respond to disasters have been translated into English and French (ONEMI, 2015), including recommendations directed towards foreign consulates in Chile (ONEMI, n.d.). A special instruction for Chilean consular representations deals with “Emergencies that affect Chileans outside the Country”.²¹

In the case of Chile, these efforts by the Government of Chile complement those of foreign governments. For example, shortly after the February 2010 earthquake, the Peruvian embassy in Chile was distributing food and other relief supplies to affected Peruvians (Andina, 2010). It estimated that approximately 700 Peruvians in Santiago and 500 in Concepción required assistance and the Government of Peru provided air transport for 100 of its nationals to return to Peru (IOM, 2010). In 2015, such efforts were facilitated by the consular network of Pacific Alliance countries, which allows Colombian, Peruvian, Mexican and Chilean migrants who are affected by a disaster to have recourse to the consular representation of any one of those countries as if it were their own (Chile, MRE, 2015).

Conclusions and recommendations

This paper demonstrates the range of domestic laws, policies and practices used by States in the Americas to provide for entry, stay and/or assistance to migrants affected by natural disasters. Even in the absence of international law or policy on this issue, the tools and innovation that already exist in this area should not be overlooked. Indeed, to the extent that countries within the Americas and from other parts of the world wish to develop their own laws and policies for responding to these challenges, the collected practice of the Americas represents an inspiring touchstone.

Overall, the law, policy and practice examined in this paper are rooted largely in the discretionary power of States to take account of humanitarian considerations

¹⁶ Argentina, Decreto No. 616/2010, Article 24(h) (2010), emphasis added.

¹⁷ Permanent Council of the OAS, Special Committee on Migration Issues, *Migrants in Disaster Situations* (2009).

¹⁸ Permanent Council of the OAS, Special Committee on Migration Issues, *Summary for the meeting of January 27, 2009* (2009).

¹⁹ Permanent Council of the OAS, Special Committee on Migration Issues, *Migrants in Disaster Situations* (2009).

²⁰ See, in general, USA, USCIS, Special Situations.

²¹ Ministerio de Relaciones Exteriores (MRE), “Gestión de Emergencias”, presentation at Nansen Initiative, Regional Consultation in South America (July 2015). On file with author.

when making migration law, policy and decisions.²² In this sense, there is nothing overly “particular” about the legal and policy tools presented here that limits their transferability to other national contexts. However, it is important to appreciate that the ability by individual policymakers or immigration officials to exercise such discretion (especially negatively) will sometimes be hedged about by wider sets of rules, such as those of national and international human rights law guarantees.

Finally, the research behind this paper has also fed into processes promoting greater international cooperation in this area:²³ its analysis of the first two categories of migrants helps to underpin the legal protection component of the Nansen Initiative Protection Agenda, adopted by 109 governments in October 2015, as well as developments in regional fora in the Americas; meanwhile, the research on the third category feeds into the Latin American part of the Migrants in Countries in Crisis (MICIC) project. Even the Americas where many States have adopted national measures to respond to the migration-related challenges of natural disasters, these developments point to the value that can be added to them by parallel coordination at the regional or international level.

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²² Such policy is usually created under section 25 of Canada, *Immigration and Refugee Protection Act* (2001); in this case, specifically section 25.2. This section equally forms the basis on which entry or stay on such exceptional grounds may be granted in individual cases (see further below).

²³ The International Law Commission (ILC) has begun elaborating a set of draft articles on the Protection of Persons in the Event of Disasters (for the most recent iteration, see ILC, “Protection of Persons in the Event of Disasters: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading”, UN Doc A/CN.4/L.831 (15 May 2014)). However, as yet, they do not deal specifically with the challenges identified here.

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