Refugee Law and the Displacement Loophole

Matthew Rosenberg*

Despite numbering more than twenty million, internally displaced persons (IDPs) have no formally recognized international legal protection. As the United Nations High Commissioner for Refugees (UNHCR) states, “they fall between the cracks of humanitarian law and assistance”.\(^1\) While the ratio of IDPs to refugees, defined as persons fleeing persecution that have crossed sovereign borders, continues to rise, refugee law has failed to keep pace with this burgeoning problem. The end of the Cold War and the rise in civil wars as well as focused regional conflicts translate into escalating IDP figures. Despite the primary legal constraint of inviolable national sovereignty, international law can be interpreted to encompass IDP protection through extant human rights and humanitarian law.

Internally Displaced Persons vs. Refugees

The singular distinguishing factor between a refugee and an internally displaced person is cross-border movement.\(^2\) A refugee may travel a fraction of the distance covered by an IDP, but the act of passing over an international boundary due to persecution entitles one to protection under the 1967 Protocol on the Status of the Refugee. In contrast, the internally displaced lack such clear and recognized legally documented rights. However, much as the 1951 Convention relating to the Status of the Refugee was expanded due to necessity, so too the post Cold War understanding of migration should be revised.

In recent decades the number of IDPs has skyrocketed, particularly during the decline of the Soviet Union in the late 1980s and early 1990s. For 2003, the UN refugee branch considered 5.8 million IDPs of concern and 10.4 million refugees of concern despite the UN Secretary-General’s Representative on Internally Displaced Persons estimate of 20-25 million IDPs worldwide.\(^3\) Nonetheless, the allocation of resources to the internally displaced by the international community’s preeminent migration organization reflects a realization that the causes of this tragedy will not lessen and, instead, will likely continue to increase. Indeed, in 1970 there were 5 million IDPs from 5 countries, in 1980 there were 7 million IDPs from 10 countries, and by 1990 there were 22 million IDPs from 23 countries.\(^4\) According to one recent

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* Matthew is a postgraduate student at Harvard. He worked for UNHCR Colombia, traveling to Magdalena Medio and other regions saturated with IDPs, and studied the regional humanitarian crisis from Ecuador. He was an Elliot and Anne Richardson Public Policy Fellow at La Facultad LatinoAmericana de Ciencias Sociales where he conducted research along the Ecuadorian-Colombian border. Later, he proceeded to the US embassy in Peru, where he analyzed Andean economic issues.

\(^1\) Refer to UNHCR Mission Statement, available at www.unhcr.ch


\(^3\) UNHCR, *Refugees By Numbers*, p. 6, available at www.unhcr.ch

\(^4\) J. Hampton, *Internally Displaced People: A Global Survey*, (Earthscan Publications, London, 1998), p. 27. Alternatively, consult the *US Committee for Refugees (USCR)* ‘State of the World’s IDPs’, a paper prepared for Brookings, 1996. USCR contends that by 1997 there were more than 20 million IDPs in 35 to 40 countries versus 1.2 million in 11 countries in 1982. USCR claims that the number of IDPs has doubled over the last decade. The
paper, 30 countries that experienced major conflicts since 1980 have had more than 10% of their populations displaced and ten of these countries have had upwards of 40% of their populations displaced.  

Besides the post Cold War trend of intra-state conflict, globalization also accounts for increasing internal displacement. The end of the Cold War has also largely concluded the era of protectorate states, accompanying better access to IDPs and a shift in mentality that humanitarian intervention should be less constrained by sacrosanct national sovereignty. Finally, improved media coverage has shared the IDP plight with homes across the globe, where previously it would often fail to be noticed. The 1991 tragedy of internally displaced Iraqi Kurds broadcast by the media helped garner the crisis international attention and subsequent intervention, highlighting why internal displacement has gained prominence. Adding to what amounts to a ‘sympathy quotient,’ women and children disproportionately comprise the displaced as opposed to refugees, who are predominantly male. Finally, the worst death rates recorded during humanitarian emergencies involve IDPs, with one study finding IDPs 60 times likelier to be killed than residents of the same country.

While IDPs gained prominence in the late 1980s due to the aforementioned factors, practical reasons of stability also explain their rise in importance. The ‘multiplier effect’ of displacement means three times the number of those reported internally displaced is adversely impacted. In this sense, internal displacement can ultimately unsettle neighboring countries and harm regions rendering solutions desirable not only for humanitarian reasons, but for motives of peace and stability, the stated aims of the 1951 Convention. As Cohen and Deng note, “… [IDP] return or resettlement…and their reintegration are critical to reconstruction and to the process of reconciliation in war-torn societies. Moreover, if the process takes into account the inequities and schisms that led to breakdown in the first place, it can help prevent renewed conflict and displacement”. To address fully development issues of war-ravaged countries such as Angola, Afghanistan, Cambodia, El Salvador, Mozambique, etc. where a third to a fifth of the populations have been displaced, IDP needs must be met.

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10 Cohen, Masses In Flight 1998 p. 2.
12 Ibid
14 Cohen, Masses in Flight, p. 168.
15 Ibid, p. 5.

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From both pragmatic and sentimental standpoints, IDP aid has become an important issue. At the same time, IDPs generally fail to win the kind of support refugees have traditionally enjoyed because they do not “possess ideological or geopolitical value”. Furthermore, unlike refugees that cross into neighboring countries, the regional impact of IDPs is more indirect. The absence of a single international operational agency with IDP responsibility has also contributed to inconsistent protection of IDPs. As a result, “...the international response system [to situations of internal displacement] is far from adequate. It is too selective, organizations working on behalf of the internally displaced are poorly coordinated, protection and human rights concerns are sorely neglected, and reintegration and development support receive insufficient attention”. UNHCR failed to help IDPs in such countries as Peru, Cambodia, Sudan, and the Congo and in other countries lack of a clear mandate allowed governments of Iraq, Myanmar, the Russian Federation, Sudan, Turkey, and Sri Lanka among others to work against aid workers and observers helping the internally displaced.

Despite these shortcomings, international recognition of the problem has brought advances for IDPs. In 1992, the United Nations Secretary-General appointed an IDP representative. In 1997, the responsibility of protection and assistance for IDPs was delegated to the Emergency Relief Coordinator (ERC) and, in the same year, UNHCR stated that it would attend to IDPs in a wide range of scenarios. The UNHCR has taken a lead role in successfully helping IDPs in Yugoslavia and Tajikstan among others. Other organizations that help IDPs include the International Committee of the Red Cross (ICRC), the United Nations Development Programme (UNDP), the World Food Programme (WFP), the United Nations Children’s Fund, the World Health Organization (WHO), and the International Organization for Migration (IOM).

**IDP Legal Obstacles**

The UN’s working definition of the internally displaced are “…persons who have been forced to flee their home suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country”. The absence of universal recognition for this definition and a clear set of laws for IDPs mean that UNHCR staff often have difficulty protecting the internally displaced, whose security rests on a mélange of human rights and humanitarian law. Furthermore, in situations of armed conflict, humanitarian law is often derogable and human rights law can be severely curtailed. Compounding the problem of IDP...
assistance, non-state actors, who frequently play a role in forced migration, are not bound by international human rights law. Moreover, the states where internal displacement is most likely to occur are disproportionately those that have not signed human rights conventions and protocols that might protect the internally displaced.25

In contrast to IDPs, refugees benefit from clearly defined and internationally recognized laws. The 1951 Convention Relating to the Status of Refugees and the subsequent Protocol Relating to the Status of Refugees (General Assembly Resolution 2198 (XXI)) affirm the right to freedom of movement and the right to choose a place of residence without fear of persecution for refugees.26

The Protocol was adopted in 1967 to expand the mandate of the 1951 Convention, which had only applied to refugees created by events prior to 1951.27 Later documents expand the rights of refugees, though they have less support than the Convention and the 1967 Protocol. In particular, the Fourth Geneva Convention articulates the fundamental refugee principle of non-refoulement, which states ‘In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs’.28 Other conventions exist that broaden the applicability of refugee law to IDPs including the 1984 Cartagena Declaration, but lack sufficient support.29

Reasoning Behind Lack of IDP Protection

The twenty six nations that originally signed the 1951 Convention wrote in the agreement’s preamble: “[We] express the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides”.30 Yet, the needs of IDPs have only sporadically been met for a number of reasons. Guy Goodwin-Gill explains that due to the principles of national sovereignty and non-intervention, states assume responsibility for their own internally displaced.31 The International Court of Justice confirmed this principle of sovereignty in 1986, when it stated that United States assistance of contras violated the law of non-intervention.32 Moreover, the United Nations’ General Assembly Resolution 46/182 affirms the importance of respecting a member’s sovereignty in particular with regard to humanitarian assistance offers.

25 Cohen, Masses in Flight, pp. 74-75, 85.
26 http://www.unhcr.ch/cgi-bin/texis/vtx/basics/+/SwwBmeJAIS_www3wwwwwwwhFqA72ZR0gRfZNtFqtxw50q5zFqtFEIfgIARFqA72ZR0gRIZNDzmxwwwwww1FqtFEIfgIopendoc.pdf, p. 29.
27 Ibid, p. 6. As of 1995, 130 countries have been party to the Convention, the Protocol or both as of 1995 (p. 7).
28 Article 45, paragraph 4 of the Fourth Geneva Convention.
29 http://www.uscr.org/news/fact_sheets/refugee_definition.htm (USCR, United States Committee for Refugees)
30 http://www.unhcr.ch/cgi-bin/texis/vtx/basics/+/SwwBmeJAIS_www3wwwwwwwhFqA72ZR0gRfZNtFqtxw50q5zFqtFEIfgIARFqA72ZR0gRIZNDzmxwwwwww1FqtFEIfgIopendoc.pdf, p. 14. Italics are mine.
32 International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, paragraph 202
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Financial considerations also account for discrepancy between refugee and IDP protection. While refugees require short term assistance outside of their countries, IDPs demand a long term-commitment on foreign soil. Patricia Tuit explains, “…by defining the refugee as ‘alien’, refugee law contains the more vulnerable and thus more costly of refugees within the refugee-producing state”.\(^{33}\) In addition to hesitation borne out of potentially shouldering increased costs, a fear exists that heavily burdening the international community would weaken acceptance of refugee protection and other humanitarian commitments.\(^{34}\)

### The Fallacy of Inviolable Sovereignty

The principle of sovereignty has often been invoked as a justification for non-intervention on behalf of IDPs. Recently, however, this argument has crystallized with the increasing recognition that sovereignty implies responsibility for one’s citizens. One displacement scholar notes that sovereignty carries the price of attending to protection of one’s citizens and, if a government fails to fulfill this commitment, it sacrifices the right to prevent international intervention.\(^{35}\) Cohen and Deng write that states must not be allowed to justify mistreatment of population with the excuse of sovereignty: “…A state should not be able to claim the prerogatives of sovereignty unless it carries out its internationally recognized responsibilities to its citizens, which consist of providing them with protection and life-supporting assistance”.\(^{36}\)

It is highly illogical that the UN can sanction states for unlawful acts while not requiring members to respect its founding charter and accept humanitarian assistance.\(^{37}\) Emphasizing this discrepancy, the first paragraph of the 1951 Refugee Convention preamble makes no explicit reference to refugees, instead, declaring that based on the UN Charter and the 1948 Universal Human Rights declaration, “human beings shall enjoy fundamental rights and freedoms without discrimination”.\(^{38}\) Former United Nations Refugee Commissioner Sadruddin Aga Khan explained that the 1975 resolution 3445 empowered the UNHCR to help persons in situations akin to those of refugees.\(^{39}\) Furthermore, the UN charter empowers the General Assembly to involve itself with intra-country conflict despite its lackluster record of intervention.\(^{40}\)

Humanitarian intervention does not necessarily require General Assembly affirmation. Article 39 of Chapter VII of the UN Charter empowers the Security Council to act in situations

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\(^{38}\) http://www.unhcr.ch/cgi-bin/textis/vtx/basics/r+SwbBmeJAIS_www3wwwwwwwhFqA72ZR0gRFZNTFqtxw5q5zFqtfFEIfgIAFqA72ZR0gRFZNDZmxxwwwwww1FqtFEIfg1/opendoc.pdf p. 15.

\(^{39}\) S. Aga Khan, *Lectures on Legal Problems Relating to Refugees and Displaced Persons delivered at the Hague Academy of International Law*, 4-6 August 1976, p. 44.

\(^{40}\) *For a Strong and Democratic United Nations: A South Perspective on UN Reform* (South Centre, Geneva, 1996), p. 21.
that have international implications for peace and security. While displacement is clearly destabilizing, the magnitude of such effects is far more subjective. Resolution 688 in 1991 established the safety zone for displaced Kurds in Iraq and Security Council resolutions 794 and 929 assisted IDPs in Somalia and Rwanda, albeit belatedly.

Beyond Security Council or General Assembly support, humanitarian and human rights law require states to accept offers of international assistance.\textsuperscript{41} Articles 55 and 56 of the UN Charter require members to observe human rights and basic freedoms and to promote them among other obligations.\textsuperscript{42} Furthermore, characteristics of IDP scenarios justify UN intervention. IDPs are frequently the victims of violence, which violate the basic human right to life, and they often are the victims of gender-specific violence, which violates the UN Declaration on the Elimination of Violence against Women.\textsuperscript{43} In addition, IDPs frequently suffer debilitating discrimination, which violates the fundamental principle of equality before the law enshrined in UN Charter Articles 1, 13, 55, and 76.\textsuperscript{44,45}

Conclusion

IDPs should be viewed as less fortunate refugees since they do not enjoy the same protection and are often “subjected to a worse fate”.\textsuperscript{46} The international community often hides behind the rubric of national sovereignty. However, not only does humanitarian assistance not interfere with conflict,\textsuperscript{47} it can lessen the cost of conflict as evidenced by the tragedy in Rwanda, where upwards of $1 billion was spent post genocide while only a fraction of this sum would have been necessary to mitigate significantly the displacement and massacre.\textsuperscript{48}

The legal means of requiring nations to accept humanitarian intervention IDPs exists, yet countries have been reluctant to help universally. Justification for IDP protection can be drawn from different international human rights and humanitarian law.\textsuperscript{49} Furthermore, as the UNHCR report on IDPs in 1994 explains, “…it must be recognized that the most serious problems with respect to the protection of persons who are either displaced or threatened with displacement in their own country result not from an absence or deficiency of legal norms but from the failure of\textsuperscript{49}

\textsuperscript{41} Cohen \textit{Masses in Flight} 1998, p. 277.
\textsuperscript{42} Concerns of neutrality should be put aside. As a UNHCR special envoy to the former Yugoslavia said, “to be silent could be a To be silent could be a form of partiality in favour of the criminals…that is correct. But if neutrality means not to take sides, not even in favour of the victims, that would be a wrong interpretation: we chose to be on the side of the victims’ Cohen \textit{Masses in Flight} 1998 p. 269.
\textsuperscript{44} If countries have signed the Fourth Geneva Convention or other stringent documents, they have an even greater obligation. For a further discussion, see \textit{Masses in Flight} (pp. 79-120) for a discussion of how violations of Articles 49, 53, 55, 147 of the Fourth Geneva Convention among others justifies humanitarian intervention.
\textsuperscript{45} See S. Aga Khan, \textit{Lectures on Legal Problems Relating to Refugees and Displaced Persons delivered at the Hague Academy of International Law, 4-6 August 1976}, for a discussion of the evolution of the UNHCR role in protecting IDPs and refugees within the framework of the UN legal framework.
\textsuperscript{47} J. Pictet, \textit{Humanitarian law and the Protection of War Victims} (A.W. Sijthoff, Leyden/Henry Dunant Institute, Geneva, 1975) p. 44.
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the parties concerned to respect and to enforce those norms..."50 Francis Deng, then Representative of the UN Secretary-General on Internally Displaced Persons, presented the Guiding Principles on Internal Displacement to the UN Commission on Human Rights in 1998.51 They have remained non-binding, but provide a “yardstick for monitoring the treatment of IDPs” and constitute the first effort to state unequivocally when displacement is impermissible and, if displacement occurs, what should be guaranteed.52 The IDP crisis will continue to be an issue of global importance. The increasing pressure to address growing numbers of internally displaced may engender the ratification of the Guiding Principles, though a legal framework for aiding IDPs already exists.