

***De Lege Ferenda*: ‘Sovereignty as Responsibility’ as a Framework for International Internally Displaced Persons Law**

By Ainslie Avery

Abstract

This article discusses existing gaps in legal protection for IDPs and highlights progress made towards closing these gaps through developments in ‘soft’ and customary international law. Further progress towards developing both hard and soft law instruments may be made by locating IDPs within discussions of ‘sovereignty as responsibility’. This article outlines why ‘sovereignty as responsibility’ provides a constructive backdrop against which to advocate for the formalisation of international mechanisms for protecting and assisting IDPs.

Introduction

In 2009, UNHCR estimated that there were approximately 27 million Internally Displaced Persons (IDPs) worldwide. IDPs are among the world’s most vulnerable people. This is largely because, due to a lack of a binding legal framework, protection and assistance cannot be guaranteed. Responses from governments are therefore discretionary, unpredictable, and unreliable. Mainstream approaches to advancing legal protection for IDPs centre on developing either binding hard law, normative soft law, or both. This article explores the potential benefits of locating these advocacy efforts within a ‘sovereignty as responsibility’ framework. Sovereignty as responsibility conceptualises state sovereignty as including states’ obligations to assume responsibility for the protection of its citizens (Weiss 2003). As such, the displacement of citizens resulting from a state’s failure to protect could indicate the state’s abdication of responsibility towards its people. Through the lens of ‘sovereignty as responsibility’, state failure to protect its citizens could, therefore, be construed as an abdication of sovereignty. This, in turn, would negate sovereignty as a defense against humanitarian intervention within that state. I argue that while this conceptualisation of sovereignty is relevant for all displaced persons, it is particularly important for IDPs who are often prevented from accessing international assistance until they cross an international border and have access to humanitarian actors.

This article begins with a discussion of existing gaps in legal protection for IDPs and highlights progress made towards closing these gaps through developments in ‘soft’ and customary international law. The discussion then turns to opportunities presented by conceptualising advocacy for IDP protection against the background of ‘sovereignty as responsibility’. While this approach is not unproblematic, and requires significant international co-operation, it has the potential to encourage states to make preventing and responding to internal displacement a higher priority.

Legal Protection for IDPs

At present, there are numerous gaps in the legal protection for IDPs at the international level. Most significantly, as there is no single binding international legal agreement addressing the rights of IDPs, relevant legal principles must be drawn from aspects of international human rights law and international humanitarian law.¹ However, both of these areas of law suffer

¹ International refugee law is simply not applicable to IDPs because, to be eligible for protection and assistance under the 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees, an individual must, *inter alia*, be ‘outside the country of his nationality’.

applicability gaps in relation to IDPs (Phuong 2004; Cohen 2006). International human rights law—for example the right to be free from arbitrary exile—while applicable to IDPs, is only binding on state actors. However, many instances of internal displacement are due in part to non-state actors, who may also play a significant role in determining whether the international community can access IDPs. For example, there are often restrictions placed on the movement of humanitarian actors by armed non-state groups, either directly or through threats and intimidation (Phuong 2002). While states may be found to violate international human rights law by failing to respond to actions perpetrated by non-state actors (*Opuz v Turkey*), the efficacy of such judgements are questionable where states simply lack the resources or infrastructure to counter non-state groups. For instance, it would be difficult to hold Somalia accountable for actions perpetrated by Al-Shabaab, which is widely recognised to have effective control over large portions of the country. International humanitarian law regulates the means and methods of warfare. For example it provides for the protection of non-combatants. Accordingly, it is not applicable where armed conflict does not cause the displacement, such as where natural or man-made disasters are the drivers.

In the absence of a comprehensive and binding international legal agreement, those working with IDPs must rely on soft law and customary international law to secure protection and assistance for IDPs. However, while soft law instruments represent progress in IDP protection, the application of these instruments is largely discretionary. In 1998, the UN Representative on IDPs, Francis Deng, presented the UNHCR's *Guiding Principles on Internal Displacement* (Guiding Principles) to the United Nations General Assembly (UNGA). The Guiding Principles are soft law, in which disparate aspects of hard law are brought to bear on IDPs (Geissler 1999; Luopajarvi, 2003; Beyani 2009). The Guiding Principles served as the foundation for UNHCR's 2010 Handbook for the Protection of Internally Displaced Persons (UNHCR Handbook). While useful in guiding non-governmental actors in protecting and responding to the needs of IDPs, like the Guiding Principles, the UNHCR Handbook is not binding on states, and application of its advice is voluntary. Though lacking hard law status, the Guiding Principles and UNCHR Handbook are increasingly the starting point for the development of domestic law and policy that deals with IDPs. For example, a number of states have either adopted, or begun to adopt, aspects of the Guiding Principles and UNHCR Handbook domestically. In 2003, Iraq established a Ministry of Displacement and Migration to assist various displaced persons, including IDPs, followed by the Commission for the Resolution of Real Property Disputes in 2006, which adjudicates property disputes for displaced persons. Also in 2010 Colombia adopted a 'Victim's Law', which provides for the restitution of property for IDPs. As of 2010, Sudan had begun developing domestic IDP policy (Beyani 2009). This domestic adoption of IDP specific law and policy is important given the locations in which it has occurred thus far. The states referred to are home to the most numerically significant IDP populations—up to 5.2 million in Sudan, and 2.5 million each in Colombia and Iraq (IDMC 2010; Orchard 2010). However, despite this significant progress, these legal developments have only been achieved at the national level, rather than internationally.

Building on the progress achieved by the Guiding Principles, the Organisation of African Unity developed the 2009 African Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention). The Kampala Convention adopted the definition of IDPs outlined in the Guiding Principles and made progress towards providing legal protection specifically for IDPs at a regional level. To date, however, only seven signatories have ratified the Kampala Convention and it has not yet entered into force. Thus, although the Guiding Principles were an important step toward the development of an international legal regime for IDPs, such a regime (insofar as it exists at all) is still very much in its infancy (Luopajarvi 2003; Weiss 2003).

Equally promising has been the development of customary international law based on the Guiding Principles. Customary international law is derived from a combination of widespread state practice and *opinio juris*, or the belief that action must be taken due to a legal imperative. The legal transformation of the Guiding Principles into customary international law is difficult to chart and there remains debate over whether customary international law relating to IDPs exists. For example Chan (2006) argues that, given the primacy of the principles of territorial sovereignty and non-intervention, it would not be possible for a customary international law obligating states to grant asylum to IDPs to exist. Further, Orchard (2010) notes that a number of countries (namely China, Egypt, and India) have voiced consistent objection to the Guiding Principles being cast as customary law. On the other hand, widespread support for the Guiding Principles, as well as a number of references to the Guiding Principles in UNGA resolutions, can be seen to indicate that customary international law is developing (Luopajarvi 2003). Similarly, the fact that a number of states are voicing objections to the Guiding Principles being cast as customary law may indicate their belief that customary law grounded in the Guiding Principles is developing.

De Lege Ferenda?

Legal scholars disagree on the desirability of developing an international legal regime for IDPs. While development of a legal framework for IDPs would address existing applicability gaps, some legal scholars argue that it is not necessary to construct separate legal protection for IDPs because many relevant rights are provided for under existing international laws. An alternative school of thought suggests that a greater emphasis should be placed on the development of customary international law and norms and national internal displacement laws, rather than constructing an international legal regime for IDPs (Weiss 2003; Kalin 2005). While this approach may avoid the ‘bitterness’ (Weiss 2003) that characterised inter-governmental debate on the Guiding Principles, lack of consistency would likely prove a persistent obstacle in addressing the spectrum of IDP needs. Further, although the development of customary international law is an important step that will facilitate the development of hard law in the future, reliance on custom will not suffice over the long term.

Notions of territorial sovereignty are undergoing a conceptual transformation from an immutable right of Westphalian states to govern within a given territory, to a contract between states and their citizens that includes states’ responsibility to protect the internationally recognised human rights of their citizens. This evolution of discourse surrounding state sovereignty presents a unique opportunity for reframing discussions of IDP assistance and protection. In particular, actions or omissions on behalf of a state that trigger internal displacement, or threaten the well-being of IDPs, may prompt the international community to co-ordinate a response.

While the emergence of sovereignty as responsibility is relevant to displaced persons generally, it is of particular value for IDPs because they are often deemed to be outside the reach of international aid until they cross an international border. However, pursuant to the concept of sovereignty as responsibility, where a state is unable or unwilling to protect its citizens, the state may be considered to have failed to uphold its duties, thereby nullifying state sovereignty as a justification for non-intervention (Shacknove 1985; Weiss 2003). Such arguments may lend themselves to an international legal regime that allows for international action (up to and including intervention) where a state cannot fulfil its obligations. This may prompt states to make the prevention of displacement, particularly displacement related to conflict, a higher priority.

Sovereignty as responsibility is not an unproblematic backdrop against which to advocate for greater protection for IDPs. Most significantly, questions arise regarding how to determine when a state has sufficiently abdicated its responsibility to justify international intervention. Such determinations may include, among other factors, the number of people displaced as well as the cause of displacement. For instance, responses may differ if displacement is caused by an armed conflict, a natural disaster, or a development project. Further, it could be argued that, as the vast majority of internal displacement takes place in the developing world, intervention against the backdrop of sovereignty as responsibility is simply a new vehicle for solidifying the dominance of developed states. While these are legitimate concerns, it should be recognised that sovereignty as responsibility imposes responsibilities on both individual states and the international community. As Luopajarvi (2003: 4) argues, ‘when demanding that states act responsibly internally, towards its own citizens and externally, towards the international community, we must also ask the international community to act responsibly when stepping in to provide surrogate assistance and protection’.

IDPs face significant protection gaps due to the absence of a comprehensive and binding international legal instrument outlining IDP rights and obligating states to provide these rights. While developments in ‘soft’ and customary international law are enhancements in IDP protection, such instruments alone will not suffice over the long term. Ultimately, this article has argued that ‘sovereignty as responsibility’ may provide a constructive framework for IDP advocates in seeking both international legal protection for IDPs and international co-operation in responding to the needs of IDPs.

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