

FORCED DISPLACEMENT & HUMAN RIGHTS

The International Legal Framework Applicable to Refugees & Internally Displaced Persons *Luis Morago Nicolás*

Some 50 million people are directly affected by forced displacement around the world. Increasingly over the last decade, calls for international assistance and protection of refugees and other displaced persons have followed one another as fears of new humanitarian disasters built up.

Such humanitarian crises have seriously challenged the ability (often the willingness) of the international community to deal with the problem of forced displacement. There is, however, a remarkable body of international legal instruments designed to ensure and protect a wide array of human rights, including the rights of refugees and displaced persons.



Rwandan refugees on move in Tanzania

Roger Yates

This briefing paper intends to provide ActionAid staff with a **basic tool for guidance and reference** to the legal framework applicable to the phenomenon of forced displacement. To this end, it outlines the main international legal instruments and institutions articulated for the protection and assistance of refugees and internally displaced persons (IDPs). It also highlights some of the main features of the current international system as regards forced displacement.

Defining refugees

To put it simply, *"refugees are people who have left their homeland because they fear that they will lose their lives or their freedom if they stay"*.ⁱ

Unlike internally displaced persons (who remain within their own national boundaries), refugees are forced to flee across an international border.

The 1951 Convention Relating to the Status of Refugees (Refugee Convention) spells out the internationally-recognised definition of a refugee. Box 1 contains its three key components.

Box 1 – Who is a refugee?

- *a person outside the country of her/his nationality*
- *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion*
- *(s)he is unable to or, owing to such fear, is unwilling to avail her/himself of the protection of the country of her/his nationality*

Subsequent definitions, adopted by regional treatiesⁱⁱ, have extended their scope of application to include

- *those compelled to leave their country of origin as a result of armed conflict, generalised violence or natural disasters*

In any case, it is the absence of effective national protection which forces refugees to rely on the hospitality of neighbouring countries and/or on international protection and assistance – especially in cases of mass displacement.

A list of relevant international and regional instrumentsⁱⁱⁱ

- 1948 UN Universal Declaration on Human Rights
- 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War
- 1951 UN Convention relating to the Status of Refugees
- 1966 Covenant on Civil and Political Rights & Covenant on Economic, Social and Cultural Rights
- 1969 Inter-American Convention on Human Rights
- 1969 OAU's Convention Governing the Specific Aspects of Refugee problems
- 1977 Two Additional Protocols to the Geneva Conventions
- 1981 African Charter on Human & People's Rights
- 1984 Declaration of Cartagena
- 1984 Convention against Torture

Refugee status: determination

The determination of refugee status is *declaratory*, not constitutive. In other words, a person becomes a refugee as soon as (s)he meets the corresponding legal requirements (see above).

The various refugee conventions and declarations do not specifically refer to procedures concerning the determination of refugee status. In practice, the application of the definition varies according to the particular context. In the absence of fixed criteria for assessment, refugees are often denied a fair procedure which conforms with the minimum legal guarantees (e.g. rights to an interpreter, to legal assistance and to appeal).

Developed primarily to deal with individual cases, the international legal framework has often been tested as a result of large-scale displacements. Status determination, in such instances, is done *on a 'group' basis*.

In this respect, we have recently seen the emergence of the notion of **temporary protection** (e.g. Bosnian refugees in 1993). This flexible approach addresses the refugees' immediate needs for protection and assistance, while preserving the interests of the host state. In the long term, 'temporary protection' is based upon the assumption of eventual return home of the refugees.

The application of this form of protection, however, has been controversial. Firstly, it has allowed more restrictive interpretations of the host state's legal responsibilities towards refugees. Secondly, temporary protection has been used as a mechanism to deny refugees some of their fundamental rights. In 1993, for instance, most refugees from Bosnia were denied access to the refugee determination procedures established by the 1951 Convention.

The Refugee Convention does not apply in all circumstances. Article 1.F, for instance, contains a number of **exceptions** to the general rule of application. Consequently, it does not extend its legal protection to those persons who *have committed a war crime, a crime against humanity or a serious non-political crime*.

In practice, the operation of the exclusion clause presents serious obstacles, particularly in cases of mass displacement. As the tragic events that took place in the African Great Lakes region in the 90s illustrate, refugee camps may witness the cohabitation of legitimate civilians seeking asylum together with gangs of armed aggressors. In such circumstances the law is hard to apply.

Human rights of refugees

"Today's human rights abuses are tomorrow's refugee movements"^{iv}.

Certainly, the lives and experiences of millions of refugees could be described as a long sequence of denial and violation of their most basic rights. Yet, contrary to a widespread public perception, refugees (at least in theory) are entitled to a fairly extensive list of rights and freedoms. As noted above, several major international and regional legal instruments contain explicit provisions regarding their protection and assistance.

The **Universal Declaration of Human Rights** declares everyone's rights

- *to leave any country, including his/her own, and to return to his/her country* [article 13 (2)]; and
- *to seek and to enjoy in other countries asylum from persecution* [article 14 (1)].

Although host states are not obliged to grant protection to asylum seekers, equally they may not forcibly expel or return (*refouler*) an individual to a country where his/her life or freedom would be at risk. This is the fundamental principle of **non-refoulement** affirmed by the 1951 Refugee Convention (see below).

States also have a duty not to discriminate against refugees "*as to race, religion or country of origin*" (article 3, 1951 Convention).

Overall, the granting of refugee status results in the legal recognition of certain rights, entitlements and duties attached to such status. Box 2 contains a basic catalogue of the main rights and freedoms explicitly established by law.

Box 2 – A Summary of Human Rights of Refugees

CIVIL RIGHTS & FREEDOMS

- **Freedom of Movement** (Covenant on Civil and Political Rights 1966 – CCPR -, article 12)
- **Freedom from torture or cruel, inhuman or degrading treatment or punishment** (CCPR 1966, article 7)
- **Freedom of thought, conscience and religion** (CCPR 1966, article 18; 1951 Refugee Convention, article 4)
- **Right of association** (CCPR 1966, article 22; 1951 Refugee Convention, article 15)
- **Right to free access to the courts of law**, including legal assistance (1951 Refugee Convention, article 16)
- **Right to acquire property** (1951 Refugee Convention, article 13)
- **Artistic rights and industrial property** (1951 Refugee Convention, article 14)

ECONOMIC & SOCIAL RIGHTS

- **Right to work**, including wage-earning employment, self-employment and practice of a liberal profession (Covenant on Economic, Social and Cultural Rights – CESCR - 1966, article 6; 1951 Refugee Convention, articles 17, 18 & 19)
- **Right to housing** (1951 Refugee Convention, article 21)

- **Right to education** (CESCR 1966, article 13; 1951 Refugee Convention, article 22)
- **Right to public relief and assistance** (1951 Refugee Convention, article 23)
- **Right to social security**, including medical care (CESCR 1966, article 9; 1951 Refugee Convention, article 24)

In addition to the general instruments of protection outlined above, **women and child refugees** are further entitled to special protection. Such specific entitlements respond to their particular vulnerability to discrimination and human rights abuses. Regrettably, stories of sexual and physical violence and abuse, prostitution, forced recruitment into armed forces and widespread discrimination in aid delivery constitute a common feature of the experiences of many women and child refugees.

The following international legal instruments contain further special provisions for their care and protection:

- 1974** Declaration on the Protection of Women and Children in Emergency and Armed Conflict
- 1979** Convention on the Elimination of All Forms of Discrimination Against Women
- 1989** Convention on the Rights of the Child

Finally, it is worth noting that in some cases (e.g. state of emergency) host states may lawfully restrict certain rights of refugees, such as freedom of movement or freedom to work. This restriction, however, must be exceptional and never arbitrary or discriminatory.

The host state and the principle of *non-refoulement*

As mentioned above, states' paramount obligation to refugees concerns the principle of *non-refoulement*. Accordingly, states may not forcibly return refugees to a territory where their life or freedom would be threatened.

The principle is also embodied in a number of international legal instruments: the 1949 IV Convention (article 45); 1984 UN Convention Against Torture (article 3), and several Regional instruments, such as the 1969 OAU Refugee Convention (article II [3]) and the 1984 Declaration of Cartagena.

States may, nevertheless, expel individual refugees if their presence is proven to be a threat to national security or public order (articles 32 & 33 of the Refugee Convention). The 1969 OAU Convention, however, admits no exception to the principle of *non-refoulement*.

In any case, decisions to expel a refugee must be reached in accordance with due process of law (Refugee Convention, article 32.2). Furthermore, states must "allow such a refugee a reasonable period within which to seek legal admission into another country" (article 32.3). In cases of mass displacement, state practice has consistently supported the application of the principle *non-refoulement* to large groups of refugees as well.

More recently, the importance of this principle has been recognised by the *Sphere Humanitarian Charter*, which includes it as one of its three fundamental principles.

Internally displaced persons (IDPs)

Both refugees and internally displaced persons (IDPs) have been forced to flee their homes. Unlike the former, IDPs remain within the confines of their countries of origin. But despite the magnitude of this category of forced displacement, there is no specific international provisions governing their assistance and protection. That does not mean that they are not entitled to human rights protection. On the contrary, they have a wide range of rights legally recognised.



School in Gangdyang Camp for Internally Displaced Persons (Kitgum, Uganda) *ActionAid Uganda*

General human rights and humanitarian law provisions include the following fundamental rights to which IDPs (as all human beings) are entitled:

- **Right to request and to receive protection and humanitarian assistance** from their national authorities
- **Right not to be arbitrarily displaced** from their home or place of habitual residence
- **Rights to life, dignity, liberty and security**
- **Freedom of movement** and freedom to choose one's own residence
- **Right to flee** (and seek asylum in another country if necessary) from areas where their lives, security or freedom are threatened
- **Right to an adequate standard of living**

Based upon existing international instruments, Francis Deng, UN representative for IDPs, produced a list of **Guiding Principles on Internal Displacement** to guide governments as well as international humanitarian and development agencies in providing assistance and protection to IDPs (Foreword to the Guiding Principles).

The reality, however, is that the application of such norms and standards largely depends on the will of governments, which often oppose international involvement arguing considerations of national interest and sovereignty.

The role of humanitarian agencies

According to international law, protecting refugees and internally displaced persons is the primary responsibility of states. In practice, protection and assistance of such groups have become the *'responsibility'* of a wide range of humanitarian agencies.

Initially created to deal with refugees only, the **United Nations High Commissioner for Refugees (UNHCR)** has seen its mandate successively expanded in response to particular situations increasingly affecting internally displaced persons.

UNHCR's mandate is twofold: to *ensure* that refugees are protected by their country of asylum; and *assist* that government in the fulfilment of that obligation. To such end, the UN agency plays a role which is supportive, advisory and supervisory with regard to the state concerned. Over the last decades UNHCR has raised its profile as a humanitarian agency, increasingly assuming responsibilities for the provision of assistance to refugees and occasionally to groups of IDPs, as well as the co-ordination of relief efforts involving displaced populations.

Though of a non-binding nature to states, UNHCR's resolutions constitute an authoritative source of guidelines, particularly regarding procedures and criteria for the determination of refugee status.

Nevertheless, the expanding role of UNHCR remains controversial. As some authors point out, the assumption of further responsibilities seems to have occurred to the detriment of its primary role: the protection of refugees (Darcy, 1997:27).

Other UN agencies are closely associated with the plight of refugees and other displaced persons, such as the World Food Programme (WFP), UNICEF, the World Health Organization (WHO), United Nations Development Programme (UNDP) and the UN High Commissioner for Human Rights (UNHCHR).

Endnotes

ⁱ Lesson Plans for ages 9-11, in Human Rights and Refugees, For teachers, UNHCR, <http://www.unhcr.ch/teach/tchhr/tchhr.htm>

ⁱⁱ Article 1.2 of the 1969 OAU Convention on Refugee Problems in Africa; and the 1984 Cartagena Declaration, adopted by ten Latin American States

ⁱⁱⁱ To know more about international laws relating to refugees, visit UNHCR's web site: <http://www.unhcr.ch>

^{iv} Amnesty International, *Refugees, Human Rights Have No Borders*, AI Publications, 1997

^v IASC, Working Group, Policy Paper Series, No.1 (1999), http://www.reliefweb.int/ocha_ol/pub/IDPManual.pdf

The **International Committee of the Red Cross (ICRC)** plays a crucial role as an independent provider of protection and assistance to victims of international and non-international armed conflict and internal disturbances. Its activities include protection of civilians, medical assistance, food aid, visit to detainees and family tracing.

In cases of forced displacement, humanitarian assistance is also provided by the **National Red Cross and Red Crescent Societies** and their **International Federation (IFRC)**. In addition, the ICRC, IFRC and their national societies seek to encourage respect for international humanitarian law.

Non-Governmental Organizations (NGOs) have a long tradition in assisting and protecting refugees and other displaced persons around the world. Either as direct providers of assistance, implementing agencies or advocates of their rights, NGOs continue playing an essential role on behalf of those affected by forced displacement. Their work includes:

- Provision of aid to refugees and IDPs (e.g. food, clothing, shelter and medical care)
- Raising public awareness of the needs of refugees and IDPs. Their role as information providers is invaluable, particularly with regard to early warning systems.
- Influencing national policies and lobbying governments to secure better respect for the rights of those affected by forced migration
- Monitoring, witnessing and reporting rights abuses
- Legal and social counselling
- Offering education and training programmes to refugees and IDPs

In this respect, UNHCR and several NGOs have recently produced a "**Field Guide for NGOs: Protecting Refugees**" (1999). In addition, the UN's Inter-Agency Standing Committee Working Group has published a "**Manual on Field Practice in Internal Displacement**" (1999)^v. These materials constitute a highly useful source of basic legal information concerning international protection for refugees and IDPs, while offering practical guidance in relation to the incorporation of protection measures in NGO field operations.

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