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The Protection of Refugees and Internally Displaced Persons: *Non-Refoulement* under Customary International Law?

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**ABSTRACT**

After decades of inter- and intra-State wars, the United Nations named 20 June 2004 as World Refugee Day with ‘A Place to Call Home’ as its theme. However, whilst citizens in war-free countries were able to commemorate this significant day in the safety of their homes, for millions of refugees and internally displaced persons who yearn for safety and security, a home is but a distant hope. In the light of the plight of these unfortunate persons, this article will examine whether a state is under a duty under customary international law to offer a home – asylum – to refugees and internally displaced persons.

‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’

Universal Declaration of Human Rights, Art.14(1)

‘Internal displacement is a global crisis that affects from 20 to 25 million people in over 40 countries, in literally all regions of the world.’

Representative of the Secretary-General on Internally Displaced Persons

**Introduction**

After decades of inter- and intra-State wars, the United Nations named 20 June 2004 as World Refugee Day with ‘A Place to Call Home’ as its theme. However, whilst citizens in war-free countries were able to commemorate this significant day in the safety of their homes, for millions of refugees and internally displaced persons who yearn for safety and security, a home is but a distant hope.

In the light of the plight of these unfortunate persons, this article will examine whether a state is under a duty under international law to offer a home – asylum – to refugees and
internally displaced persons. It should be noted that to create rule of customary international law, two requirements must be satisfied, namely State practice, which must be ‘both extensive and virtually uniform ... and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved’, to be accompanied by opinio juris, namely an intention on the part of the relevant States tending to such recognition ‘to distinguish legal obligations from non-legal obligations, such as obligations derived from considerations of morality, courtesy or comity’. Whilst ‘both [the United Nations High Commissioner for Refugees (UCHCR)] and the [United Nations] General Assembly went even further in assessing that, in many instances, the internally displaced are present alongside refugees ... in situations where it is neither reasonable nor feasible to treat the categories differently in responding to their needs for assistance and protection’, the two groups will be discussed separately for contrast and clarity.

Refugees

The 1951 Refugees Convention and the Principle of Non-Refoulement

The 1951 Convention relating to the Status of Refugees (Refugees Convention) is the cornerstone of any analysis of international refugee law and asylum will be granted only to a refugee so defined in accordance therewith. Under Article 1A(2) of the Refugees Convention, as amended by Article 1(2) of the 1967 Protocol relating to the Status of Refugees (Refugees Protocol), a refugee is one who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The Refugees Convention being a multilateral treaty, the crucial issue to the purpose of this article is whether the principle of non-refoulement, as enshrined in Article 33 thereof and upon which the whole thrust of international refugees law rests, is binding upon non-party States as a rule of customary international law. It provides that ‘[N]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

State Practice

Generality of Practice. As of 1 February 2004, 145 states are parties to either the Refugees Convention or the Refugees Protocol, or both. This significant number demonstrates a general consensus within the international community that the principle of non-refoulement in Article 33 has acquired the status of a rule of customary international law as it is widely recognised that ‘the multilateral treaty-making process is legislative in objective but contractual in method’. Moreover, Article 33 is a provision to which
reservations cannot be made; under Article 42(1) of the Refugees Convention, ‘any State may make reservations to Articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36–46 inclusive’. The Refugees Protocol also contains a similar limitation. Robinson elucidates that:

Following the example of the 1933 and 1938 Conventions and the recent United Nations practice, Article 42 divides the articles of the Convention into such parts to which reservations by States are permissible and such which have to be accepted as they stand or no adherence to the Convention may take place at all. This is the result of the contention that several of the provisions are so fundamental that, if they are not accepted by a state, the Convention could not fulfil its purpose.

Consistency of Practice. The principle of non-refoulement has further been broadened by a significant number of other important multilateral treaties as well as United Nations declarations and resolutions. For instance, the 1967 Declaration on Territorial Asylum, unanimously adopted by the General Assembly, states that ‘[n]o one [entitled to asylum] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution’. Similarly, the fourth Geneva Convention on the Law of War provides that ‘[p]rotected persons shall not be transferred to a Power which is not a party to the Convention . . . 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’.

At the regional level, regard is had to the 1984 Cartagena Declaration on Refugees, which Kourula observes as ‘reiterating the principle of non-refoulement’s importance and meaning, including the prohibition of rejection at the frontiers, as a cornerstone of the international protection of refugees, and [noting] that the principle is imperative in regard to refugees and should be acknowledged and observed as a rule of jus cogens’. It is paramount that this Declaration is now most authoritative on this matter among Central American countries. In addition, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa proclaims that ‘[n]o person shall be subjected to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened’. As to Asia, the 1966 Principles Concerning Treatment of Refugees propounded by the Asian–African Legal Consultative Committee observe too the international consensus surrounding the principle of non-refoulement by providing an analogous provision. Regarding Europe, where the two World Wars originated, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) obtains and will now be looked into by reference to Article 3 thereof (which concerns torture) since ‘[p]rotection against refoulement is . . . closely related to protection against torture and inhuman or degrading treatment’, to examine whether the principle of non-refoulement has emerged as a rule of customary international law. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) and the International Covenant on Civil and Political Rights (ICCPR) will also be discussed as a matter of course.
Relevancy of Prohibition Against Torture. In this analysis, the European Convention should be preferred to both the Torture Convention and the ICCPR as the respective responsible supervisory organs for the latter two treaties, namely the Convention against Torture Committee and the Human Rights Committee, do not possess legal authority to enforce their views which thus only have moral force upon the States Parties thereto, whilst judgments of the European Court of Human Rights have legally binding effects upon the 45 Members States of the Council of Europe and their implementation is supervised by the Committee of Ministers. It is worth noting, nevertheless, that State practice (which is essential to creating a rule of customary international law) demonstrates consistent compliance with the Views of the Convention against Torture Committee and that ‘a Special Rapporteur was appointed, in 1990, and a procedure created to follow up the views of the Human Rights Committee’.

Article 3 of the European Convention provides that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment’. This prohibition is absolute in nature, as indicated by the European Court of Human Rights in Ireland v. United Kingdom that ‘the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct’; and in Soering v. United Kingdom that ‘Article 3 makes no provision for exception and no derogation from it is permissible under Article 15 in time of war or other national emergency’. The relevancy of this provision vis-à-vis the principle of non-refoulement lies with the precept that State responsibility will be incurred on the part of the State from which asylum is requested but which nevertheless denies asylum in violation of non-refoulement ‘where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in his or her home country’. Lambert argues that ‘by reaching far beyond the limits of its own decisions and jurisdiction, the work of the Strasbourg organs on non-refoulement is of a norm-creating character’.

Concluding Remarks on State Practice. The general consensus on the importance of the principle of non-refoulement at both global and regional levels, the enormity both qualitatively and quantitatively of resolutions and declarations in support of non-refoulement, and the absolute prohibition against torture as a rule of jus cogens confirm that non-refoulement has acquired status as a rule of customary international law by virtue of the relevant State practice, which is itself extensive and uniform.

Opinio Juris

Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the opinio necessitates juris except when it is shown that the conduct in question was not accompanied by any such intention.

This authoritative statement by the late Hersch Lauterpacht discerns that opinio juris does not necessarily have to be proved separately but can be derived from evidence of State practice itself. Grahl-Madsen observes in relation to the 1954 United Nations Conference
on the Status of Stateless Persons that the principle of non-refoulement is ‘an expression of a generally accepted principle’. Moreover, there is general consensus amongst legal scholars that non-refoulement has now ‘become binding as a matter of both treaty and customary law if not also as a so-called peremptory norm or jus cogens’. Whilst Hallbronner differs by doubting the existence of extensive and more or less uniform State practice accompanied by opinio juris; and in discounting as ‘wishful legal thinking’ the contention that non-refoulement has become a rule of customary international law, he is criticised for “[overlooking] the consensus at the global, regional and national levels in favour of addressing in some way the claims of those persons in one’s territory or at one’s borders who fear harm in their country of origin as a result of serious disturbances of public order”. Thus, in the light of the importance of the principle of non-refoulement, the significant number of States Parties to the Refugees Convention and the Refugees Protocol, the consistency of observance of non-refoulement even outside the Refugees Convention regime at both global and national levels, the close correlation between refoulement and torture, and, above all, ‘elementary considerations of humanity’, the necessary opinio juris should be found as sufficiently exemplified by reference to such State practice as evidenced above.

Internally Displaced Persons

In accordance with the UNHCR’s Guiding Principles on Internal Displacement,

internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.

Given that no international treaty concerns itself with internally displaced persons, it cannot but be true that a State is under no duty under customary international law to grant asylum to these persons despite their severe plight. Although it is the UNHCR which determines who is within its mandate, ‘[t]he activities of the UNHCR . . . must not be confused with state practice’. Asylum simply cannot be granted to any internally displaced persons given the pre-eminence in international law of the principles of territorial sovereignty and non-intervention. As the International Court of Justice reaffirmed in Nicaragua v. United States, the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference . . . the Court considers that it is part and parcel of customary international law. As the Court has observed: ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations’ (ICJ Reports 1949, p.35), and international law requires political integrity also to be respected. . . . The existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States.
Notwithstanding and without prejudice to the desirability of a legal regime covering internally displaced persons, the question of whether a State is under a duty under customary international law to grant asylum to these persons must thus be answered in the negative.

Concluding Remarks

Australia on 13 July 2004 announced that holders of an Australian temporary protection visa were to be allowed to apply within Australia – and thus without first returning to their home countries from which they fled in the first place – for ordinary migration visas that would allow for permanent settlement. Whilst this move was laudable, it was but one step towards successful amelioration of the world refugees problem and the international community must continue to observe both in letter and in spirit the principle of non-refoulement. As Ambassador Moore, United States Co-ordinator for Refugee Affairs, stated in 1987, ‘[c]onsidering that the most important element of a refugee’s protection was the obligation of non-refoulement . . . [t]he threat to a country posed by influxes of economic migrants should not serve as an excuse for refusing asylum’. This analysis, it is hoped, has illustrated that the principle of non-refoulement has transformed itself from a treaty provision into a rule of customary international law, if not one of jus cogens. As Grahl-Madsen asserts: ‘We may, indeed, consider it a principle of civilisation, one of the building blocks of civilised government.’ Meanwhile, the alarming phenomenon of internal displacement must be borne in mind and resolved. Whilst ‘[n]ational authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction’, it is common ground that the problem will diminish significantly if full observance of international humanitarian law – especially with respect to civilians – is attained.

Notes

11. Refugees Convention, Art.42(1).

15. Declaration on Territorial Asylum, Art.3(1).


17. Ibid. Art.45 (emphasis added).

18. Adopted during 19–22 November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.


24. Article 3(1) of the 1966 Principles Concerning Treatment of Refugees provides that ‘[n]o one seeking asylum ... should ... be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory’.


31. Ibid. p.522.

32. Ibid.

33. European Convention, Art.3.


35. Ibid. para.163.


37. Ibid. para.88.

38. Ibid. para.91.


54. The Representative of the Secretary-General on Internally Displaced Persons has stated that

53. Nicaragua

49. See Ved P. Nanda, ‘Comments on: The Legal Basis of International Jurisdiction to Act with Regard to the

44. Kay Hailbronner, ‘Nonrefoulement and “Humanitarian” Refugees: Customary International Law or Wishful

Legal Thinking?’, in David Martin (ed.), The New Asylum Seekers: Refugee Law in the 1980s (Dordrecht,

45. Ibid. p.132.

p.116.

47. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United

48. Office for the Co-ordination of Humanitarian Affairs, Guiding Principles on Internal Displacement,
Introduction, para.2.

49. See Ved P. Nanda, ‘Comments on: The Legal Basis of International Jurisdiction to Act with Regard to the
Internally Displaced’, in Vera Gowelland-Debbas (ed.), The Problem of Refugees in the Light of Contempor-
there are a number of United Nations General Assembly resolutions on the subject matter including the most
recent one adopted on 20 February 2002 (A/RES/56/164), and a London Declaration propounded by the
International Law Association (see International Law Association, ‘The London Declaration of International
(2000), p.672), these instruments are as such not binding in international law. See also Kourula (note 5)
p.189, where the author quotes the Representative of the Secretary-General on Internally Displaced
Persons in his Statement to the 51st Session of the Committee on Human Rights (February–March 1995),
that ‘both normatively and institutionally, the international response to the problem of internally displaced
is significantly constrained, uncertain and inadequate’.

50. See United Nations High Commissioner for Refugees, Executive Committee, 45th Session, EC/SCP/87, 17
August 1994, ‘Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons’, Intro-
duction, para.4; as excerpted in Chimni (note 46) pp.433–39 at p.435, where it is stated that ‘[b]y recognising
that the problems of the internally displaced and of refugees are manifestations of the same phenomenon of
coerced displacement, UNHCR has increasingly considered activities on behalf of the internally displaced to
be indispensable components of an overall strategy of prevention and solutions’.

51. Hailbronner (note 44) p.130.

52. Nevertheless, as Chimni (note 46) p.392 avers ‘[s]uch an argument is, however, not to be read as supporting
an absolute doctrine of sovereignty. It is not as if sovereignty cannot be trumped in favour of human rights
under any circumstance. The problem is “that the invocation of human rights is selective, often a pretext for
attaining incompatible ends, and is advocated by powers which author global policies irreconcilable with any
Journal of Refugee Studies, p.298 at p.299)’.


54. The Representative of the Secretary-General on Internally Displaced Persons has stated that

Without prejudicing the issue of whether or not new normative standards are needed, it is generally recog-
nised that even though the existing law appears to be adequate for the needs of internal displacement, a
consolidation and evaluation of existing norms would be of value and would provide the basis for
filling whatever gaps may exist. Building on the knowledge acquired from the practical experience on
the ground, as well as the expertise of scholars with expertise in this area of the law, the proposed
project would aim at the development of ideas for normative standards based on principles of existing
international instruments. The goal would be to develop a doctrine of protection specifically tailored to
the needs of the internally displaced. This requires first a compilation/commentary of the existing
norms and a further elaboration of the relevant standards . . . and eventually a declaration or other authoritative document.


56. Grahl-Madsen in Macalister-Smith and Alfredsson (note 41) p.206.
58. See Gowlland-Debbas (note 49) p.127.