Reconciling State Sovereignty and Protections for the Internally Displaced

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Questions about state sovereignty arise in any discussion of how best to protect internally displaced persons (IDPs). IDPs are those driven from their homes in fear like refugees, but who unlike the latter have not crossed the international boundary into another state. They “are among the most vulnerable populations, desperately in need of protection and assistance.” Sovereignty does not prevent effective action to meet these needs, but governments invoking “sovereign rights” sometimes do.

States retain a set of exclusive sovereign prerogatives but these are not absolute, and are balanced by corresponding responsibilities. These include responsibilities to other states, and the responsibilities of the state towards its own citizens. In particular, each state has the responsibility to provide both internal and external security to its citizens. When a state cannot provide for the security of its citizens international humanitarian assistance becomes essential.

Sovereignty in Historical Context

As the international system as a whole has evolved, so too has the concept of sovereignty. The almost absolute concept of state sovereignty has given way to a more qualified notion. At this point sovereign rights do not entitle the government of any state to deny humanitarian assistance to IDPs.

As the sovereign state first developed circa 1648 sovereignty was understood to mean that each state had exclusive jurisdiction to make law, adjudicate disputes, and to enforce law on its own territory. This jurisdiction and authority is the positive aspect of sovereignty. A more negative aspect affirmed each state’s right to keep out external interference. Other states were not supposed to interfere with the prerogatives of a state on its own territory, and this led to the idea of sovereignty as a kind of shield for the state. More recently a competing concept of sovereignty has emerged. Philosophers such as Jean-Jacques Rousseau, John Locke, and Thomas Jefferson argued that true sovereignty emanates from and belongs to the people of a state and not its government. This notion of “popular sovereignty” has gone well beyond philosophy, and has directly affected both the practice of states and the development of international law. It has become fundamental to understanding the legitimacy of national governments and to developing and applying the rules of the international system.

I. “Internal displacement, affecting some 25 million people worldwide, has become increasingly recognized as one of the most tragic phenomena of the contemporary world. Often the consequence of traumatic experiences with violent conflicts, gross violations of human rights and related causes in which discrimination features significantly, displacement nearly always generates conditions of severe hardship and suffering for the affected populations. ... The internally displaced are among the most vulnerable populations, desperately in need of protection and assistance.” Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, paragraph 1.
Sovereignty, Positivism and the Evolving International System

International law must be capable of changing and adapting to the realities of the international system, just as it has adapted to such changes in the past. During the Middle Ages the prevailing conception of international law was that it reflected the application of the Law of Nature (natural law) to the conduct of states. When Europe’s Holy Roman Empire collapsed, a new international system developed in its place, and it was supported by a new conception of international law. The 1648 Peace of Westphalia formalized the transition from a nominally unified Empire to a system of sovereign nation-states not subject to any superior external authority.\(^2\) New theories of international law developed by Hugo Grotius,\(^2\) among others, adapted the prevailing concepts of natural law to the changed conditions by divorcing it from Catholic theology and supplementing it with notions of positive international law. The term “positive law” refers to law created by people through legislation, decree, agreement or other means. “Positive international law” refers specifically to rules of law binding upon sovereign states because they are based upon the consent of those states. The theory is that sovereign states can have binding legal obligations without any contradiction because the right to enter into treaties or accept other obligations under international law is, in itself, an attribute of sovereignty.\(^4\)

By the 19th Century this concept of a positive international law based on the consent of states emerged as the only generally acceptable theory of international legal obligation. Evidence of explicit state consent to rules of positive international law can be found in treaties formally accepted by those states. Other rules of international law may be inferred from the general and consistent practice of states accompanied by indications that they implicitly accept, as part of customary international law, the obligation to conduct themselves according to a given rule.

At times, however, international law must take a step beyond positivism. Indeed, it is in the field of international human rights that it is most inappropriate to insist upon a narrowly positivistic model of international law. The idea of universal human rights has its origins in the concept of natural law, and notions of natural justice provide a standard for evaluating the sufficiency of all positive law. The horrors of the Nazi holocaust revealed the inadequacy of the existing positive international law that did not clearly and specifically condemn genocide, crimes against humanity and other atrocities when committed by a state against its own citizens. The need for a positive international law of human rights became apparent, and this provided the impetus for change. Since the Second World War there has been a major thrust toward the enactment of a positive international law of human rights. By articulating norms relating to human rights in treaties and other international normative instruments, states and international organizations have begun to transform the nature of the international system.

The UN Charter’s Effect Upon State Sovereignty

In a very real sense the United Nations Charter fundamentally redefined sovereignty when it came into force over 55 years ago. Chapter VII of the Charter grants the Security Council the authority to make decisions needed to maintain or restore international peace and security.\(^5\) The Charter explicitly provides that these decisions are binding upon UN Member-States\(^6\) but those states nonetheless retain their sovereignty. It’s just that now sovereignty is subject to the regime established by the UN Charter. The concept of state sovereignty, like the rest of international law, continues to evolve.
Sovereignty and Human Rights

Some years ago, Michael Reisman, published a short but thought-provoking article calling for the application of an updated, or as he called it "contemporized" concept of sovereignty. In particular, he stressed the need to stop thinking of sovereignty as something that belongs to the government and to recall that sovereignty belongs to the people. Conceptualizing sovereignty in this manner allows us to recognize that governments can violate the sovereignty of the people they are supposed to represent. In Reisman's view, human rights norms are "constitutive norms", in that they imply a radical and qualitative change in international law as a whole.

Currently, the idea of popular sovereignty influences perceptions of political legitimacy. A regime that fails to respect the human rights of its people, while ritualistically invoking sovereignty as a response to external criticism, will eventually be perceived as having lost much if not all of its political legitimacy. So where does that leave sovereignty in international law? International law is still concerned with the protection of sovereignty, but sovereignty means something different from what it did before. Sovereignty is no longer about protecting the power base of the tyrant, but more fundamentally about protecting the rights of the people. Governments still have sovereign prerogatives; which have not disappeared; but they exercise these prerogatives subject to an obligation to respect human rights.

The need to protect the rights of the internally displaced is, of course, a very important human rights issue today. As already noted, governments exercising sovereign prerogatives have responsibilities as well. The responsibility to provide security is relevant to the situation of the internally displaced because it is this aspect of security that is lacking in the situations of conflict, chaos, and persecution which typically result in large numbers of IDPs. In this context, it's important to note that the Guiding Principles on Internal Displacement declares that: "the primary duty and responsibility for providing humanitarian assistance to the internally displaced lies with national authorities." National authorities have the primary responsibility, but if they fail to fulfill it someone else must act to protect and assist them. The secondary responsibility falls to the international community: to international organizations, non-governmental organizations, and to other states. It is important to consider all these aspects together; the positive and negative aspects of sovereignty, the prerogatives and the duties, the imperative need to protect the fundamental human rights of IDPs and to provide them with essential humanitarian assistance.

8. Id. at 873.
9. Id. at 872.
The potential tension between the traditional concept of state sovereignty and the need to protect human rights has been especially apparent as states have declined to adopt stronger international norms and mechanisms for the protection of IDPs. Multilateral treaties have been adopted and widely accepted to promote and protect the rights of refugees under international law. In contrast, there is as yet no treaty defining the rights of IDPs despite the severity of the humanitarian crisis they often face.

More than 50 years into the UN Charter, some purists still object to the idea that states are subject to the decisions of the Security Council. An absolute concept of sovereignty from 400 years ago is still invoked from time to time. It is important to note just how far divorced from reality such conceptions are. From the beginning, international law has been changing and adapting to the realities of the international system and it will no doubt continue to do so. The development of international refugee law, demonstrates this evolution.

The Development of the Refugee Law Treaty Regime

The Refugee Convention was negotiated after World War II just as the international law of human rights began to develop. States signing that convention consented to certain obligations with regard to refugees, which were in derogation of their sovereignty. The obligations they accepted did not go very far at first, largely because the refugee convention incorporated a very narrow definition of the term “refugee.” It defined as refugees only those who, due to events prior to 1951, had a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion; were outside the country of their nationality; and were unable or owing to such fear unwilling to avail themselves of the protection of that country. The pre 1951 time restriction severely limited the scope of that convention, but states were unwilling to accept a broader definition at the time, opting to accept obligations only with regard to refugees from the WW II era. Fortunately, the definition was expanded by the 1967 Protocol Relating to the Status of Refugees to eliminate this time restriction.
But another severe restriction, limiting the definition of a refugee to someone who has crossed international borders, was retained. It is this element of the definition that effectively denies IDPs the status of refugees. The widespread acceptance of the Refugee Convention reflects a sense that when people are driven across an international border a situation that may have begun as an internal matter gains an international aspect justifying the application of some sort of agreed international standards. The attitude of states, and thus the legal framework, has remained remarkably different in situations where no international border has been crossed.

If states had wanted to accept broader standards of refugee law applicable to the internally displaced they could easily have done it in 1967. That they declined to do so suggests that states were reluctant to internationalize the issue of IDPs, preferring by default to retain this issue within their exclusive sovereign jurisdiction. Since 1967, the practices and attitudes of states, of international organizations and of NGOs with regard to IDPs have evolved and the need to develop better international standards and protections for them has increasingly been recognized. The 1998 Guiding Principles on Internal Displacement ("Guiding Principles") is evidence of some progress on this issue.

The Guiding Principles on Internal Displacement
Unlike the Refugee Convention, which is a formally binding treaty, the Guiding Principles on Internal Displacement has not been explicitly consented to by sovereign states. Nonetheless, because these principles largely restate fundamental rules of international human rights law already accepted by states, most of what can be found in them is already binding upon them either under existing treaties, as part of customary international law, or both.

Like the International Covenant on Civil and Political Rights and various other human rights treaties, the Guiding Principles provide for the rights to life, dignity, liberty and security of IDPs; for their rights to freedom of thought, conscience and religion; that they shall be protected against genocide, murder, summary or arbitrary executions and enforced disappearances; that they shall be protected from discriminatory arrest or detention as a result of their displacement; and that they have the right to liberty of movement. Like the International Covenant on Economic, Social and Cultural Rights, the Guiding Principles recognize that IDPs should also have access to food, clothing, shelter, medical services and education and that they have the right to communicate in a language they understand.

The Guiding Principles also attempt to build upon the humanitarian aspects of the refugee convention. When principle 15 provides, among other things, that IDPs have the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk it follows the lead of the Refugee Convention in incorporating the principle of "non-refoulement." Extending this principle to IDPs is a small step forward at best. Under existing rules of human rights law IDPs, like others lawfully within the country, already have the right to liberty of movement within the territory of their home states. In theory this right should already preclude their forcible return or resettlement. The Guiding Principles simply make this explicit.

The Guiding Principles do more than restate some of the more pertinent of the applicable rules of international human rights law. They also seek to move the applicable legal regime forward by applying basic humanitarian principles to IDPs. From a purely positivist perspective these normative steps forward might be described today as having only the status of “soft law,” i.e. rules proposed but not yet accepted by states or binding upon them. From another perspective, one can argue that “elementary considerations of humanity,” such as have been recognized by the International Court of Justice as a source of international law, militate in favor of this incremental development.

Where the Guiding Principles go a step beyond existing treaties they would in most cases apply to IDPs rights and protections already granted to refugees under positive law. Ultimately, the same humanitarian imperative that compelled granting those protections to refugees must eventually compel their extension to IDPs. The limits of positivism can rightly be identified here.

As noted above, the UN Charter’s regime, radical in itself, involved a restructuring of the traditional idea of state sovereignty. Chapter VII of the Charter gives the Security Council the power to make decisions binding upon all UN members whenever it determines that there is a threat to international peace and security. International peace and security is high on the list of international values. Indeed the first concern mentioned in the UN Charter’s Preamble, and the UN’s first purpose as identified is to promote international peace and security. Also very high on the list of UN values is the promotion of human rights. Human rights are mentioned in the second paragraph of the Preamble and their promotion is identified, throughout the Charter, as a purpose of the UN.
The recognition that uninvited humanitarian organizations have rights that national governments must respect on their own territory will undoubtedly be seen by some of them as a threatening form of external intervention inconsistent with their sovereignty. Governments tend to be embarrassed when outside actors point out that they have a problem and that they need help in dealing with it. Although a right of access for humanitarian organizations may not appeal to national governments currently host to many IDPs, it may be essential to ensuring better protection for the internally displaced.

When host governments do consent to allow the entry of outside humanitarian assistance for their IDPs they have been known to try to direct that assistance according to their own, non-humanitarian, criteria. In some cases they may be embarrassed about the situation in one part of the country, and want to accept outside assistance, and any incidental scrutiny by outside relief personnel, only elsewhere where they are not as embarrassed about the situation. In far too many cases, humanitarian assistance has been diverted to other purposes. To address this problem the Guiding Principles stress that humanitarian assistance "shall not be diverted, in particular for political or military reasons."77

As noted above, some of the more forward-looking aspects of the Guiding Principles are not yet well established in international law and practice, but they may soon crystallize into new rules of customary international law if they have not done so already. The practice and attitudes of states, including their conviction as to what the rules of international law require (known as opinio juris) generally determines whether proposed new rules such as these become part of binding positive international law. But when issues of fundamental justice or human rights are concerned, international law has at times moved forward in advance of positive state consent.

**Precedents from International Humanitarian Law**

In order to remain relevant to the changing realities of our world, international law has recently taken some very bold normative and institutional steps forward. It has long been recognized that international humanitarian law establishes a number of war crimes punishable under international law. The Geneva Conventions of 1949 explicitly define a number of "grave breaches" of those conventions as crimes under international law, which all parties to those conventions are to define and punish.78 According to the text of those treaties, these grave breaches must be committed in the context of international armed conflict.78 Recently, however, the practice of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda established beyond any doubt that war crimes, in violation of international law, could also be committed in the context of internal armed conflict.40 A similar extension of international humanitarian norms from an international matter (refugees) to a parallel internal matter (IDPs) also seems both desirable and inevitable.
41. In 1512 the Polish astronomer Copernicus radically transformed the European view of the cosmos by affirming that the Earth and the other planets revolve around the sun. Before Copernicus the Western World believed the Earth to be the center of the universe. For more on the notion of a paradigm shift, see THOMAS S. KUHN, The Structure of Scientific Revolutions 2nd Ed., University of Chicago Press, (1970).

42. See, The Antelope, 23 U.S. 66, 116 (U.S. Supreme Court 1825). This opinion by Chief Justice John Marshall condemns the slave trade as “abhorrent” and “unnatural” noting that public sentiment in the US and Great Britain had already turned against the practice. Nonetheless, the court decided that as of 1825 the slave trade was not yet prohibited by positive international law.

These developments are all part of a fundamental shift away from the old state-centric international law. The evidence of this change can be found in the practice of states, international organizations, and NGOs. This shift in the center of the international legal and political universe is so fundamental that it may be said to constitute a “Copernican revolution”, i.e. a paradigm shift in which existing conceptions have to be rethought because of a new view or understanding of what constitutes the “center”.

States and their governments are finding that their position at the center of international law is no longer secure. Instead, people and their fundamental rights and interests are taking center stage. The idea of protecting the State’s sovereign prerogatives at the expense of the fundamental rights of the internally displaced is rapidly losing whatever claim to legitimacy it may once have had.

Conclusions

War, conflict and upheaval have forced some 25 million people worldwide into internal displacement. Assuring them of even basic humanitarian assistance is often impossible because international law has not required states to allow distribution of that assistance on their territory. Nor has international law barred states from forcibly returning or resettling IDPs to areas where they would be at risk. In the past state sovereignty was understood to permit states to retain these sovereign prerogatives at the expense of IDPs but this view is now out of step with popular conceptions of what is fair and right. In 1825 United States Chief Justice John Marshall, in discussing the legality of the slave trade under international law, wrote that “it is not wonderful that public feeling should march somewhat in advance of strict law…”

Once again, however, it seems that there is an unfortunate lag in the acceptance of more enlightened humanitarian norms as part of positive international law.

Sovereignty, per se, is not the problem. Recognizing international protections for the fundamental rights of IDPs would no more violate state sovereignty than did recognition and acceptance by states of similar protections for those who qualify as refugees. National governments may invoke sovereign rights to justify regulating if not outright blocking outside assistance offered to IDPs on their territory, but sovereignty does not grant them the right to deprive their citizens of fundamental rights. The rights of IDPs and the international community’s need to protect them are more important than state sensitivities regarding non-violent humanitarian assistance. To put it in another way, the sovereign rights that states enjoy within their territory do not absolve them from fulfilling their sovereign responsibilities to the people within those territories.
An international conference could be called to negotiate a special treaty on IDPs but this would be a slow and uncertain process. Success would require that states explicitly endorse a new balance between their sovereignty and the rights and interests of IDPs. It is not clear how many governments would be willing to take that step at this time.

As nations debate whether to call a treaty conference millions of IDPs are denied access even to the limited amount of international humanitarian assistance that is presently available. State sovereignty is not responsible for this situation. Responsibility lies with the governments who decide to deny this access. Also contributing to the problem is the narrowly positivistic notion that only a treaty conference can move this body of law forward.

Fortunately, a treaty conference is not the only option. The *Guiding Principles* build incrementally upon human rights standards that are already applicable. The more innovative aspects of these principles are not directly binding upon states as a treaty would be, but may soon gain status as rules of customary international law. International organizations, NGOs, and others have been invoking these principles in support of their activities on behalf of IDPs thereby developing a new trend in state practice. Pursuant to this process states may tacitly acquiesce to new and necessary rules of customary international law regarding IDPs long before they agree to the explicit acceptance of similar rules in treaty form.

The state retains positive sovereign rights to legislate and govern on its territory, but the negative right to exclude action by outsiders must to some extent yield. Hostile interference and military intervention by outside actors will rarely, if ever, be justified but benign humanitarian assistance to IDPs is another matter entirely. Such assistance does not threaten the legitimate interests of any state, and thus governments that block its delivery unjustifiably violate the basic rights of their own people. As this view comes to represent the opinio juris of the international community as a whole the legal rights of IDPs, and their overall situation, will be drastically improved.

One way or the other international law must eventually adapt to provide greater protections for IDPs. Elementary considerations of humanity make this imperative. The question is how international law will make the necessary adaptations and how soon this will occur.