

# PROTECTION OF INTERNALLY DISPLACED PERSONS IN INTERNAL CONFLICTS

*Luke T. Lee* \*

I.	PROTECTION OF IDPS BY GOVERNMENTS AND DE FACTO AUTHORITIES .....	530
II.	PROTECTION OF IDPS AS REFUGEES .....	531
III.	PROTECTION OF HUMANITARIAN PERSONNEL .....	535

There are some thirty million internally displaced persons (IDPs) today as compared to fifteen million refugees. The root causes generating refugees and IDPs are essentially the same: armed conflicts and human rights abuses. While refugees are protected by a number of international treaties and organizations, and are enjoying comparative safety in countries of asylum or resettlement, IDPs are not — supposedly on the ground that since IDPs are within their own country, their government should be responsible for their protection. This ignores the fact that their own government often is the source of their persecution or is unwilling or unable to provide them with protection. Consequently, IDPs on the whole suffer more than refugees. Little effort, however, has been made to fill the gap in the protection of IDPs by the United Nations and international lawyers. With respect to the United Nations, on the recommendation of the Commission on Human Rights, the Secretary-General in 1992 appointed Dr. Francis Dent of the Sudan as his representative on IDPs, but with very little budgetary or staff support. The United Nations High Commission for Refugees (UNHCR) has extended its protective arms to IDPs on an ad hoc basis at the request of the General Assembly. The International Law Commission or the Sixth Committee (Legal) of the General Assembly has not seen fit to codify or progressively develop the legal status of IDPs.

At the non-governmental level, the International Law Association (ILA) established in November 1992 an International Committee on IDPs, with Professors Rainer Hofmann of Germany and Yukio Shimada of Japan as co-Rapporteurs, and myself as Chairman. The Committee is drafting a Declaration of Principles of International Law on IDPs for adoption by the

---

\* Special Adviser, Population, Refugees and Migration, Department of State. The views expressed in this paper are entirely the author's and do not necessarily reflect those of the Department.

ILA in 1998. At its conference in Helsinki last August, the ILA provisionally adopted a Draft Declaration and is requesting comments from the Special Representative of the Secretary-General on IDPs, as well as from UNHCR, United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA), the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross (ICRC), and relevant regional and non-governmental organizations. The Committee would also welcome your comments and would send you copies of the text of the Draft Declaration upon request. I would like to discuss my topic under three headings: protection of IDPs by governments and *de facto* authorities, protection of IDPs as refugees, and protection of humanitarian personnel.

#### I. PROTECTION OF IDPs BY GOVERNMENTS AND DE FACTO AUTHORITIES

The term *internally displaced persons* may be defined as “persons or groups of persons who have been forced to leave or flee their homes or places of habitual residence as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.”<sup>1</sup>

Recognizing the indispensable role of *de facto* authorities in the protection of IDPs, the Draft Declaration singles out such authorities for special emphasis and defines them as “any non-State entities in actual control of parts of a State's territory which are parties to an armed conflict and/or internal strife or have generated or hosted internally displaced persons.”<sup>2</sup>

We proceed from the premise that a foremost responsibility of a government is to provide protection to its nationals. As defined by Vattel, nationality is “the bond which ties a state to each of its members.” In the *Panevezys-Saldutiskis Railways* case, the Permanent Court of International Justice observed: “[I]n the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”

If, during an internal armed conflict, a government is unable to provide protection to its citizens in an area from which it is driven away, the *de facto* authorities must assume the responsibility. Indeed, their ability to succeed to the *de jure* government hinges on their fulfillment of such responsibility. Thus, under the Draft Declaration, *de facto*

---

1. Draft Declaration, art. 1(1).

2. Draft Declaration, art. 1(1).

authorities have the obligation to adopt all necessary measures to ensure that IDPs have free and safe access to assistance and protection by relief organizations (article 9); to take joint and separate action with states and to cooperate with the United Nations and other international organizations, both governmental and non-governmental, to promote respect for and safeguard the rights and interests of IDPs (article 3); to renounce the use of starvation as a weapon against IDPs during armed conflicts (article 16); and to address the root causes of internal displacement with a view to adopting preventive measures and obtaining durable solutions (article 11).

The aspirations of *de facto* authorities to succeed to the *de jure* government and be recognized as such, as well as to gain membership in the United Nations, provide a strong incentive for their compliance with the Draft Declaration's provisions, especially if coupled with sanctions in the event of noncompliance.

## II. PROTECTION OF IDPS AS REFUGEES

The question may be raised as to whether the legal status of IDPs may be analogized to that of refugees. An affirmative answer would entitle IDPs to international protection as refugees, *mutatis mutandis*. An analysis of their legal relationship follows.

The 1951 Convention and the 1967 Protocol relating to the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1984 Cartagena Declaration, all retain crossing of national borders as *sine quo non* for the definition of *refugee*. Thus, if persecuted individuals cross their national borders, an elaborate system of international law and institutions comes into play for their protection. However, if they remain within the national border, they are not considered *refugees*, hence not entitled to such protection. But the use of border crossing as the most important criterion for distinguishing between refugees and IDPs, hence determining their eligibility to international protection, may be faulted on historical, practical, juridical, and human rights grounds. Each of these grounds will be briefly discussed. Historically, the phenomenon of *refugee* has existed since time immemorial; some would date it to the proverbial expulsion of Adam and Eve from the Garden of Eden. And yet territorial boundaries assumed importance only after 1648 with the establishment of the Peace of Westphalia that set the stage for the modern nation-state system. Indeed, until the 1951 Convention relating to the Status of Refugees, there had never been any agreement defining *refugee* as a person who must be outside his country. Under the May 12, 1926 arrangement, for example, a Russian *refugee* was defined as "[a]ny person of Russian origin who does

not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republic and who has not acquired another nationality.”

Similar definitions were adopted in the June 30, 1928 arrangement, the 1933 Convention relating to the Status of Refugees, and others *mutatis mutandis*. The decisive criterion was the presence or lack of protection by the governments concerned.

Even during the early years of the United Nations, the term *refugee* included also the meaning of IDPs. Under the International Refugee Organization of 1946, un-resettled persons of Jewish origin or foreigners or stateless persons who had resided in Germany or Austria, who were victims of Nazi persecution, and who were detained in Germany or Austria, were also defined as *refugees* even if they had never left Germany or Austria.

During the Korean War, the United Nations did not differentiate between *refugees* and *internally displaced persons* in United Nations documents. The United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA) has treated many IDPs as Palestine *refugees*. Even during the early 1980s, the United Nations Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, of which I was a member, did not adhere to any *refugee* definition using border crossing as a criterion.

Why, then, do the 1950 Statute of the UNHCR and the 1951 Convention relating to the Status of Refugees give great emphasis to border crossing as a prerequisite to the refugee status?

It is necessary to place the 1951 Convention in perspective: namely, it was adopted against the backdrop of a deepening Cold War. Originally and essentially a European regional instrument until the adoption of the 1967 Protocol, the 1951 Convention perforce mirrored the political realities then in Europe, where the crossing of the *Iron Curtain* was considered to be of critical importance and where political control within Communist countries was so tight as to leave no room for conflicts that might produce IDPs.

With the disappearance of the Soviet Union as a superpower and communism as a dominant ideology, the political *persecution* of individuals by government has been largely replaced by human rights abuses, ethnic conflicts, and generalized violence. Under these situations, border crossing should no longer be made a prerequisite to the attainment of the refugee status. The impracticality of using boundaries to distinguish refugees from IDPs was highlighted by John Bolton, former Assistant Secretary for International Organization, who accompanied former

Secretary of State James Baker to the Iraqi-Turkish border near Tchivergia in April 1991 as follows:

We saw very dramatic evidence of the plight of the refugees and displaced. The Turkish military very kindly took us up to the border right at the border so we could look out on this hard to describe scene of thousands and thousands of people just sitting on the sides of the hills, and in the valley; no shelter, no sanitation, no food distribution, nothing just people who had come and were sitting there. A very dramatic sight, it had a profound effect on the Secretary and in my view led directly to our decision to launch "Operation Provide Comfort." But, just as an example, we were to go up to the border and it was in a very hilly area. The Secretary was there and our Defense Attachè from Ankara came up to me and said: 'I don't know how quite to say this, but we and the Secretary are about ten yards inside Iraq.' It was a telling example that they did not have bright yellow line painted in the sand or in the dirt between Iraq and Turkey at that point, and the people on one side of the line were in exactly the same condition as the people on the other side of the line. They both needed protection and they both needed assistance.

Similarly, in my travel to the Ethiopian-Somali border as a member of a Multi Donor Technical Mission in February 1991, I was struck by the irrelevance of boundaries to nomads who fled ethnic conflicts or civil strife crisscrossing the border. Since these nomads shared the same ethnicity or nationality, religion, custom, language, or dialect, were they Somali or Ethiopian refugees? Were they IDPs or returnees? Or a mixture of the above? What difference would it make anyway, so long as they needed the same kind of assistance and protection? Indeed, the Multi-Donor Technical Mission rightly decided to base its recommendations for their assistance not on their *legal status*, but rather on their *needs*.

A formidable juridical argument against the use of boundaries as determinant of the refugee status is the fact that the validity of a boundary is inextricably linked to the diplomatic recognition of the state concerned. And yet there is no rule mandating a uniform diplomatic recognition of a particular state. Thus, a country or a party to a civil war may be recognized by some states, but not by others. Cases in point are Biafra during the late 1960s, former North and South Vietnam, former East and West Germany, North and South Korea, and now the fragmentation of the former Soviet Union and Yugoslavia. In each case, a displaced person may be considered a *refugee* and IDP simultaneously by different states, depending on the recognition factor. Such dual status cannot but blur the boundary between the two.

Indeed, the domestic laws of some countries already recognize that refugees need not be outside their country. The Refugee Act of 1980, for example, defines *refugee* to mean, *inter alia*:

In such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>3</sup>

This provision has provided the basis for the Orderly Departure Program (ODP) administered by UNHCR, under which *refugees* have been airlifted from Ho Chi Minh City to Bangkok for onward journey to resettlement countries. It has also formed the basis for in-country processing of asylum seekers in Russia, Cuba, and Haiti. In view of the involvement of UNHCR in the ODP, all of its members may arguably be presumed to have accepted the fact that refugees need not by definition be physically outside the countries of origin.

But the strongest argument against the use of border crossing to justify preferential treatment of refugees over IDPs is its incompatibility with equal protection under human rights defined by the late Sir Humphrey Waldock, former President of the International Court of Justice, as "rights which attach to all human beings equally, whatever their nationality," and, I would add, wherever they may be. To the extent that their basic human rights have been violated, they are entitled to protection and assistance whether as refugees abroad or as IDPs within their own country. Equal rights for all individuals, be they aliens or nationals, refugees or IDPs, is implied in all universal and regional United Nations human rights instruments through the use of such expressions as *all human beings*, *everyone*, *no one*, or *all*. Not a single right in the Universal Declaration of Human Rights, for example, is specified or implied as belonging only to *refugees*, and not IDPs. Thus, in the words of the present United Nations High Commissioner for Refugees: "It made little sense for UNHCR to bring relief and protection to one group of suffering people, i.e. refugees under the 1951 Convention, and to disregard the misery of the other afflicted people."

She therefore proposed international relief and protection based on needs rather than on the categories into which people are classified.

---

3. The Refugees Act of 1980, Pub. L. No. 96-212, § 201(42) 94 Stat. 102 (1980).

But can equal protection of refugees and IDPs be translated from theory into practice? The International Committee of the Red Cross (ICRC) has shown that this can be done. And the Security Council, in Resolution 688 of April 5, 1991, mandates "that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq," in addition to requesting the Secretary-General "to address urgently the critical needs of the refugees and displaced Iraqi population."

The foregoing analysis shows that basing international protection of refugees and IDPs on border crossing is untenable on historical, practical, juridical, and human rights grounds. Border crossing should no longer be the criterion for conferring or withholding international protection. Both refugees and IDPs are entitled to international protection.

There are, to be sure, procedural differences between the implementation of international protection of refugees and that of IDPs. However, such differences should not be allowed to obscure the substantive similarities. How to harmonize the two poses a serious challenge to international lawyers.

### III. PROTECTION OF HUMANITARIAN PERSONNEL

It is truism to state that humanitarian services and supplies cannot be effectively delivered abroad without the active involvement of humanitarian personnel, both expatriates and local employees, whose safety must be ensured. While, in the event of an armed attack or a threat thereof, expatriates can be withdrawn to safety in their home base or country relatively easily in view of their small numbers, local employees and their families, however, present a more difficult problem. The current debate over the evacuation of local employees of American relief agencies and their families from northern Iraq to Turkey and thence to Guam and the United States for resettlement is a case in point. Might not such evacuation and resettlement have a deterrent effect on future humanitarian effort?

One possible solution lies in linking all humanitarian efforts vis-à-vis IDPs to the United Nations or one of its agencies, as well as in promoting the widest possible adherence to the United Nations Convention on the Safety of United Nations and Associated Personnel, signed December 9, 1994. The Convention defines *associated personnel* as, *inter alia*, persons deployed by a government, intergovernmental organization or "a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a

specialized agency . . . to carry out activities in support of the fulfillment of the mandate of a United Nations operation”<sup>4</sup>

---

4. (Art. 1(b)(iii)).