

12. The Legal Dimensions of Preventing Forced Migration

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Introduction

Population displacements are caused by a wide variety of factors. Some are in the nature of emergencies. Armed conflicts and widespread violations of fundamental human rights often precipitate mass population movements. Environmental catastrophes and natural disasters frequently produce forced movements of people. Other factors are chronic in character. Economic underdevelopment and disparity, environmental degradation, deforestation, desertification, and failures of governance can promote population movements. Often, involuntary displacements result from a complex interaction of numerous causes for which the identification of solutions is sometimes elusive.

An international legal regime is emerging which may contribute to preventing or ameliorating the causes of forced migration. This includes the development of normative standards concerning such matters as refugees, migrant workers, human rights, humanitarian need, peace, development, and environmental protection. This emerging regime, however, is characterized by conceptual lacunae, uneven institutional capacities, inadequate remedies, and operational fragmentation.

This chapter argues for a reformulation of legal standards and institutions to permit the international community to undertake the responsibility to prevent and ameliorate the causes of forced migration. New and effective legal and institutional frameworks could enhance the security of states as well as persons at risk of displacement in the new world disorder.

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The Current Regime: Legal and Institutional Frameworks

There are a myriad of normative arrangements and institutional mechanisms which are relevant to issues of forced migration. These include traditions of providing legal protection and humanitarian assistance to victims of displacement. Implementation and enforcement possibilities vary widely. A brief review follows of some of the central arrangements and mechanisms.

Refugees

The 1951 United Nations Convention Relating to the Status of Refugees, and its 1967 Protocol, defines the term “refugees,” (those with a well-founded fear of individualized persecution) and delineates rights and obligations relating to refugees. These include rights that must be respected even when asylum seekers are unlawfully present in a territory, such as the substantive norm articulated in Article 33 of the Convention and Protocol, which declares the right of a refugee not to be forcibly returned to a place where his or her life or freedom would be threatened. This precept of *non-refoulement* is perhaps the foundation of all refugee protection. Indeed, many commentators have concluded that Article 33 has achieved the status of customary international law in that it is reflective of state practice and recognized by states as legally binding. As of this writing, 130 states are party to the Convention and/or Protocol. The Office of the United Nations High Commissioner for Refugees (UNHCR), a specialized U.N. agency, is responsible for supervising the application of the Convention and Protocol. States are obliged under the treaties to cooperate with UNHCR for this purpose.

Regional instruments, such as the 1969 Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa, the 1984 Cartagena Declaration (endorsed again at a colloquium in 1994), and the 1989 Central American Refugee Conference documents utilize a broadened refugee definition which includes those fleeing civil strife or public disorder. Since 1989, a Comprehensive Plan of Action has addressed solutions for Vietnamese and Laotian asylum seekers in Asia. Asylum sharing arrangements are also currently coming into force in Western Europe.

Internally displaced persons—those who have not yet crossed a national border—are not covered under the ambit of the international refugee treaties. Nor are there other international instruments which expressly relate to them.

International Migration

At the international level, an individual has a right to leave any country, including his or her own, but no corresponding right of admission into another country. This right to leave, coupled with no privilege of admission elsewhere, reflects a basic dilemma in current practice—a lack of symmetry to the freedom of international movement, reflected in the tension between individual autonomy and state regulation. Consequently, multilateral arrangements are rare regarding international migration.

The International Organization for Migration (IOM), an intergovernmental organization outside of the United Nations system, is frequently involved in logistical arrangements regarding the movements of non-citizens, including those forced to migrate. IOM also provides technical assistance to governments on migration-related matters. The Organization for Security and Cooperation in Europe (OSCE) has begun to consider questions of the human dimension of migration in a diplomatic context.

Armed Conflict

In terms of multi-lateral arrangements, the U.N. Security Council has political responsibilities concerning conflict prevention and resolution. Peacekeeping and humanitarian intervention (the use of force for humanitarian objectives) has emerged recently as possible approaches to ameliorating emergencies, with mixed success. The emergence of special war crimes tribunals in the former Yugoslavia and Rwanda provides another possible approach. No entity within the international community, however, has a specific legal responsibility or obligation to prevent or resolve conflict.

Protection is provided to civilian non-combatants under the 1949 Geneva Conventions and their Protocols Additional. The International Committee of the Red Cross, a nongovernmental entity recognized under the treaties, has implementation responsibilities with respect to the Conventions, including training and dissemination activities.

Regional mechanisms such as OSCE are also involved in activities concerning conflicts. This includes OSCE's High Commissioner for National Minorities, which was established in 1993, and which has a mandate to ameliorate conflicts relating to minorities within states. Such efforts of preventive diplomacy and action seek to avert conflict.

Human Rights

International human rights law provides a broad set of substantive norms from which a right to remain in peace and safety in one's country of origin can be derived. Implementation mechanisms under the U.N. system include monitoring, reporting, and certain forms of individual case adjudication. Regional human rights arrangements in Europe and Latin America provide remedies under certain circumstances which are judicial or quasi-judicial in character.

With limited exceptions, human rights law applies to non-citizens. The detention of a non-citizen, for example, can be analyzed under prohibitions upon arbitrary detention under international human rights law. General sources of rights for non-citizens include the 1948 Universal Declaration of Human Rights, the 1966 International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, as well as several more specific human rights instruments concerning women, children, workers, and stateless persons.

Migrant Workers and Economic Causes

Discussions of forced migration has tended to center on asylum seekers who have fled state persecution or armed conflict. To a large extent, international migration is an economic phenomenon. Global economic restructuring has been a significant factor in prompting movement. People have sometimes been forced to migrate for economic survival, and this movement has been largely unregulated.

International standards concerning migrant workers have evolved on such matters as working conditions, social security, and protection of employment rights. These labor standards find their origin in broader human rights concepts. The recognition of human rights corresponded to the recognition of the particular vulnerability of migrant workers, whose rights were addressed and amplified in other international documents, particularly the International Labour Organization's conventions and recommendations concerning migrant workers. The 1990 U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families also establishes standards. The Convention defines a "migrant worker" by acknowledging his or her status as engaged in economic activity outside his or her country of origin. The Convention sets out general entitlements enjoyed by migrant workers that are also guaranteed to all other persons under human rights law, modeled on the International Covenant on Civil and Political Rights. It also extends an

additional set of rights on behalf of migrant workers and their family members who are “documented.” Convention concerns, as well provisions applicable to particular categories of migrant workers and members of their families, include cross-border or “frontier” workers, seasonal workers, and so forth. Protections are weaker for undocumented workers. Very few states have acceded to the migrant workers Convention.

Environmental Causes

Environmental reasons for involuntary movements are varied. Populations may be displaced through natural or anticipated disasters or environmental emergencies. Still others are affected by the lure of economic prosperity. For example, environmental disasters have caused increased levels of environmental damage over the years, compounded by the effects of high population versus land ratios. Deforestation is intimately linked to the global economy. Often, there are few alternatives available other than to market resources which deplete natural resources. Drought emergencies, which engender poor agricultural yields, are major causes of migration. Development projects, in order to be effective, must take into account issues of biodiversity, wildlife conservation, deforestation, and the appropriate resettlement of indigenous people who may be affected by such projects.

The 1992 Rio Declaration had the mandate to develop international law in the area of sustainable development. Two treaties adopted at the United Nations Conference on Environment and Development (UNCED), the U.N. Framework Convention on Climate Change and the Convention on Biological Diversity, although primarily aimed at sustainable development, had provisions to develop human rights standards. Agenda 21, adopted by states at UNCED 1992, was the program of action designated to implement and make policy according to the agreements made in Rio. Agenda 21 reflected the importance of law in enforcing agreements among countries to promote compliance with sustainable development initiatives and environmental equity. The Rio Declaration, which proclaims the principle of common responsibility, is a starting place to promote strategies to prevent migrations which result from environmental causes.

The Need for New Approaches to Cope with Forced Migration

A new comprehensive approach is necessary in order to cope with the complex set of factors that cause involuntary population movements. A normative

framework could be derived from the various areas touched upon in this paper. The development of a restatement of these precepts, focusing particularly on forced migration, would clarify application and identify lacunae in coverage. A more effective institutional framework would require a new treaty regime.

It is difficult to choose the optimal international approach from the myriad of available models concerning movement of persons. An intriguing possibility would be to look to recent efforts to regulate the movements of capital and trade—the General Agreement on Tariffs and Trade (GATT)—as an international legal framework to manage migration and protect the human rights of non-citizens. The GATT is a set of centralized arrangements between contracting parties who make decisions which are implemented by a professional secretariat. Sub-agreements negotiated among limited groups of countries have been used under the GATT, reflecting the legitimacy of regional approaches. Finally, the GATT contains a formal dispute settlement mechanism. Such a mechanism could be used for arbitration or mediation of disputes between states or between individuals and states concerning forced migration.

Conclusion

The need is pressing to strengthen the normative and institutional frameworks concerning forced migration. In this fashion, genuine policies of prevention could be pursued. Governments, acting through the United Nations and regional intergovernmental organizations, must not only expand coverage of international law, but also improve its enforcement.

Until governments establish comprehensive international standards and meaningful implementing mechanisms, the treatment of those forced to migrate will continue to be reactive, inadequate, abusive, and discriminatory. Many internationally homeless persons will simply remain insecure and subject to human rights violations. The international community in its widest sense should, therefore, act immediately to achieve a new international order to address issues of forced migration.