

Response to Hathaway

ROBERTA COHEN

The Brookings Institution, 1775 Massachusetts Avenue, NW, Washington DC 20036

rcohen@brookings.edu

Conflict situations around the world regularly compel the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations to become involved in assisting both refugees and internally displaced persons (IDPs). In West Darfur, Sudan, UNHCR is helping tens of thousands of refugees from Chad as well as hundreds of thousands of IDPs, both fleeing their homes and communities from military attacks and in desperate need of food, shelter and protection. Across the border in Chad, IDPs and refugees also face many of the same threats and problems. The similarities in the predicament of refugees and IDPs prompted UK Secretary of State for International Development Hilary Benn to ask, 'Is it really sensible that we have different systems for dealing with people fleeing their homes dependent on whether they happen to have crossed an international border?' (Benn 2004).

One response to Benn's question is provided by Professor James Hathaway, who would turn the clock back to an earlier time when only refugees, or individuals who flee across borders from persecution, could expect attention from the international community. Although Hathaway does not argue that people seriously at risk inside their own countries should be ignored, he is vehemently opposed to 'reorienting attention away from refugees' on the grounds that any focus on uprooted groups other than refugees will detract from the distinct legal status and protection accorded to refugees under international refugee law.

Hathaway argues that refugee flight is prompted by 'discrimination' and 'social disfranchisement'. While the 1951 Refugee Convention would bear this out, the description hardly captures the refugee experience of today or even applies to the vast majority of refugees being assisted by UNHCR, who flee their countries because of armed conflict and generalized violence. In fact, one of the reasons internally displaced persons are so often intermingled with refugees is that both are often fleeing, not individualized persecution, but armed conflict, generalized violence or human rights violations, and operationally the international community must deal with both groups (Van Hear and McDowell 2006: 12, 15–43, 59). But to Hathaway, any attempt to address, or even discuss, the plight of internally displaced persons in the same breath as that of refugees and under the heading of 'forced migration' sullies the distinctiveness of international refugee protection and takes away from what should be a 'commitment to the centrality of the refugee'.

Hathaway builds his case largely around the argument that refugee law is a distinct branch of international law and refugees have a distinct international legal status, which it is critical to preserve. Being outside their countries of origin and deprived of the protection of their governments, refugees receive substitute legal protection from the international community, or governments that grant them asylum. Internally displaced persons by contrast are in their own countries, are the primary responsibility of their governments and are expected to enjoy the same rights and freedoms as all other persons in their countries. What is more, the description of internally displaced persons is not enshrined in any binding international legal document.

However, the operational reality is that the forcible uprooting of people, whether they become refugees or IDPs, is a profound human tragedy overturning lives, livelihoods and communities, and producing far-reaching psychosocial, political and economic consequences that cannot be dismissed simply by denying, as Hathaway does, that involuntary movement constitutes a *prima facie* case of vulnerability. IDPs in conflict situations just like refugees also frequently have fled persecution and discrimination. Although they remain inside their countries, they are often perceived as ‘the enemy’ either through their association with an insurgent group, an opposing political or ideological viewpoint, or as members of an ethnic, cultural, religious or social group considered inferior or threatening. Often they experience *de facto* ‘outsider’ status.

Nor do many IDPs enjoy the protection of their own governments (IDMC 2007: 11–12). It should be recognized that protection for IDPs in civil wars or other situations of internal strife cannot be assigned to the very authorities that may have been the cause of their persecution and displacement in the first place. While it is true that the international community may not have the same ‘unqualified ability’ to come to their aid as it does in the case of refugees, counter-insurgency or ethnic cleansing campaigns carried out by governments or non-state actors often require an international response. So too do situations in which IDPs are perishing in camps, deprived of the necessities of life and basic security. Many governments do not have the resources, capacity or will to address the needs of the displaced, so that attention understandably shifts to the international community. The Guiding Principles on Internal Displacement, based on international humanitarian and human rights law, make clear that the international community has an important role to play in addressing the protection and assistance needs of IDPs, even though primary responsibility rests with their governments. The World Summit Outcome Document of 2005, signed by 192 heads of state and government, reinforced this international role when it recognized the Guiding Principles as ‘an important international framework for the protection of internally displaced persons’ and resolved ‘to take effective measures to increase the protection of internally displaced persons.’

Yet Hathaway would deny to internally displaced persons recognition as a category of international concern. He imputes international interest in

IDPs as arising mainly from a desire to contain refugee flows. While this motivation likely was a factor for some states' interest in the protection of IDPs, there were many other important and legitimate reasons why IDPs came onto the international agenda (Cohen and Deng 1998: 3–5). For one, the growing numbers of IDPs in the 1990s demanded attention; 1.2 million counted in 1982 surged to close to 25 million by 1997, two to three times as many as the number of refugees in most emergencies. Greater access at the end of the Cold War to people uprooted in their own countries, coupled with changing notions of sovereignty, enabled the international community to step in when governments proved unable or unwilling to provide for the security and well being of their displaced populations. It was in fact refugee advocates who first saw the similarities between refugees and IDPs and decried treating IDPs as 'second class victims', as did Sergio Vieira de Mello (De Mello 1999; see also Crisp 1990; Clark 1988; and Independent Commission 1986). The much-promoted 'responsibility to protect' arose not from the desire to contain people inside their own countries but from the imperative need to protect civilians from being subjected to war crimes, crimes against humanity and genocide. Not all people, after all, *can* leave their countries.

Why inhospitality to refugees came about had little to do with IDPs. It began with the end of the cold war when the political advantage that motivated many states to accept asylum seekers ceased to exist and was replaced by efforts to reduce their entry. Security concerns, financial costs, and social and cultural dislocations arising from the admission of large numbers of newcomers played a role as well (Martin *et al.* 2005: 121–122).

That IDPs are a special category is also questioned by Hathaway on the grounds that no 'new law' for their protection has had to be created. His dismissal of the Guiding Principles for having added 'virtually nothing to the pre-existing corpus of already binding international human rights law' suggests that he has not read the *Compilation and Analysis of Legal Norms* that preceded the drafting of the Guiding Principles or the *Annotations* to the Principles (UN Commission on Human Rights 1996, 1998; Kälin 2000). Otherwise, he could not fail to see that the Guiding Principles do more than restate existing law; they tailor its provisions to the specific needs of IDPs, and they also fill grey areas and gaps in the law. Legal experts found seventeen areas of insufficient protection for IDPs and eight areas of clear gaps in human rights and humanitarian law. One notable example is the absence of a norm explicitly prohibiting the forcible return of internally displaced persons to places of danger, which was addressed in the Principles in part by guidance from refugee law. Another was the absence of a right to restitution of property lost as a consequence of displacement during conflict or to compensation for its loss. Still others included the right not to be arbitrarily displaced, the internment of IDPs in camps, and the need for special guarantees for women and children. The Principles provide a framework for identifying the protection needs of IDPs and have afforded much

needed guidance to governments, international organizations and other actors engaged with displaced populations (Kälin 2005a: 8).

The main reason no internationally binding instrument on IDPs has been introduced is not that the displaced are deemed an unworthy category but because states have not been ready to adopt a treaty on anything so sensitive to their own claim to sovereignty as internal displacement. Indeed, many states have preferred to discuss the application of the Guiding Principles without considering the issue of legal obligations. However, it is telling that a growing number of governments—including those of Angola, Burundi, Colombia, Georgia, Liberia, Peru, the Philippines, Sri Lanka, Turkey and Uganda—have been incorporating the Principles into their domestic laws and policies because they see IDPs as a category that needs to be addressed in their countries (Wyndham 2006). At the regional level, the African Union is in the process of developing a binding instrument based on the Guiding Principles, while at the sub-regional level, the member states of the International Conference on the Great Lakes Region have already adopted a Protocol on Protection and Assistance to Internally Displaced Persons—a binding instrument, that obliges states to accept the Guiding Principles by incorporating them into domestic law. At the international level, UN human rights treaty bodies have been regularly invoking the Principles when addressing situations of internal displacement. Ultimately, all these efforts may well lead to a universal convention on the protection of IDPs or to recognition of them as an expression of international customary law.

Hathaway also contends that IDPs are not a discrete category because no ‘new institutions’ have evolved to address their needs. This argument ignores the fact that for more than a decade, the international community has been trying different institutional arrangements for IDPs in an effort to create a more predictable and accountable system. In 1992, the UN Secretary-General appointed a representative on internally displaced persons and in 1997, the Emergency Relief Coordinator became the focal point for coordinating assistance and protection for IDPs. A special Internal Displacement Unit, followed by an Internal Displacement Division, was created to support the ERC in this role. In 2007, the Division was phased out and the ‘cluster approach’ was introduced to assign definite responsibilities for IDPs to the operational agencies. UNHCR thus became the lead in protection, camp management and emergency shelter for IDPs in conflict situations, while UNDP assumed responsibility for early recovery and other organizations became leads in health, sanitation, nutrition and other areas. The fact that no *one* agency was created hardly means that IDPs are not a category of concern but rather that they require attention from a variety of agencies, as do other categories like women, minorities, disabled people and the elderly. Refugees too require multi-agency involvement from the World Food Program, UNDP and a myriad of NGOs in addition to UNHCR.

Hathaway would lump the internally displaced along with the rest of the population. Yet numerous international organizations, NGOs, research

institutions and experts have issued reports over the years demonstrating how the special needs of IDPs by virtue of their displacement are often *different* from those in the general population. While they may not in every case be worse off than the non-displaced population, they are often described as ‘internal refugees’ since only IDPs live in camps inside their own countries with the specific and horrendous problems camp life entails. IDPs also need special protection from being forcibly returned to danger zones (internal *refoulement*); and unlike others, IDPs lose their homes, communities, livelihoods and property, and invariably face difficulty regaining them. They also face obstacles in many countries in securing documents or in having lost ones replaced without having to return to their areas of origin, or they are unable to register as voters because this too can only be done at the place from which they originated. Furthermore, being displaced creates inherent vulnerabilities. In many situations, IDPs have been shown to have higher mortality rates, higher malnutrition rates, and greater exposure to sexual violence, restrictions on movement, violations of land, housing and property rights, lack of access to education and jobs (see reports of the International Organization for Migration, the World Food Program, the World Health Organization, UNHCR, IDMC 2007: 19–20; 27, 47, 56, 70, 74, 77, 84, 89 as well as Mooney 2006; Feller 2006; Kälin 2006, 2007a; Ibañez *et al.* 2006; Martin *et al.* 2006; Van Hear and McDowell 2006: 63–64; OCHA 2003: 1–2; Salama 2001; Cohen and Deng 1998: 26–29). Where the situation of IDPs is on a par with that of other marginalized communities, this may be the result of the special assistance and protection efforts that have been undertaken on their behalf (Kälin 2007b). Sometimes even a decade after the emergency is over, the World Bank and the Representative of the Secretary-General have found that many IDPs remain ‘significantly vulnerable’ in ways unlike the rest of the population (Holtzman and Nezam 2004; Kälin 2005b; Ibañez *et al.* 2006).

This hardly suggests that each and every IDP (or for that matter each and every refugee) has acute protection or humanitarian problems. IDPs (like refugees) may also be merged into urban populations, where they may be indistinguishable from others despite their distinct needs. But it hardly follows that because displacement situations vary the entire IDP category should be set aside and *all* IDPs subsumed instead under the rubric of other ‘internal human rights victims’, as Hathaway proposes. UNHCR has found a more effective approach: in assuming lead responsibility for IDP protection, it has committed to pay attention to people living in IDP-populated areas and areas of IDP return (Feller 2006: 12). This could mean community-based programmes or flexibly targeted funding to ensure that the needs of IDPs are not prioritized over others. Even the International Committee of the Red Cross in its latest IDP policy recognizes that IDPs have different and sometimes more urgent needs than others in the civilian population and that a balance needs to be struck between specifically targeting IDPs and more general efforts aimed at broader segments of the population (International Committee of the Red Cross 2006).

In the last decade of the twentieth century, the surging number of IDPs quickly surpassed those of refugees, intruding upon the staid and comfortably established study and practice of international refugee law and in some measure overshadowing it. This trend is likely not just to continue but to accelerate in the twenty-first century as the impact of climate change magnifies conflict situations. A recent study by Christian Aid goes so far as to forecast a total of one billion persons displaced by the year 2050, with only five million of this figure being refugees as defined by the Refugee Convention (Christian Aid 2007). Academics and some practitioners may continue to insist on the primacy of the refugee category and deny legitimacy to that of internal displacement, but their arguments are bound to be seen as ever more irrelevant to the challenges of a new century.

Above all, it is important not to fight over who should have priority but to respond to the legitimate protection and assistance needs of both refugees and IDPs with specific instruments that are most likely to achieve the goal of ensuring that they can regain and secure the enjoyment of their rights and their human dignity.

Acknowledgement

The author expresses appreciation to Walter Kälin, Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons, for his contribution to this response. She also thanks Erin Mooney for her helpful comments.

- BENN, H.** (2004) Statement before the Overseas Development Institute, London, 15 December.
- CHRISTIAN AID** (2007) *Human Tide: the Real Migration Crisis*. London: May.
- CLARK, L.** (1988) 'Internal Refugees: The Hidden Half', *World Refugee Survey*. Washington, DC: US Committee for Refugees and Immigrants.
- COHEN, R.** and **DENG, F. M.** (1998) *Masses in Flight: The Global Crisis of Internal Displacement*, Washington DC: Brookings Institution.
- CRISP, J.** (1990) 'People Without Protection,' *Refugees*, July–August.
- DE MELLO, S. V.** (1999) Briefing before the UN Security Council. New York: UN Office for the Coordination of Humanitarian Affairs, Inter-Office Memorandum, 3 June.
- FELLER, E.** (2006) 'UNHCR's Role in IDP Protection: Opportunities and Challenges,' *Forced Migration Review*, special issue December.
- HOLTZMAN, S. B.** and **NEZAM, T.** (2004) *Living in Limbo: Conflict-Induced Displacement in Europe and Central Asia*, Washington DC: The World Bank.
- IBAÑEZ, A. M., MOYA, A.** and **VELASQUEZ, A.** (2006) 'Toward A Proactive Policy For The Displaced Population,' Executive Summary, Secretariado Nacional de Pastoral Social, Caritas Colombia, Bogotá: February.
- INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES** (1986) 'Seeking Sanctuary: Displaced People within Developing Countries', *Refugees: Dynamics of Displacement*. London: Zed Books.
- INTERNAL DISPLACEMENT MONITORING CENTRE** (2007) 'Internal Displacement: Global Overview of Trends and Developments in 2006', Geneva, April.
- INTERNATIONAL COMMITTEE OF THE RED CROSS** (2006) 'The ICRC's Position on Internally Displaced Persons'. Geneva: April.

- KÄLIN, W.** (2000) *Guiding Principles on Internal Displacement: Annotations*, Washington DC: American Society of International Law and the Brookings Institution Project on Internal Displacement.
- KÄLIN, W.** (2005a) 'The role of the Guiding Principles on Internal Displacement', *Forced Migration Review*, Supplement, October.
- KÄLIN, W.** (2005b) 'UN Expert Voices Concern for Internally Displaced Persons in Georgia', UN Press Release, 27 December.
- KÄLIN, W.** (2006) 'Côte d'Ivoire Facing Protection Crisis in terms of Human Rights of Internally Displaced Persons', UN Press Release, 24 April.
- KÄLIN, W.** (2007a) 'The Representative of the Secretary-General on the Human Rights of Internally Displaced Persons Concludes His Visit to the Central African Republic', UN Press Release, 2 March.
- KÄLIN, W.** (2007b) 'UN Expert on the Human Rights of Internally Displaced Persons Concludes Visit to Azerbaijan', UN Press Release, 6 April.
- MARTIN, S. F., FAGEN, P. W., JORGENSEN, K. M., SCHOENHOLTZ, A. and MANN-BONDAT, L.** (2006) *The Uprooted: Improving Humanitarian Responses to Forced Migration*. New York: Lexington Books.
- MOONEY, E.** (2005) 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as Category of Concern', *Refugee Survey Quarterly* 24(3).
- OCHA** (Office for the Coordination of Humanitarian Affairs) (2003) *No Refuge: The Challenge of Internal Displacement*. New York and Geneva: United Nations.
- SALAMA, P., SPIEGEL, P. and BRENNAN, R.** (2001) 'No Less Vulnerable: The Internally Displaced in Humanitarian Emergencies', *The Lancet* 357(9266): 1430–1431.
- UNITED NATIONS COMMISSION ON HUMAN RIGHTS** (1996, 1998) *Compilation and Analysis of Legal Norms (Part I), and Legal Aspects Relating to the Protection against Arbitrary Displacement (Part II)*, Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng, UN Docs. E/CN.4/1996/52/Add.2 and E/CN.4/1998/53/Add.1.
- VAN HEAR, N. and MCDOWELL, C.** (eds) (2006) *Catching Fire: Containing Forced Migration in a Volatile World*. New York: Lexington Books.
- WYNDHAM, J.** (2006) 'A Developing Trend: Laws and Policies on Internal Displacement', *Human Rights Brief*, American University: Winter.

doi:10.1093/jrs/fem020

To Date or To Marry: That is the Question

HOWARD ADELMAN

Key Centre for Law, Ethics, Justice and Governance, Griffith University, Nathan, Queensland 4111, Australia
h.adelman@griffith.edu.au

SUSAN McGRATH

Centre for Refugee Studies, York University, 4700 Keele Street, Toronto, ON M3J 1P3, Canada
smcgrath@yorku.ca

Jim Hathaway's appeal to date rather than marry proposes a separation of the study of convention refugees from that of others who are being