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Forced Displacements from Syria or How to Institutionalize Regimes of Suffering

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In March 2011, anti-government protests commenced in parts of Syria against President Bashar al Assad's regime. Protesters had a range of demands including releasing political prisoners, abolishing Syria's five decade emergency law, and ending pervasive government corruption. Discontent stemmed from a history of interrelated international and domestic political, economic and environmental factors, involving a complex interplay of regional and global geostrategic power and interest, the Assad regime's longstanding power monopoly and violent oppression of any opposition, increasing wealth inequality, underdevelopment of rural areas, long-term drought, widespread crop failure, and food and water insecurity.

The Assad regime responded with a violent crackdown, which exacerbated and entrenched its opposition. State oppression provoking increased popular resistance resulted in an ongoing cycle of escalating violence. Peaceful protests were overshadowed by militant opposition groups demanding regime change. Both government and opposition are supported by various international factions politically, militarily and financially, creating a situation of protracted conflict and insecurity.

Prior to the Syrian uprising, the Arab region already had the world's largest refugee numbers and flows. In March 2013, the Office of the United Nations High Commissioner for Refugees (UNHCR) announced that Syrian refugees numbered more than one million.¹ The total number of people forcibly displaced from Syria is much greater as many do not contact UNHCR and, of those who do, some do not fall under the refugee category. Many more are forcibly displaced domestically. As the theater of violence in Syria expands, some are uprooted multiple times as fighting catches up with their retreat. Due to protracted displacement, they are increasingly without income or savings and dependent on the generosity of others.

¹ UNHCR, *Syrian Regional Refugee Response: Interagency Information Sharing Portal* at <<http://data.unhcr.org/syrianrefugees/regional.php>> accessed 17 April 2013.

When large populations are forced across international borders, how does international law help mitigate the resultant suffering, public order, development, security, health, sanitation, environmental and other issues? For answers, the lawyer likely thinks of international refugee law, and the layperson of refugee camps run by the United Nations. This instinct is worth interrogating given that the primary international refugee law instruments – the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* – do not address mass forced displacement and make no mention of camps. Why then are contemporary international responses circumscribed by refugee law and camps? Understanding why not only sheds light on the international response to displacement from Syria; it reveals international laws on population movement to be systemically enabling certain types of persecution whilst rendering the resultant suffering invisible.

Historically, concepts of asylum and refuge have at times helped address the human suffering and public disorder caused by mass displacement, including during and between the First and Second World Wars. However, the modern international refugee law regime is not geared towards this problem. The 1951 Convention protects individuals fleeing a well-founded fear of persecution on the basis of certain types of discrimination: on the basis of race, religion, nationality, political opinion or membership in a particular social group. The Convention ties asylum to the international human rights law of non-discrimination, not international humanitarian law. This choice is particularly significant as international refugee law is a unique small chink in the otherwise impenetrable armor of the sovereign state's right under international law to control entry of non-citizens.

The Convention does not directly protect those forcibly displaced due to invasion and occupation, internal conflicts, widespread indiscriminate human rights abuses, drought, famine or natural disaster (unless the individual faces discrimination on Convention grounds). While international human rights, humanitarian, and environmental law target some of these issues, they do not directly address mass population movement. Thus, despite such movements posing long-standing global and regional challenges, there is a legal vacuum on how to cooperate internationally. The issue's pressing nature is compounded by climate change, likely to cause future displacements directly through floods, drought and desertification, and indirectly through the resultant conflict over resources. North Africa is predicted to face some of the most drastic impacts of climate change.²

States have maintained this lacuna in international law. Mass forced displacement has been managed in ad hoc and unjust ways. Burdens are not fairly shared and people are not treated equally. Such an approach is even more troubling as such displacement is predicted to increase. So far, in the absence of any other international law dealing with forced displacement, states have turned to the international refugee system and expanded the seemingly limitless mandate of UNHCR. UNHCR's 'populations of concern' now stretch well beyond Convention refugees, encompassing mass displacement and internal displacement. The primary response to mass displacement

² Intergovernmental Panel on Climate Change, *Fourth Assessment Report* (2007).

since the end of the Cold War has been the proliferating phenomenon of camps. When large numbers of forcibly displaced arrive, whether technically refugees or not, host states confine them to camps. What is by nature a provisional emergency reaction has become a long-term management strategy for protracted displacement; including in the Arab world where new generations are sometimes born and raised in camps. Seemingly ad hoc solutions have become an institutionalized part of the international system, forming structures of injustice, as the Syrian case illustrates.

Most who fled Syria remained in the Arab region, the majority in Jordan and Lebanon, with significant populations in Turkey, Iraq and Egypt.³ They fled for a variety of reasons including political persecution; fear of execution, rape, torture, enforced disappearance and abduction; indiscriminate shelling and violence; and loss of home, family or livelihood. Such cases may fall under Convention protection if persecuted on the basis of ethnicity, political opinion or other Convention grounds. However, of the primary host states, only Turkey and Egypt are party to the Convention and they have significant reservations: Egypt curtails refugee entitlement to welfare, employment, education and health;⁴ and Turkey only accepts refugees from events occurring in Europe.⁵ Outside the Convention, international law also grants everyone the right to seek and enjoy asylum in the *Universal Declaration of Human Rights*.⁶ Additionally, the Convention prohibition of refoulement – sending someone back to a place where their life or liberty is threatened on Convention grounds – is arguably customary international law.⁷ Thus all states, whether Convention signatories or not, should refrain from turning back asylum seekers at borders so as to determine whether they fall under international protection. States in the region have at times violated these laws with regard to those fleeing Syria.⁸

³ See above n 1.

⁴ United Nations Treaty Collection at http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en#EndDec accessed 7 May 2013.

⁵ United Nations Treaty Collection at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en accessed 7 May 2013. Thus, Turkey sees itself as a transit country for those fleeing Syria, giving temporary asylum until those entitled to international protection seek asylum elsewhere. Lebanon adopts the same policy, allowing persons to remain for a year, in which time UNHCR must resettle or repatriate them.

⁶ *Universal Declaration of Human Rights* art 14.

⁷ P Chan, 'The Protection of Refugees and Internally Displaced Persons: Non Refoulement under Customary International Law?' (2006) 10 *International Journal of Human Rights* 231; G Goodwin-Gill and J McAdam, *The Refugee in International Law* (2007) 201–267; J Hathaway, *The Law of Refugee Status* (1991) 24–27.

⁸ The Syrian army mined borders in an attempt to prevent asylum-seeking. 'Syria: Army Planting Banned Landmines', *Human Rights Watch* (13 March 2012) <http://www.hrw.org/news/2012/03/13/syria-army-planting-banned-landmines> accessed 18 April 2013; A Amrieh, 'Borders shut down in face of refugees fleeing Syria', *Daily Star* (20 May 2011) <http://www.dailystar.com.lb/News/Politics/2011/May-20/Borders-shut-down-in-face-of-refugees-fleeing-Syria.ashx> accessed 18 April 2013. With regard to refoulement, at times Lebanon and Iraq partially or fully closed their Syrian borders. After domestic and international pressure both states reopened borders, except for the Al Qa'im border in Iraq, which remains closed with limited exceptions.

With few Arab states party to the Convention, the region manages mass displacement through both generous and draconian measures. Syria is not party to the Convention but hosted one of the largest forcibly displaced populations in the world. Those fleeing violence in Iraq since 2003 and Lebanon in 2006 were welcomed with generosity and minimal friction despite large numbers and sectarian differences. They were integrated rather than confined to camps. But when people flee Syria, they are sometimes turned back, and those who make it out are often ill-treated, even by those whom Syrians once welcomed.⁹ Jordan, Turkey and Iraq restrict those coming from Syria to camps.¹⁰ Confinement in camps violates human rights and exposes people to special vulnerabilities, especially women and children.¹¹ Non-signatories to the Refugee Convention have obligations under other human rights treaties to protect those within their territory. Yet camps restrict freedom of movement, make regular employment and societal integration impossible, and keep stability and normality in indefinite suspension.

Camps are usually managed by domestic, international, or a mixture of both types of authority. They allow states to share the expense of hosting large populations with the international community. For instance, those fleeing Syria to Jordan are aided by UNHCR, IOM, WFP, UNICEF, and various NGOs. However, available funds are incommensurate to needs. Only 31 per cent of the \$1.5 billion pledged in January 2013 to address Syrian displacement has been forthcoming, although those fleeing have reached 110 per cent of original planning figures.¹²

The Syrian situation aptly illustrates an international framework for managing displacement that sustains itself by institutionalizing suffering in mass and protracted ways. The Refugee Convention's preamble requires the international community to share burdens and cooperate to achieve durable solutions for refugees. Indeed, Chimni has argued that burden-sharing may be a principle of customary international law.¹³ Durable solutions envisioned by the Convention are local integration, resettlement in a third state, or voluntary repatriation. The proliferation of camps undermines these goals. The majority of forcibly displaced peoples are in poor states, and camps ensure that most remain there. Rich states minimize their resettlement and integration obligations by instead funding UNHCR to buffer the bulk of these populations from accessing their territories. Poor states that are least able to bear the burden have to shoulder it even

⁹ Turkey and Lebanon refer to Syrians as 'guests' or 'brothers' rather than refugees, which means they cannot claim Convention benefits. Other surrounding states grant those fleeing Syria short-term renewable visas, temporary protection, asylum-seeker status, and only in rare cases refugee status.

¹⁰ There are currently 20 camps for those fleeing Syria. See UNHCR, 'Inter-Agency Regional Response for Syrian refugees - Egypt, Iraq, Jordan, Lebanon, Turkey 21-27 March 2013, *Reliefweb* (27 March 2013) <http://reliefweb.int/report/jordan/inter-agency-regional-response-syrian-refugees-egypt-iraq-jordan-lebanon-turkey-21-27> accessed 18 April 2013.

¹¹ For example, in Jordan, some Syrian women are forced to marry local residents as a means for their family to leave the camp. Young men of military age also risk forcible recruitment in ongoing conflict.

¹² *Ibid.*

¹³ BS Chimni, 'The Principle of Burden-Sharing' in BS Chimni (ed), *International Refugee Law: A Reader* (2000) 146.

though, as in the Syrian case, global factors frequently have a causal role in mass displacement.

As aforementioned, the Convention only protects a small category of forcibly displaced peoples. This is understandable as its original purpose was to address mass displacement in Europe in the aftermath of the Second World War – a displacement largely tied to discrimination on the basis of ethnicity and religion. This framework's extension globally was justified on the basis that the Convention protects those in greatest need. It is debatable whether discrimination gives rise to the greatest protection need and, even if one accepts this, whether the Convention lists the neediest categories of discrimination. During the Cold War, the Convention reflected Western anti-communist ideology, emphasizing individual status determination over mass influx, and prioritizing specific civil and political rights. It allowed those seeking defection from beyond the Iron Curtain to live in exile in the West. These refugees tended to be white, male and highly educated.

As Chimni and Hathaway observed, in the post-Cold War era, when faced with large numbers of Third World asylum seekers, there was a shift in Western states towards non-entrée regimes, including increasingly restrictive interpretations of the Convention, restrictive visa policies, creating international zones, off-shore processing, off and on-shore detention, among other efforts to escape Convention obligations. With regards to durable solutions, the emphasis changed from integration and resettlement to repatriation, thus justifying keeping as many people as possible close to their state of origin whether in camps or through 'safe third state' agreements.¹⁴

Global and regional responses to the Syrian exodus evidence various shortcomings in the international law on forced displacement. Beyond forced displacement, more troubling is disciplinary incoherence with regard to the broader issue of population movement. While the distinction between refugee law and other types of forcible displacement is problematic, the disciplinary distinction between forcible and voluntary migration raises more fundamental questions about the types of suffering international lawyers prioritize and those we obfuscate, normalize and tolerate. Why is the freedom from fear thus privileged over the freedom from want? Is such a bias preventing us from seeing durable solutions to large scale population movement? After all, the primary driver of population movement is economic need. Yet the discipline has insulated migration from any international normative framework except those allowing rich states to assert ever-increasing sovereign control over their borders.

Charlesworth observed that international lawyers often understand, describe and shape our discipline through the lens of perceived crises events.¹⁵ Border camps, where

¹⁴ BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350; BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23 *Refugee Survey Quarterly* 55; J Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 13 *Harvard International Law Journal* 129; J Hathaway & RA Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115.

¹⁵ H Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 267.

international organizations struggle to discipline and control mass movements, engender just such a crisis-centered mentality. By the end of this year, aid agencies predict there will be 3.6 million people fleeing Syria and 6 million displaced internally, out of a population of 23 million. But forced displacement from Syria is not just about temporary crises. It is also symptomatic of protracted conflicts, much longer systemic patterns of struggle and resistance, intertwined with various transnational, international and global factions, interests and standoffs. Whether in Syria or elsewhere, people are driven to move for reasons not unrelated to international regimes of trade, environment, investment, labor, migration, and so on, that contribute to poverty, conflict and human rights abuse. To formulate a coherent disciplinary response to the pressing issue of population movement, we may have to learn to be more closely attuned to these diverse forms of persecution, thus enabling us to identify and dismantle those international laws that institutionalize regimes of suffering.