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# Reconciling State Sovereignty and Protections for the Internally Displaced

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# 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."[1] 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.

**1.** "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. ... [T]he 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,[3] 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.

**2.** See Leo Gross, *The Peace of Westphalia*, 1648-1948, 53 *American Journal of International Law* 1 (1959).
**3.** See, Hugo Grotius, DE *JURE BELLI AC PACIS, LIBRI TRES*. (On the Law of War and Peace) Translated by Francis W. Kelsey [with others] New York: Oceana, 1964. (Classics of international law.) Grotius lived from 1583-1645. This work was first published in 1646.
**4.** See, S.S. Wimbledon, 1923 PCIJ (ser. A) No. 1, at 25 (Aug. 17).
**5.** See, *UN Charter* Articles 39-42.
**6.** *Id.*, Article 25

## 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.[7] 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.[8] 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.[9]

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.[10] 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."[11] 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."[12] 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.

**7.** W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *American. Journal of International Law*. 866, 872, 876 (1990).
**8.** *Id.*
**9.** *Id.* at 873.
**10.** *Id.* at 872.
**11.** See, *Guiding Principles on Internal Displacement*, (*Guiding Principles*) Annex to the Report of the Representative of the Secretary-General, Mr. Francis M. Deng, op. cit. note 1, Principle 25 of which provides that:

> (1) The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
> (2) International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
> (3) All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

**12.** See, Bartram S. Brown *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHICAGO-KENT LAW REVIEW 203, 204 (1992). (On the responsibilities of the international community when the state fails and cannot protect the basic rights of its citizens.)

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*[13] 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,[14] 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.[15] 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.[16]

**13.** *Convention Relating to the Status of Refugees* Art. 1. 189 U.N.T.S. 137. Signed at Geneva on July 28, 1951; entered into force on April 22, 1954.

**14.** One of the principal obligations was not to expel or to return refugees to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion. persecution. *Id.* Article 33.

**15.** *Id.* Article 1(A)(2).

**16.** Protocol Relating to the Status of Refugees, 6577, 606 U.N.T.S. 267, Signed at New York on January 31, 1967, entered into force on October 4, 1967.

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*[17] ("*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*[18] and various other human rights treaties, the *Guiding Principles* provide for the rights to life, dignity, liberty and security of IDPs;[19] for their rights to freedom of thought, conscience and religion;[20] that they shall be protected against genocide, murder, summary or arbitrary executions and enforced disappearances;[21] that they shall be protected from discriminatory arrest or detention as a result of their displacement;[22] and that they have the right to liberty of movement.[23] Like the *International Covenant on Economic, Social and Cultural Rights*,[24] the *Guiding Principles* recognize that IDPs should also have access to food, clothing, shelter, medical services and education[25] and that they have the right to communicate in a language they understand.[26]

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[27] it follows the lead of the *Refugee Convention* in incorporating the principle of "non-refoulement."[28] 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.[29] In theory this right should already preclude their forcible return or resettlement. The *Guiding Principles* simply make this explicit.

**17.** *The Guiding Principles on Internal Displacement* were formulated by Francis M. Deng, pursuant to a request from the UN Commission for Human Rights, and are reproduced in the Annex to his report 1998 to the Commission. See, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, op. cit. note 1, Annex.

**18.** *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

**19.** *Id.* Principle 8.

**20.** *Id.* Principle 22(a).

**21.** *Id.* Principle 10.

**22.** *Id.* Principle 12(3).

**23.** *Id.* Principle 14.

**24.** *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

**25.** *Id.* Principles 18 and 23.

**26.** *Id.* Principle 22(e).

**27.** See, *Id.* Principle 15.

**28.** Convention on the Status of Refugees, op. cit. Note 15. at Art. 33(1). Art. 33(1) states that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

**29.** Article 12 of the International Covenant on Civil and Political Rights provides that: Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his own residence.
...
The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect public national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
ICCPR Article 12(1) and (3).

## Humanitarian Imperatives in the Development of International Law: The *Guiding Principles* and Progressive Development of the Law

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,[30] 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 these 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.[31] 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.[32]

This language was sufficient to establish that human rights are a matter of international concern, but that was only the beginning. The proper balance between international human rights and state sovereignty has been a subject of continuous debate since the *Charter*'s adoption. Some governments still invoke state sovereignty in protesting any discussion of the human rights situation in their countries.[33] They resent and condemn as a form of unwelcome intervention even the most benign form of concerned diplomatic intercession, whether by international organizations such as the UN, by the governments of other states, or by NGOs. But in the second half of the twentieth century it was widely recognized that state sovereignty does not shield a state from legal or political responsibility for human rights violations, and that it does not bar diplomatic initiatives by other states on behalf of the victims.

Likewise, sovereignty should not entitle a state to deny available humanitarian assistance to IDPs who desperately need it to survive. A modest but highly significant step forward is proposed in those *Guiding Principles* relating to humanitarian assistance. These assert, among other things, that NGOs "have the right to offer their services in support of the internally displaced,"[34] that "consent thereto shall not be arbitrarily withheld" by the national authorities when outside humanitarian assistance is urgently needed,[35] and that national authorities "shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced."[36]

**30.** See, for example, the 1949 decision of the International Court of Justice in the *Corfu Channel Case* (United Kingdom v. Albania), 1949 I.C.J. 4, 22, which noted that "[t]he obligations incumbent upon the Albanian authorities ... are based, not on the Hague Convention of 1907 ... but on certain general and well-recognized principles, namely: elementary considerations of humanity..." The specific principles found to reflect such elementary principles and applied in that case were the freedom of maritime communication, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. *Id.*
**31.** *UN Charter* Article 1(1).
**32.** See, for example the *UN Charter* Articles 1(3) and 55(c).
**33.** In support of their argument these states can cite article 2(7) of the *UN Charter* which provides that "[n]othing contained in the present *Charter* shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present *Charter*; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
**34.** *Guiding Principles*, op. cit. note 13, Principle 25(2).
**35.** *Id.*
**36.** *Id.* Principle 25(3).

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."[37]

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.[38] According to the text of those treaties, these grave breaches must be committed in the context of *international* armed conflict.[39] 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.

**37.** *Id.* Principle 24(2).

**38.** See, for example Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, [*hereinafter* Geneva Convention (IV)] article 147.

**39.** See, *Id.*, article 2 (limiting the applicability of the Geneva Convention to armed conflict between parties to the Convention), article 4 (stating that "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals"); and article 147 (defining the grave breaches as certain listed acts committed against "protected persons" as defined in article 4.)

**40.** See *Prosecutor v. Tadic*, APPEALS DECISION ON JURISDICTION, Case No. IT-94-1-AR72, Aug. 19, 1995. In this landmark decision the International Criminal Tribunal for the Former Yugoslavia concluded that because of increasing global interdependence and concern about human rights, state sovereignty no-longer justified excluding internal armed conflict from the purview of international humanitarian law.

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. . . . Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight. (*Id.*, para. 97.)

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."[41] 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..."[42] 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.

**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.

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.