

# Legal protection frameworks

Tamara Wood

**The large-scale displacement associated with the recent popular uprisings in North Africa both reinforces and challenges the role of legal protection mechanisms.**

For more than 60 years the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) has provided the cornerstone of international protection for displaced persons. It is an important source of protection for many of those fleeing popular uprisings in North Africa, having been ratified by many of the destination countries, such as Egypt, Tunisia, Algeria, Italy and Malta.<sup>1</sup>

The broader context of North African displacement, however, highlights some of the limitations of the Convention's rather narrow and technical definition of a refugee, which may exclude many people genuinely in need of protection. Persons fleeing generalised violence or armed conflict, such as occurred in Libya for example, will frequently fall outside the Convention's definition because of their inability to establish a link between the risk of harm they face and one of the five stated grounds of persecution [see box]. In addition, the Convention's refugee definition is confined to persons with a well-founded fear of persecution only in relation to their country of nationality. So-called 'third-country nationals' – including migrant workers and refugees from other

The 1951 Refugee Convention, along with its 1967 Protocol, applies to any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (Art 1A(2)). Persons satisfying this definition are refugees and benefit from a range of rights under the Convention, including rights to work, education and housing, as well as protection from *refoulement* – that is, from being returned to a place in which their life or freedom would be threatened (Art 33).<sup>2</sup>

countries living and working in North African states at the time of the uprisings – are unable to claim protection under the Refugee Convention in relation to their fear of harm in those states.

For persons falling outside the scope of the Refugee Convention, a number of

subsequent developments in the protection of forced migrants may provide an alternative source of protection. The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) is one such source, designed to address aspects of African refugee protection not adequately addressed by the 1951 Convention.<sup>3</sup> Significantly, the 1969 OAU Convention's definition of a refugee extends protection to include any person who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (Art 1 (2)).

This more readily encompasses displacement caused by situations of widespread conflict, such as in Libya.

Like 1951 Convention refugees, refugees under the 1969 Convention also benefit from the principle of *non-refoulement*, which prevents them from being returned to a territory where their "life, physical integrity or liberty" would be threatened. They also arguably benefit from the broad range of refugee rights set out in the 1951 Convention; although the 1969 Convention itself does not contain a comparable list of rights, its explicit intention to provide a 'regional complement' to the former presents a strong case for the provision of equal rights to refugees under both definitions.

While the scope of the 1969 Convention's refugee definition is broader than its 1951 counterpart, it imposes protection obligations on African states only, and does not extend to the more than 45,000 people who fled across the Mediterranean Sea to Europe, who must rely on the narrower 1951 Convention definition for refugee status. And even within Africa, OAU Convention refugees may be denied the opportunity to access durable solutions such as resettlement, which is generally only available to refugees under the 1951 Convention.

Refugee status under both the 1951 and 1969 Conventions is also subject to the instruments' respective exclusion and cessation provisions, whereby a refugee's protected status may be denied where the refugee has committed a war crime, crime against humanity or other serious non-political crime,<sup>4</sup> or may be removed where "the circumstances in connection with which he was recognized as a refugee have ceased to exist"<sup>5</sup>. However, such provisions must be interpreted in light of each Convention's overall object and purpose – which is to provide protection – and thus should be applied cautiously. For example, UNHCR has made it clear that for change in country conditions to warrant cessation of refugee status, that change must be sufficiently "fundamental, stable and durable".<sup>6</sup> While many Libyans who left the country during the height of conflict have now returned, the violent nature of regime change in Libya means it is unlikely to constitute sufficiently stable and durable change to warrant the cessation of refugee status in the immediate future.



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In addition to the refugee-specific 1951 and 1969 Conventions, broader international human rights law also provides protection to displaced persons, both by extending the principle of *non-refoulement* beyond those who qualify for refugee status and by stipulating minimum standards of treatment for all persons within a given state's territory or jurisdiction. The International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT) and the Convention on the Rights of the Child (CRC), for example, all prevent states from returning people to locations and situations where they would face harm.

In Europe, these broader *non-refoulement* obligations have been implemented under the European Union's

forms of displacement pose to existing frameworks. A significant number of Somali, Sudanese and Eritrean migrant workers, for example, fled Libya to neighbouring countries such as Egypt and Tunisia. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides important rights for migrant workers in their country of residence; however, it does not address the particular issue of displacement. Where migrant workers can show that they would face serious harm if returned to their country of origin, they may benefit from the broader principle of *non-refoulement* but, in general, despite facing situations of vulnerability equal to, or greater than, many displaced nationals, migrant workers are rarely afforded the special status of many other displaced persons.

The lack of protection under international law for persons who have not crossed an international border – i.e. IDPs – is also a noted feature of international and regional forced displacement governance, although the Guiding Principles on Internal Displacement<sup>7</sup> and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)<sup>8</sup> present two significant developments in this area. In particular, the Kampala Convention – adopted unanimously by the African Union (AU) in October 2009 – provides binding obligations on African States Party to provide for protection of persons displaced within their own borders. Although this is yet to come into effect (requiring ratification by a minimum of 15 AU Member States), the North African experience demonstrates the potential future significance of such an instrument in the region.

Perhaps the greatest challenge to protection, however, is in the actual implementation of international and regional legal protection mechanisms. In many states, both treaty and customary obligations must be incorporated into national law before they are enforceable at the national level. Where states fail to fulfil their international protection obligations, there are limited opportunities for redress for those affected. While many human rights treaties have review and complaints mechanisms, such mechanisms are slow-acting and may bring a result too late to be meaningful for the complainant. And there is a conspicuous absence of any equivalent procedures under refugee-specific protection instruments. The experience of displacement in North Africa presents an opportunity to consider how both international and regional legal protection mechanisms might be strengthened to ensure that limitations in scope and implementation do not undermine the overall protection goals for which they were conceived.

Tamara Wood [tamara.wood@unsw.edu.au](mailto:tamara.wood@unsw.edu.au) is a Nettheim Doctoral Teaching Fellow and PhD candidate at the University of New South Wales. [www.unsw.edu.au](http://www.unsw.edu.au)

1. See 'Who's signed what' section, FMR supplement on 'Islam, human rights and displacement' [www.fmreview.org/human-rights](http://www.fmreview.org/human-rights)
2. [www2.ohchr.org/english/law/refugees.htm](http://www2.ohchr.org/english/law/refugees.htm)
3. [www.unhcr.org/refworld/docid/3ae6b36018.html](http://www.unhcr.org/refworld/docid/3ae6b36018.html)
4. 1951 Refugee Convention, Art 1F
5. 1969 OAU Convention Art 1(4)(e); 1951 Refugee Convention Art 1C(5)
6. UNHCR ExCom Conclusion No. 68 (1992)
7. See [www.brookings.edu/about/projects/idp/gp-page](http://www.brookings.edu/about/projects/idp/gp-page) for all language versions
8. <http://tinyurl.com/Kampala-Convention-En>



A Tunisian man hands back passports to Bangladeshi refugees that were collected by the Tunisian military at the time of crossing the border.

'subsidiary protection' regime. However, it is worth noting that the principle of *non-refoulement* is now so widely accepted that it is considered a principle of customary international law; the obligation not to return persons to harm is therefore binding on all states, including those not party to any of the relevant treaties.

### Outside the protection net

The international and regional protection instruments described above reflect long-standing legal and normative distinctions between different categories of migrants – in particular, between so-called 'forced' and 'voluntary' migrants. Mixed migrations flows – whereby economic ('voluntary') migrants, refugees and other forced migrants move simultaneously between states and regions – make it difficult to identify those genuinely in need of protection. In addition, the mixed motivations of individual migrants challenge the conceptual distinction between refugees and other migrants.

In the North African context, displaced migrant workers provide a stark illustration of the challenges that modern