The history and status of the right not to be displaced

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The many existing fragments of law relating to arbitrary displacement have a common thread running through them, revealing a human right not to be displaced. The existence of such a right might seem obvious but it has not yet been recognised in any international legal instrument.

In 1993, in the context of the huge displacement crisis in the former Yugoslavia, UN High Commissioner for Refugees Sadako Ogata spoke for the first time on the 'right to remain'. In addressing the UN Commission on Human Rights she spoke boldly of the right of people to remain in their homes and homelands in peace, reflecting a shift in UNHCR's own thinking about human rights issues and human rights violations in causing refugee movements.

Since the 1970s there had been a focus in international law on distinct aspects of arbitrary displacement, such as mass expulsions or population transfers, and a call for their prohibition. This work developed into fully fledged UN studies in the 1990s on population transfers. Another stream developed into UN studies on forced evictions, while – in an unrelated development – the International Labour Organization was exploring displacement and the rights of indigenous peoples, and the World Bank and others were debating development-induced displacement.

A first academic proposal suggested the following formulation for the right not to be displaced:

"No one shall be forced to leave his or her home and no one shall be forcibly relocated or expelled from his or her country of nationality or area of habitual residence; unless under such conditions as provided by law solely for compelling reasons of national security or specific and demonstrated needs of their welfare or in a state of emergency as in cases of natural or man-made disasters. In such cases all possible measures shall be taken in order to guarantee the safe departure and resettlement of the people elsewhere…."[1]

Not everyone was impressed with the promotion of a right not to be displaced or a right to remain. Opponents seemed particularly upset with Ogata's 'right to remain', which they saw as duplicating existing human rights law and, more importantly, endangering the right to seek asylum. Proponents, on the other hand, noted that clarity and comprehensiveness in the law on displacement were both desirable and much needed. Some went so far as to propose a merger of nascent 'IDP law' and traditional refugee law, based on a comprehensive human rights treatment of forced migration within which displacement would be a clear violation.

Traditional refugee protection work had never been strong in addressing the causes of displacement, although it can also be argued that this apparent shortcoming is actually a strength in that it preserves the humanitarian – i.e. non-political – character of asylum. To the extent that UNHCR staff could, in the 1990s, conceive of their protection work in human rights terms, they logically tended to emphasise the affirmation of people's freedom of movement rather than an elusive right to remain and to receive protection *in situ*. Meanwhile, however, the agency found itself increasingly engaged with internal armed conflicts, and physically closer than ever before to very serious human rights violations causing displacement. Internal displacement, it was thought, was the issue in need of legal gap-filling, while asylum had to stand, as an indispensable last resort.

Gaining ground

Upon taking office in 1992, the first Representative of the Secretary-General on Internally Displaced Persons, Francis M Deng, made it clear that he considered dealing with the causes of displacement to be an integral part of any effort to promote the rights of internally displaced persons. Even so, it took him some time to convince his team of legal experts. Under the heading 'Principles Relating to Protection from Displacement' (and clearly not limited to internal displacement), Principles 5 to 9 of the Guiding Principles on Internal Displacement articulate the "right [of every human being] to be protected against being arbitrarily displaced from his or her home or place of habitual residence" and the circumstances, standards and modalities (both substantive and procedural) under which displacement is permissible. States have both the duty to respect the right not to be displaced by refraining from carrying out arbitrary displacement, and the duty to protect the right from being threatened by non-state actors, such as armed militias, or particular circumstances, like natural or human-made disasters.

The team drafting the Guiding Principles had a distinct sense that Principles 5 to 9 were breaking new ground in international law, even though the Guiding Principles as a whole were, and largely remain, 'soft law' only. The Guiding Principles also address the concern that the right not to be displaced would endanger or substitute the right to seek asylum by expressly providing that the Principles "are without prejudice to the right to seek and enjoy asylum in other countries".[2] Indeed, these two human rights can be considered as being fully complementary, offering a choice (at least in theory) to potential victims of displacement: to stay or to move.

Since the formulation of the Guiding Principles on Internal Displacement, the right not to be displaced has been explicitly recognised in a number of international, regional and sub-regional instruments. In 2000, the International Law Association (ILA), a non-governmental organisation devoted to the study and development of international law, adopted the London Declaration of International Law Principles on Internally Displaced Persons which includes an explicit reference to the

A family hurries away from the Abobo neighbourhood in search of safety during political unrest in Abidjan, Côte d'Ivoire, 2011.

right not to be displaced.[3] Five years later, the Special Rapporteur on Housing and Property Restitution, Paulo Sérgio Pinheiro, articulated the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (commonly known as the Pinheiro Principles). Principle 5(1) explicitly recognises the right not to be arbitrarily displaced, almost exactly copying the Guiding Principles. Although these instruments are not legally binding, they are evidence of the widespread acceptance of Principles 5 to 9.

In 2006, eleven African states of the Great Lakes Region adopted the Protocol on the Protection and Assistance to Internally Displaced Persons. This Protocol was the first legally binding instrument to oblige states to implement the Guiding Principles on Internal Displacement (and thus the right not to be displaced). A last, important development was the African Union's adoption in 2009 of the legally binding Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), article 4(4) of which expressly lays down the right not to be displaced.

Globally, about twenty states have to date incorporated the Guiding Principles into their national legislation and policy, and/or have drawn inspiration from them, at least implying a degree of approval of the right not to be displaced. In other words, the right not to be displaced has on various occasions been recognised as a universally applicable human right, and can therefore be considered as an emerging right in international law. That it is derived from or implied by other, well-established human rights – in particular the right to freedom of movement and residence, the right to private life and the right to adequate housing – is beyond dispute. Nonetheless, the 'naming effect', i.e. restating and clarifying a legal norm in a legally binding or otherwise authoritative instrument, thereby defining explicitly what is implicit in international law, is likely to significantly strengthen existing protection.

The express recognition of the right not to be displaced has considerable symbolic value. It gives a clear signal to state and non-state actors actively involved in the displacement of people by affirming the intolerable character of such practices. In addition, it serves as a solid legal framework guiding responsible actors in their various duties in relation to the prevention of arbitrary displacement. And for potential victims of arbitrary displacement it may ease their struggle against state conduct or policy decisions before these lead to unlawful displacement.

In addition, the right not to be displaced provides victims of arbitrary displacement wishing to hold their states accountable with a stronger legal basis to plead their case and bring successful claims for remedy and reparation before judicial or quasi-judicial bodies, since a 'detour' through other human rights is no longer necessary.

The way forward

The majority of the instruments explicitly laying down the right not to be displaced are 'soft law'. In order to strengthen legal protection from displacement,

three things are needed. First, the right not to be displaced should be more firmly recognised by a competent, authoritative body (such as the UN General Assembly or UN Human Rights Council) in an authoritative international instrument (such as a new convention, a protocol to existing human rights conventions, or a resolution). A working group may be established and mandated by the Human Rights Council to (re-)examine the right not to be displaced and draft an appropriate normative instrument.[4]

Secondly, efforts must be undertaken to further clarify and make concrete the contents of the right not to be displaced. This includes establishing its personal, substantive, territorial and temporal scope of application, spelling out as precisely as possible the rights attributed to individuals and obligations imposed on states, and detailing the conditions under which the right can be lawfully restricted. Human rights courts, commissions and committees, as well as scholars, can all contribute to the clarification and interpretation of the right not to be displaced.

Thirdly, the right not to be displaced must be more than just a lofty declaration of intent. Both at the international and the domestic level, measures and initiatives must be introduced in order to implement, enforce and effectively realise this right. Such implementation and enforcement measures should aim at the prevention of arbitrary displacement; the halting of ongoing violations of the right not to be displaced; the effective punishment of perpetrators; and the provision of remedies and reparations for victims of arbitrary displacement, including access to justice, restitution and/or compensation and rehabilitation. At the international level, we would propose the establishment of a new Committee on the Protection from Arbitrary Displacement to monitor and enforce the right not to be displaced.

The recognition and effective realisation of the right not to be displaced should not remain a utopian pursuit. Tackling displacement at its roots through a rights-based approach is definitely the way forward.

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1. Stavropoulou, M (1994) 'The right not to be displaced', American University *Journal of International Law and Policy* 9(3), 689-749.

2. Principle 2(2)

3. Article 4(1)

4. In this respect, inspiration could be drawn from the legal developments as regards the prohibition of enforced disappearance.
See www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98