

Regional approaches to incorporating the Guiding Principles

Walter Kälin, the UN Secretary-General's Representative on the Human Rights of Internally Displaced Persons, has – like his predecessor – sought to 'harden' soft law by encouraging states to develop national laws and policies based on the Guiding Principles. A parallel track has been to

work with regional organisations to develop region-wide, binding conventions. While the negotiations may be more lengthy, involving as they do a number of states, the impact may be greater, firstly because several states accede to regional conventions at the same time and secondly because being subject to the scrutiny of a

regional organisation may place greater pressure on individual states to actually fulfil their commitments.

The best examples to date of incorporating the Guiding Principles in regional approaches are in Africa, as discussed in this article by Brigitta Jaksa and Jeremy Smith.

Africa: from voluntary principles to binding standards

Brigitta Jaksa and Jeremy Smith

A continent-wide Convention to protect IDPs in Africa could soon be adopted by the African Union. If sufficiently robust and aligned closely with the Guiding Principles, it would send a powerful signal about Africa's determination to address IDP issues.

With as many IDPs in Africa – 12 million – as in the rest of the world put together, African states have already shown leadership in the area of IDP protection. Signed in 2006, the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons¹ obliges signatory states to adopt and implement the Guiding Principles. The decision by African Union (AU) ministers in 2006 to initiate a process to develop a continent-wide framework on the rights of IDPs raises the prospect of binding standards for Africa as a whole. The Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa is expected to be approved at a Special Summit of the AU in Uganda in April 2009

The draft Convention is broadly based on the Guiding Principles. IDP advocates welcome it but have a number of reservations.

- The opening clause requiring states to refrain from and prevent discrimination is too

narrow, focusing only on "ethnic, racial or religious" factors, rather than mirroring Guiding Principle 4 which outlaws discrimination of any kind.

- The Convention lacks the positive assertion of Guiding Principle 1 that IDPs "shall enjoy ...the same rights and freedoms under international and domestic law as do other persons in their country." At most, it creates a negative obligation on states to "prevent political, social, cultural and economic exclusion and marginalization, likely to cause displacement."

- Language about "simplified procedures" to restore property to IDPs is vague and may not empower IDP women to recover property in cases where they lack the right to inherit what is considered solely their husband's property.

- The Convention itemises rules of behaviour for non-state armed actors but, by definition, such non-state actors cannot be party to the Convention.

- The Convention, unlike the Principles, directly addresses the issue of development-induced displacement. However, the vagueness of a caveat saying that this applies only to "large-scale" development could allow states to avoid responsibilities. The Convention says nothing about public and parliamentary scrutiny of projects likely to cause displacement.

- Various articles dealing with states' responsibilities to provide protection and humanitarian assistance – or to enable others to provide it – create unease: for each clause strongly laying out standards, another clause potentially undermines the point being made. For example: the Convention requires states to acknowledge the neutrality, impartiality and independence of humanitarian actors but, worryingly, gives states "the right to prescribe the technical arrangements" concerning humanitarian access; a clause gives international agencies only a limited role in assessment of needs and vulnerabilities, meaning that a state could choose to decide that IDPs' needs are being met, whatever the actual situation they face; references to situations when states are unable to protect and assist IDPs sometimes

indicate that states “shall” seek international assistance and sometimes merely that they “may”; and the inclusion of a condition that outside assistance would be sought when “maximum available [state] resources are inadequate” is unhelpful, since it creates a mechanism by which a state can prevent such assistance, even in cases where it has no intention of providing it itself.

- Language about monitoring compliance is vague. The draft envisages the establishment of a Conference of States Parties for the purposes of monitoring and reviewing implementation but does not specify its functions or clarify reporting mechanisms.

A potential means of ensuring compliance is the African Court of Justice and Human Rights – an institution intended to be the “principal judicial organ of the [African] Union” but which is not yet functional. According to the protocol establishing it, the Court has jurisdiction over not only provisions of the African Charter on Human and Peoples’ Rights² but also any other relevant human rights instruments ratified by the states concerned. This means that if a state has ratified the Protocol, the Court would in theory be able to consider issues of a state’s compliance with the IDPs Convention.

Should these reservations be addressed, the Guiding Principles

could be on the cusp of forming the core of the world’s first international legal instrument for the protection of IDPs.

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1. The Protocol, part of the Pact on Security, Stability and Development in the Great Lakes Region, was signed by 11 states, including Sudan, Uganda and the Democratic Republic of Congo, between them home to nearly two-thirds of Africa’s IDPs. http://www.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol.pdf

2. http://www.achpr.org/english/_info/charter_en.html