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’ Rights 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.

Brigitta Jaksa (brig@idpaction.org) is Legal Advisor and Jeremy Smith (jeremy@idpaction.org) is Director of Organisational Strategy at IDP Action (www.idpaction.org), a UK-based agency campaigning for the rights of African IDPs. The full version of this article is available at the organisation’s website.

Can the Guiding Principles make a difference in Kenya?

Jacqueline Klopp and Nuur Mohamud Sheekh

Kenya has signed the Regional Pact on Security, Stability and Development in the Great Lakes Region which includes legally binding IDP protection protocols based substantially on the Guiding Principles. Potentially, advocates could use the Pact to enhance efforts to assist those still displaced as a result of violence following elections in December 2007.

Prior to the most recent bout of violence in Kenya, small steps were being made in pushing the Kenyan government to address long-standing internal displacement issues. A Task Force on Resettlement was set up and allocated some 1.3 billion Kenya shillings (approximate US $16.5 million) in the 2007-08 financial year to buy land on which to resettle the displaced. While there were serious problems with how the task force and resettlement money were handled, it was a step forward. Ratification of the Pact signified acceptance of the Principles as a framework for dealing with internal displacement.

Some 600,000 people were displaced and around 1,500 killed after the election on 27 December 2007. Many of these people had been displaced on previous occasions. Chronicling previous politically induced displacements in 1992, 1997 and 2002, the Commission of Inquiry into Post-Election Violence described internal displacement as a “permanent feature” in Kenya’s history. The National Accord and Reconciliation Agreement signed on 28 February 2008 prioritised dealing with the displacement crisis, mandated an investigation into the post-election violence that caused mass displacement and put together a team to forge a National Reconciliation and Emergency Social and Economic Recovery Strategy. Determined to encourage rapid and premature return, the government announced its intention to close IDP camps situated in stadia and public showgrounds by June 2008. However, IDPs were not adequately profiled or disaggregated into categories according to needs and as a result of lack of consultation the government failed to recognise the substantial category of people unable or unwilling to return home.

In May 2008, the government launched Operation Rudi Nyumbani (Operation Return Home). To put pressure on IDPs, essential services such as water were cut off – in clear violation of the Guiding Principles. Sums of 10,000 Kenya shillings (approximately $127) were offered to those who agreed to go back home. IDP associations raised a number of concerns about Rudi Nyumbani, noting the lack of:

- compensation or business support loans
- preparations for security and reconciliation in places of return
- planning for those who did not wish to return or had no access to land
- provision for vulnerable groups such as HIV/AIDS patients and displaced children in foster families and in school