

The future of the Guiding Principles

Walter Kälin

Although it is hard to take an objective view on an enterprise in which you have been closely involved, it is fair to say that over the last ten years the Guiding Principles have demonstrated their utility and impact but also their limitations.

In Burma, they have been used to raise awareness about displacement and mobilise humanitarian assistance but have offered little diplomatic or political leverage to influence the national authorities. During elections in Bosnia and Herzegovina and in Kosovo, the Principles focused attention on IDPs' political rights but across the world IDP political participation remains inconsistent. They have helped inspire the peace process in Nepal but the country still lacks an effective IDP strategy. They have informed the ongoing process of drafting the African Union Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa but – assuming it is approved by the African Union at a special summit¹ – its effectiveness will depend on the degree of compliance and monitoring. The Principles were issued to Georgian civil servants designated to provide assistance to those displaced by the recent conflict but the response of the government to Georgia's latest displacement crisis has been criticised. They form the basis for Uganda's National Policy for Internally Displaced Persons but there is still a very significant implementation gap.

As the article by Elizabeth Ferris² explains, it is not easy to assess accurately the impact of the Principles. However, the examples that have been provided in this Special Issue, in particular those by field practitioners working with the Principles, have helped me to better understand their potential and limitations.

What can be done to further increase the impact of the Principles? Some have suggested that the sorts of

obstacles to their adoption and implementation described in the preceding articles would be overcome by having a binding UN Convention on the human rights of IDPs. Francis Deng, my predecessor, deliberately submitted the Principles as an expert text rather than a draft convention.

As the article by Deng and Roberta Cohen³ explains, there were several convincing reasons for this decision. Treaty making in the area of human rights had become difficult and time-consuming. Deng felt that something more immediate was required to respond to the needs of the growing numbers of IDPs worldwide, and he wanted to avoid a long period

of legal uncertainty resulting from drawn-out negotiations. We stressed that the Principles were not creating new law but restating obligations that already existed under human rights and international humanitarian law binding upon states. We were concerned that negotiating a text that draws as heavily from existing law as do the Principles might have allowed some states to renegotiate and weaken existing treaty and customary law. Having a treaty approved would by no means have guaranteed its widespread ratification by governments. Finally, we felt that to draft a treaty that combines human rights and humanitarian law was probably premature. In legal, institutional and political terms, the distinction between human rights applicable mainly in peacetime and humanitarian law for times of armed conflict still was so fundamental that it was likely that many states and organisations would strongly oppose

IDP camp, Hal Hajid, Chad, February 2008.



any attempt to combine both areas of law in a single UN convention.

Still an internal affair?

These reasons still stand today. Negotiations on the 2005 World Summit Outcome document⁴ showed that while the Principles were welcomed by all governments, many governments were still not ready explicitly to recognise their binding character. The idea that internal displacement is essentially an ‘internal affair’ remains strong in many parts of the world. Consensus between states and their sovereign governments is the very foundation of international law. I believe it still makes sense to continue to build consensus from the ‘bottom up’.

Such an approach hinges on convincing states affected by internal displacement to incorporate the Principles into domestic law and to encourage regional organisations to develop locally applicable normative frameworks. This approach has worked with some success but we must develop new strategies, especially how to better incorporate the rights of IDPs restated by the Principles into domestic law. Too often, they are incorporated simply through a general reference to the Principles in a law or policy document. This may be because of an insufficient understanding of the complexities of the task but in some cases indicates lack of sufficient political will to properly address the plight of IDPs.

My missions and visits to countries affected by internal displacement have shown that, even where the political will to help IDPs does exist, applicable legislation often fails to take into account their specific needs and thus may create insurmountable obstacles for enjoyment of the rights guaranteed to them. In Nepal, for example, the right to education of displaced children is affected by their inability to produce ‘transfer papers’ issued by the headmaster of their former school, thus barring them from enrolment in a new school. In Côte d’Ivoire, most displaced children lack the birth certificate needed to access schools – either never having had one, having left it behind during flight or having had it confiscated – but there are no mechanisms for replacing documents. Commonly,

IDPs cannot participate in elections because there are no provisions for absentee voting. In northern Uganda, funding mechanisms provide districts with resources earmarked for development, not humanitarian activities; at the end of the year, funds which could have alleviated IDPs’ problems have been returned unspent to Kampala as conflict has prevented development activities. Frequently IDPs cannot regain their property because they lack documents proving their ownership. Sometimes, people displaced for long periods cannot recover their property even if return becomes possible because of statutes to the effect that those who have abandoned property for a stipulated period have lost their rights. This can allow those who arbitrarily displaced people by force to become rightful owners.

It is obvious that in such situations the headmaster of a local school, the national electoral commission or other authorities will stick to the laws immediately regulating their work and not apply the Principles, even if they know them. In short, existing domestic laws on internal displacement have not always succeeded in clarifying how the rather abstract general principles of international law articulated by the Principles should be translated into concrete actions.

Manual for Law and Policymakers

The next step is to bring the Principles into line with relevant domestic laws. My mandate, together with the Brookings-Bern Project on Internal Displacement, has developed a manual for law and policy makers which identifies obstacles and key principles that must be enshrined at the domestic level. The central aim of the manual is to provide advice on how to shape laws and policies addressing the protection and assistance needs of IDPs in a way that ensures full protection of their rights in accordance with the Principles. The manual is targeted at national policymakers, competent ministries, legislators and civil society groups concerned with internal displacement. We hope the manual will be of direct and concrete assistance in crafting laws and policies that will, wherever possible, prevent internal displacement and mitigate its effects

on the lives of IDPs. While the guidance in the manual will need to be applied in accordance with the domestic legal order and national drafting traditions, it should provide specific guidance on approaches to structure responses to internal displacement that comply with relevant international law principles.⁵

The law of internal displacement can only grow if states, international organisations and other actors continue to insist that specific guarantees exist for the internally displaced. Even if some of these claims will be rejected, others, as the history of the Principles show, will be accepted. I hope that this growing body of law will continue to take the direction indicated in the Guiding Principles and become an even stronger tool to protect the millions of IDPs around the world.

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1. http://www.unhcr.org/Conference_Special_Events/2008AUSpecialSummit.html

2. See p10.

3. See p4.

4. <http://www.un.org/summit2005>

5. *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, Brookings-Bern Project on Internal Displacement, October 2008. Available to download at http://www.brookings.edu/papers/2008/1016_internal_displacement.aspx or email brookings-bern@brookings.edu to request a copy.

“We have rights”

In Colombia, I met a dozen or more men and women in ragged clothes who had walked for hours through the jungle to meet me in a dilapidated school-house on the Pacific coast. They spoke about how they had fled the ongoing violence, had left behind everything, and were now struggling to survive. And then one man added: “Amidst all this suffering, we know one thing for sure. We have rights and they cannot take them from us even if they violate them. The Guiding Principles on Internal Displacement are our rights. They clearly say that we have the right to safety, the right to food and to health, and the right to return to our homes; and this gives us hope.”