

The Guiding Principles in international human rights courts

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The Guiding Principles have potential to support and complement international human rights law on internal displacement but they have had little explicit consideration by international and regional human rights courts and commissions.

The Guiding Principles broadly reinforce general human rights law by serving as a kind of bill of rights for internally displaced persons (IDPs) and by outlining the responsibilities of States and other actors. In this sense they mainly reaffirm the human rights principles that are already generally applied by international human rights bodies. However, the Guiding Principles substantially add to international human rights law in at least two areas – explicit recognition of the right not to be displaced and the right to property restitution.

Guiding Principle 6, providing that every human being “shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence”, was a breakthrough in the recognition of the right not to be displaced. It was the first articulation of such a right in any international instrument, which has since only attained binding legal status in Africa. The act of displacement is otherwise only indirectly addressed in human rights law, which is why the explicit recognition of this right has been important in terms of defining internal displacement as a human rights issue, sending a clear

message to duty-bearers and providing a solid basis for rights-holders’ claims.¹

The impact of this framing is visible in the cases of the Inter-American human rights bodies, where the Guiding Principles have been specifically and consistently used to affirm that internal displacement falls within the scope of the right to freedom of movement and residence, an approach that has also been followed by the African Commission on Human and African Commission on Human and Peoples’ Rights. Internal displacement can therefore be presumed a rights violation, and duty-bearers then bear the onus of demonstrating that the displacement – or their failure to prevent it – is legally justified. There is certainly room to strengthen legal protection from internal displacement through such an approach. This is the case not only in regional contexts outside the Americas but also in relation to causes of displacement which have so far been very sparsely addressed by all human rights mechanisms, for example displacement caused by natural disasters or environmental degradation.

The Guiding Principles have made a further important contribution by affirming the right of IDPs to recover property lost as

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a result of displacement, or to compensation where this is not possible. Until their adoption, such a right was not clearly recognised.² Guiding Principle 29 gives a practical account of the duties required by the right to a remedy in displacement contexts – specifically, by highlighting the State’s duty to assist displaced people to obtain restitution or compensation, and confirming that restitution should be prioritised wherever it is possible. Yet despite the potential the Principles have to at least set minimum standards for reparations, human rights courts have often been reluctant to address restitution in displacement contexts too directly at the international level and have not used the Principles to engage further with this issue.

The Inter-American Court of Human Rights has also used the Guiding Principles to reinforce indigenous peoples’ specific protections against displacement, as well as on issues such as family reunification, return, reintegration and participation.³

A greater role in international human rights forums

Of a total of 51 mass internal displacement cases reviewed, 47 were decided by international human rights bodies since the launch of the Guiding Principles on Internal Displacement in 1998. Of these, only eleven make explicit reference to the Principles themselves.⁴ These references were made by the Inter-American Court of Human Rights (eight cases), the European Court of Human Rights (two) and the African Commission on Human and Peoples’ Rights (one).

The mandates of the African, Inter-American and European regional human rights courts appear to allow the Guiding Principles to be used as an interpretive source, and the initiative for exploring the further potential of the Guiding Principles may therefore lie with petitioners and their representatives and with judges. Even in contexts where a mechanism’s mandate or case law does not explicitly indicate openness to other legal sources, such texts are often de facto used in interpretation, and an examination of the use of similar soft law (that is, non-binding) texts in related fields

may therefore also reveal opportunities. For example, while the UN human rights treaty bodies have not used the Guiding Principles in decisions on individual cases, most of them have recommended compliance with the Guiding Principles in their broader concluding observations on the human rights situation in a particular country.⁵ This practice may serve as a basis for their further use in individual decisions.

Questions remain about the future of the Guiding Principles in the human rights sphere. Why are they so little invoked by international and regional human rights bodies? Is this the result of mandate limitations, a perceived lack of relevance, general reluctance to consider soft law, or other factors? Is greater explicit reference to the Guiding Principles by human rights forums desirable or relevant in the eyes of judges, claimants, legal representatives, and affected communities more broadly?⁶ If so, how can this be achieved, and to what end? Ultimately, the ability of the Guiding Principles to advance concrete outcomes for IDPs, including in international human rights courts, will be a major test of whether their potential still matches their promise.

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1. See Morel M, Stavropoulou M and Durieux J-F (2012) ‘The history and status of the right not to be displaced’, *Forced Migration Review* issue 41 www.fmreview.org/preventing/morel-et-al

2. Williams R C (2008) ‘Guiding Principle 29 and the right to restitution’, *Forced Migration Review* special GP10 issue www.fmreview.org/GuidingPrinciples10/williams

3. See for example Inter-American Court of Human Rights *Case of the Rio Negro Massacres v. Guatemala* (2012) par. 173 and 176 bit.ly/IACHR-RioNegro-2012

4. This article is based on a review of 51 admissible cases relating to mass internal displacement being undertaken as part of the author’s ongoing doctoral research.

5. See for example Committee on the Rights of the Child ‘Concluding observations on the combined fourth and fifth periodic reports of Colombia’, CRC/C/COL/CO/4-5, 6 March 2015, par. G(d), www.refworld.org/docid/566e765c4.html

6. See Desmet E (2014) ‘Analysing users’ trajectories in human rights: a conceptual exploration and research agenda’, *Human Rights & International Legal Discourse* Vol. 8 (2): 121–141.