

## Lessons from the development of the Guiding Principles on Internal Displacement

Roberta Cohen

**The Guiding Principles on Internal Displacement filled a major gap in the international protection system for uprooted people. Whether their development holds lessons for those seeking to develop standards in the migration field remains a question to explore.**

The process by which the Guiding Principles on Internal Displacement (GPs) were developed has become a more accepted course of action. The Principles have gained broad international recognition and authority even though independent experts, not states, prepared, reviewed and finalised their provisions outside a traditional intergovernmental framework.<sup>1</sup> The innovative process also paved the way for the development of other UN standards, the Pinheiro Principles and the Guiding Principles on Business and Human Rights.<sup>2</sup>

Yet, the GPs succeeded for specific reasons. To begin with, they were based on and consistent with existing law. States were not asked to assume new obligations but rather to understand better how to apply their existing obligations in new situations. Second, the GPs were developed under the direction of a UN expert, the Representative of the UN Secretary-General on Internally Displaced Persons (RSG) Francis M Deng. Although they were drafted by a team of international lawyers, Deng led the process and reported regularly to the Commission on Human Rights and the General Assembly which requested the development of an appropriate framework to protect IDPs.

Third, the GPs responded to a critical need that states and international organisations wanted to address. The explosion of civil wars emanating from and following the Cold War caused millions of persons to be forcibly uprooted inside their countries by conflict, communal violence and human rights violations, to whom the 1951 Refugee Convention did not apply. The UN began in the 1990s to examine the legal and

institutional gaps affecting those who did not cross internationally recognised state borders.

There are a number of lessons to be learned from the development of the Guiding Principles that may prove useful to those seeking to develop standards in new and emerging fields:

- Prior to initiating new standards, it was imperative to 'put the issue on the map' in order to pave the way for international acknowledgment of the problem and the need to take steps to address it.
- The appointment of a UN expert to lead the process proved effective in persuading governments to accept the development of new principles.
- The association of the expert with an independent institution (in the case of the GPs, the Project on Internal Displacement at the Brookings Institution) was essential to organising and managing the process.
- Support from key governments was vital in building consensus around the Principles, especially among those states with reservations.
- The involvement of experts from UNHCR, the Office of the UN High Commissioner for Human Rights, and the ICRC in drafting the GPs lent support to the international lawyers in charge of the process.
- A broad-based process of consultation on the thorny issues that arose (involving experts from regional bodies, international

February 2014

humanitarian and development organisations, humanitarian and human rights NGOs, women's and children's advocacy groups) influenced many governments to respond positively. States were in particular disposed to support the Principles if operational agencies found them useful in the field.

The actual drafting of the GPs also carries lessons:

- Basing the Principles on the three branches of law – human rights law, humanitarian law and refugee law by analogy – allowed for coverage of most situations of internal displacement.
- Opting for a needs-based approach, that is, identifying the needs of IDPs before examining the extent to which the law adequately addressed those needs, made possible the identification of grey areas and gaps in the law requiring attention. The decision to draw from not only treaty law but also customary law and soft law instruments reinforced this approach.
- Sticking to existing law in addressing gaps and grey areas rather than creating new law was critical to acceptance. The temptation often existed to improve upon the law but one of the strengths of the GPs is that although not a binding document *per se*, they are based on already binding law.
- The choice to restate the law enabled the legal team to tailor the law's provisions to the needs of IDPs. In cases where clear gaps were found, the legal team drew upon what they considered implicit in the law. That each Principle could be traced to law already negotiated and accepted by states gave many governments confidence to use the Principles as the basis for policies and laws in their countries.
- Defining IDPs with enough elasticity to meet the test of time helped make the definition widely accepted. It sought to strike a balance between too narrow a

framework that risked excluding people and one so broad that it could prove operationally unmanageable.

- Making sure that singling out one group for protection did not confer a privileged status on that group involved pointing out that IDP was not a legal status and that the aim was to ensure that IDPs' unique concerns were addressed along with those of others. IDPs were a vulnerable group in the same way that refugees, women, children and the elderly were.
- Establishing a conceptual approach respectful of sovereignty, namely sovereignty as responsibility, attracted support for the GPs. They clearly affirm that primary responsibility for the displaced rests with their governments. But they also emphasise that if governments are unable or unwilling to assume their obligations, international organisations are expected to become involved. International humanitarian organisations "have the right to offer their services in support of the internally displaced" and governmental consent is not to be "arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required assistance." The RSG affirmed regularly that it was in states' interests to carry out their national responsibilities.
- A dissemination plan to reach governments and civil society around the world was crucial to promoting support for them.

#### Limitations and benefits of a non-governmental process

A legally binding instrument, it is argued, would have more authority and international recognition and be more likely to be implemented than the non-binding GPs. But negotiation of an international treaty for which there was limited or no support could have taken decades to complete. It also would have been risky because it could have resulted in the watering down of existing provisions in human rights and humanitarian law on which the GPs were based.

February 2014

Governments, moreover, do not always ratify treaties they adopt or comply with the treaties they ratify. Influencing governments to carry out their responsibilities is a challenge whether the instrument is binding or non-binding. The two RSGs found it easier to negotiate with national officials on the basis of guidelines because some governments found them less threatening since they could not be formally charged with non-compliance.

In the case of the GPs, sustained usage and acceptance would appear the best route to follow. More and more governments have been adopting national laws and policies based on the Principles, regional bodies like the African Union have adopted the legally binding Kampala Convention, and courts and treaty bodies have been increasingly citing the Principles. In time, this could reinforce the trend toward considering the GPs as customary law; or if international support developed, a legally binding convention could follow.

Could the experience of the Guiding Principles be helpful with the development of standards for 'crisis migrants' or environmentally displaced persons? Doubtless

it could, but it would require, first, the formulation of a clear definition or description of those considered in need of protection and, second, the examination of whether rights and entitlements for such persons can be discerned from existing international law. There would also be need for broad consultations nationally and regionally so that the perspectives of a wide range of governmental and non-governmental actors are brought into play while support for the issue is mobilised.

We do know that the frequency and severity of natural disasters today, fuelled in great measure by climate change, are making it essential to strengthen legal safeguards not only for IDPs (especially those uprooted by slow-onset disasters) but also for those who are forced to cross borders yet are not considered refugees.

**Roberta Cohen** [rcohen@brookings.edu](mailto:rcohen@brookings.edu) is a Non-Resident Senior Fellow at the Brookings Institution. [www.brookings.edu](http://www.brookings.edu)

1. The Guiding Principles on Internal Displacement were endorsed by 193 heads of state in 2005 as "an important international framework for the protection of IDPs" [www.who.int/hiv/universalaccess2010/worldsummit.pdf](http://www.who.int/hiv/universalaccess2010/worldsummit.pdf), para 132.
2. <http://unhcr.org/ua/img/uploads/docs/PinheiroPrinciples.pdf> and [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)