

Incorporating the Guiding Principles on the Human Rights of Internally Displaced Persons into National Laws and Policies

Walter Kälin

Looking back at what has been achieved during the past 10 years, it is fair to say that the glass is, at the same time, half empty and half full. Half full insofar as the Guiding Principles have become the normative point of reference for everyone dealing with internal displacement: Today, they have a solid standing as a document that, although not legally binding, is based upon and reflects binding international human rights and humanitarian law. In this sense, the heads of state and government gathered in New York for the 2005 World Summit solemnly recognized them as “an important international framework for the protection of internally displaced persons”. They continue to guide and assist governments in all parts of the world to better discharge their responsibilities in protecting and assisting people forcibly displaced within their countries. They help international humanitarian agencies and civil society in the countries concerned planning and implementing their actions in favor of internally displaced persons both during the emergency but also during recovery and reconstruction. On occasions they have even inspired provisions in peace agreements. And last but not least, they empower the displaced themselves by providing them with the knowledge that they possess rights which remain their legal and moral entitlements even if they are violated.

At the same time, the glass is half empty to the extent that the overall number of internally displaced persons has not declined during these 10 years and their rights continue to be disregarded in many parts of the world. Too often, the Guiding Principles are invoked by governments rhetorically without real political will to implement them. Too often, governments lack the capacity to do so even if they seriously want to better protect and assist the displaced.

What to do under these circumstances? Three elements must be in place to ensure that internally displaced persons can fully enjoy their human rights: First, a strong normative framework; second, a strong will of all relevant actors to implement such a framework; and third, the capacity to do so.

Although the standing of the Guiding Principles is firmly established, more must be done to strengthen the normative framework for the protection of the human rights of internally displaced people. Some have suggested that a way to do so is to enshrine the Guiding Principles in a UN treaty. I am not convinced that this would be the best way to proceed. We are too far away from consensus among States that the Principles should be made legally binding at the universal level. The idea that internal displacement is essentially an ‘internal affair’ remains strong in many parts of the world. In this political environment it is better to try to build consensus from the bottom up.

First and foremost, it is essential to continue, as Secretary-General Kofi Annan stressed in 2005, to promote the adoption of the Principles through national legislation and thus to incorporate them at the domestic level. At the regional level, several regional organizations including the Organization of American States and the Council of Europe made the same recommendation to their member States. Africa moved one step further. The Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons makes it a legal obligation for States parties to incorporate the Guiding Principles into their domestic law. The present draft of the envisaged AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa lists as one of the core obligations of States the duty to enact or amend relevant domestic legislation “in conformity with their obligations under international law as expressed in the United Nations Guiding Principles [...]”.

Incorporation of the Guiding Principles into domestic law is not an easy task. General references to the Principles or even their literal reproduction in national laws and policies are not sufficient to make them operational at the field level. One important but underestimated cause for many of the difficulties encountered by internally displaced persons is the fact that applicable legislation does not take into account their specific needs and vulnerabilities and thus may create insurmountable obstacles for the displaced to enjoy the rights guaranteed to them. In one country I visited, for example, the right to education of displaced children was affected simply because they were unable to produce so called ‘transfer papers’ issued by the headmaster of their former school and thus were not admitted to schools at the location they were displaced to. Of course, when you have to flee because your village is attacked, getting hold of official documents is not your priority. In another country, children needed a birth certificate to access schools. Most displaced children did not have one, either because they were never registered as their nationality was contested, or because they had left it behind, or because it was forcibly taken from them at checkpoints, and there was no possibility to get replacement documents. Similarly, in many countries, internally displaced persons cannot participate in elections because there are no provisions for absentee voting. In one country, IDPs were neglected because the main responsibility for taking care of them was the districts’, but the money the districts received was earmarked for development, not humanitarian aid, and at the end of the year it was returned to the capital unspent as the conflict made development work largely impossible. In many situations, the displaced cannot regain their property because they have no documents proving their ownership and there are no alternative mechanisms in place that would allow for other means of proof. Sometimes, persons who have been in displacement for a very long time cannot get their property back at the time of return because of statutes of prescription providing that persons who have abandoned property for a certain period of time (e.g. 10, 15 or 20 years) lose their rights attached to it; this may mean that those who arbitrarily displaced them by force may become the rightful owners as a consequence of laws that make perfect sense under normal circumstances but deprive persons of their rights in situations of displacement.

It is obvious that in such situations the headmaster of a local school, the national electoral commission, courts examining property disputes and other authorities will stick to the laws immediately regulating their work and not apply the Guiding Principles, even if they know them. In short, existing domestic laws on internal displacement too often fail in clarifying how the rather abstract general principles of international law articulated by the Guiding Principles should be translated into concrete action on the ground.

For these reasons, the next step in making the Guiding Principles operational is to bring relevant domestic laws in line with them in a practical way. To this end, my mandate, together with the Brookings-Bern Project on Internal Displacement, has developed a Manual for law and policy makers, identifying obstacles and listing key principles that must be enshrined at the domestic level to make the Guiding Principles work. The project has proven to be very demanding and it is a particular pleasure for me to be able to launch the Manual today. Please accept it as my birthday present on this occasion of the 10th anniversary of the Guiding Principles. I would like to take the opportunity to sincerely thank everyone who was involved during the past three years in developing the Manual. My thanks go to the members of the Steering Committee representing the relevant humanitarian agencies and organizations who worked so hard to ensure the relevance and quality of the Manual; they go to the authors of the background studies we commissioned to ensure that we would cover all relevant aspects and profit from the knowledge of experts in the field; they go to the donors who supported us throughout the process; and last, but not least, they go to my friends and colleagues from the Brookings-Bern Project on Internal Displacement who invested so much time and energy to write, edit and produce the Manual. I'm greatly indebted to all of you.

The central aim of the Manual is to provide advice on how to shape laws and policies addressing the protection and assistance needs of internally displaced persons in a way that ensures full protection of the rights of internally displaced persons in accordance with the Guiding Principles. The Manual covers all phases of displacement. For each of the subject matters covered, it (i) summarizes the relevant minimum standards set out in international law; (ii) identifies problems often encountered by the displaced negatively affecting the enjoyment of their rights; (iii) provides a checklist with essential minimum elements of state regulation; and (iv) presents detailed advice on necessary elements of state regulations in the topical area concerned. The Manual is addressed to national policymakers, competent ministries, legislators and civil society groups concerned with internal displacement.

Let me conclude with expressing my hope that the Manual will be widely used and prove to be of direct and concrete assistance in crafting laws and policies that will prevent internal displacement wherever possible and mitigate its effects on the lives of internally displaced persons worldwide.