

Developments in the legal protection of IDPs

Cordula Droege

Ten years ago the International Committee of the Red Cross (ICRC) helped draft the Guiding Principles. How have the Principles contributed to improving protection for IDPs? What gaps remain?

The Guiding Principles were designed to reaffirm existing international human rights law and international humanitarian law – and to “clarify grey areas” and “address gaps”.¹ They were also meant to develop the law, rather than merely reflect existing law, but this emphasis has been dropped over recent years. At the time of drafting, the ICRC insisted that existing law had to be reflected in the Guiding Principles, and so the Guiding Principles take up a number of norms which derive directly from international humanitarian law.

Legal developments over the past decade have not only strengthened and consolidated the law underpinning the Guiding Principles but have also been influenced by them. An encouraging number of treaties have been ratified by an ever greater number of states:

- Both the International Covenant on Civil and Political Rights³ and the International Covenant on Economic, Social and Cultural Rights⁴ have been ratified by some 160 states.
- All states in the world are now party to the Geneva Conventions – the international treaties that contain the most important rules limiting the effects of war.⁵
- Adoption of the Rome Statute of the International Criminal Court⁶ has led to recognition that unlawful deportation and transfer is a war crime in any armed

conflict and a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population, even outside of an armed conflict.

- The International Criminal Tribunal for the Former Yugoslavia⁷ has recognised that displacements are crimes punishable under customary international law. It has also more precisely defined the term ‘forced’, stating that it is not limited to physical force but rather may include the “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.” The essential

element is that it is “involuntary in nature, where the relevant persons had no real choice.”⁸

Clarification of customary law has helped consolidate the legal framework protecting individuals from, during and after displacement. The ICRC *Customary Law Study*⁹ identifies a number of customary rules of international humanitarian law that must be applied by all parties in all types of armed conflict, international and non-international:

- the prohibition of forced displacement
- the obligation to take all possible measures to receive civilians under satisfactory conditions of shelter, hygiene, health, safety and nutrition
- non-separation of members of the same family unit
- the right to voluntary and safe return



IDPs, Nakuru, Kenya, January 2008.

- the protection of the property of civilians.

The importance of weapons treaties should not be underestimated. Explosive remnants of war are one of the main obstacles to safe return, causing immediate dangers to people's lives and access to their homes, disrupting infrastructure and agricultural production and imposing further burdens on weakened medical systems. The banning of antipersonnel landmines in the Ottawa Convention,¹⁰ the obligation to clear explosive remnants of war in the fifth Protocol to the Convention on Certain Conventional Weapons¹¹ and the recently-adopted Convention against Cluster Munitions¹² all help to reduce challenges for those rebuilding their lives.

At the regional level, the African Union is in the process of drafting a Convention for the Protection and Assistance of Internally Displaced Persons in Africa¹³ which has the potential to contribute to a stronger legal framework across the continent. As several articles in this issue indicate, there have been many efforts to implement the Guiding Principles, in themselves not binding, into national law, mainly thanks to the efforts of the Representative of the Secretary-General on the Human Rights of IDPs, Walter Kälin. The Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons¹⁴ commits member states to enact national legislation to incorporate the Principles fully into their national legal systems.

Have the Principles filled grey areas and gaps?

While there have been enormous advances since the process of drafting the Principles began in 1996, some of the gaps or weaknesses – such as the fact that non-state actors are not, traditionally, bound by human rights, and the option of derogation from human rights – that were identified then are still apparent. But much more importantly, the real challenge remains respect for, rather than development of, the law. Francis Deng's finding that "the implementation of existing standards is more urgent than legal reform" is as true today as it was in 1998. There are more structures in place to deal with situations of displacement. States are less prone to deny the existence of displaced people. Displacement is sometimes taken into account in peace agreements and in national action plans. The international community is better organised to provide basic shelter and assistance, even if coordination can still improve.

However, the first cause for displacement in armed conflict is disrespect for the existing rules of war. People are obliged to flee because they are forced out by the parties to the conflict, because they are threatened, subject to extortion, forced recruitment, reprisals or other violations. Or they flee the consequences of fighting, because parties do not spare civilians but indiscriminately attack and destroy homes and infrastructure. Of course, some people flee even when there is no specific violation or threat but

most displacement is induced by the unlawful behaviour of belligerents.

While a lot has been done to raise awareness of the plight of IDPs, we have no cause for complacency. Most displacement could be prevented in the first place if parties respected the laws of war. Those obliged to flee would suffer less if the parties respected the displaced as civilians. Sadly, not much has improved in this area. Humanitarian action can bring some relief but it is up to the parties to conflicts to respect and protect civilians.

Cordula Droege (cdroege@icrc.org) is a Legal Adviser in the ICRC's Legal Division (www.icrc.org).

For further information on ICRC's work with IDPs, see 'ICRC Position on Internally Displaced Persons'.¹⁵

1. UN Doc E/CN.4/1998/53/Add.2, 11 February 1998, para 9.

2. Jean-Philippe Lavoyer, 'The Guiding Principles on Internal Displacement: A Few Comments on the Contribution of International Humanitarian Law', 1998 *International Review of the Red Cross* no 324, p476.

3. http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

4. http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

5. <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>

6. <http://www.un.org/icc/>

7. <http://www.un.org/icty>

8. Prosecutor v Krnojelac, IT-97-25, Trial Chamber Judgment of 15 March 2002, para 475.

9. <http://www.icrc.org/web/eng/siteeng0.nsf/html/customary-law-rules-291008>, rules 129, 131, 132, 133.

10. <http://www.icrc.org/ihl.nsf/FULL/580?OpenDocument>

11. <http://www.icrc.org/ihl.nsf/FULL/610?OpenDocument>

12. <http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument>

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

14. http://www.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol.pdf

15. <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/idp-icrc-position-030706>

What is protection? A definition by consensus

The launch of the Guiding Principles occurred around the same time that the international community at large was beginning to take on the idea of humanitarian protection. Indeed the Principles were instrumental in shaping both the need for the emphasis on protection and the way that it was then defined.

From 1996 to 2000 the International Committee of the Red Cross (ICRC) convened a series of workshops on the protection of civilians. These workshops, involving about 50 humanitarian, human rights and academic organisations/institutions, led to a 'working consensus'¹ – that still holds – on the definition of the term protection as encompassing:

... all activities, aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights, humanitarian

and refugee law). Human rights and humanitarian actors shall conduct these activities impartially and not on the basis of race, national or ethnic origin, language or gender. (1999)

Protection activities may include responsive action, remedial action and environment-building (and may be carried out concurrently) and encompass any activity which:

- prevents or puts a stop to a specific pattern of abuse and/or alleviates its immediate effects;
- restores people's dignity and ensures adequate living conditions through reparation, restitution, and rehabilitation,
- fosters an environment conducive to respect for the rights of individuals in accordance with the relevant bodies of law.

1. <http://www.icva.ch/doc00000663.html>