

DEVELOPMENTS IN THE LEGAL PROTECTION OF INTERNALLY DISPLACED PERSONS – 10 YEARS OF EXPERIENCE SINCE THE GUIDING PRINCIPLES

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It has been 10 years since the then special representative of the Secretary-General on internally displaced persons, Francis Deng, presented the Guiding Principles on Internal Displacement to the UN Human Rights Committee. They resulted from the greater awareness at the United Nations in the early 1990s of the displacement phenomenon. With the end of the Cold War, armed conflicts and particularly internal armed conflicts were becoming more frequent and forcing great numbers of people to flee the hostilities.

The process of drafting the Guiding Principles – to which the ICRC actively contributed – and the reports by the special representative revealed several strands of thought.

Firstly, the purpose of the Guiding Principles was to reaffirm existing international human rights law and international humanitarian law. But it was also meant to "clarify grey areas" and to "address gaps".¹ The Guiding Principles were not intended only to reaffirm the law, they were also meant to develop it. This latter aspect has been dropped in recent years, with emphasis being laid much more on the fact that the Guiding Principles reflected existing international law. At the time of drafting, the ICRC insisted that existing law had to be reflected in the Guiding Principles, and so the Guiding Principles took up a number of norms which derive directly from international humanitarian law.² The ICRC's

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

² For instance, Principle 6(b) derives from Article 49(2) of the Fourth Geneva Convention and Article 17(1) of Additional Protocol II; Principle 6(e) recalls Articles 33(1) of the Fourth Geneva Convention, Article 75(2d) of Additional Protocol I and Article 4(2b) of Additional Protocol II; Principle 10(2) protects persons who are not or no longer participating in hostilities, which is a basic principle of international humanitarian law [Article 3 common to the four Geneva Conventions, Article 51(3) of Additional Protocol I, Article 13(3) Additional Protocol II]; Principle 10(2a) derives from Article 51(2 and 4) of Additional Protocol I and Article 13(2) of Additional Protocol II; Principle 10(2b) derives from Article 54(1) of Additional Protocol I and Article 14 of Additional Protocol II; Principle 10(2c) derives from Article 51(7) of Additional Protocol I; Principle 10(2d) derives from Article 52(1) of Additional Protocol I; Principle 10(2e) derives from the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997; Principle 11(2a) derives not only from human rights law but also from Article 3 common to the four Geneva Conventions, Article 75(2) of Additional Protocol I and Article 4(2) of Additional Protocol II; Principle 11(c) derives from Article 33 of the Fourth Geneva Convention, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II; Principle 12(4) derives from Article 3(1b) common to the four Geneva Conventions, Article 75(2c) of Additional Protocol I

perspective on the Guiding Principles with regard to their legal value was formulated as follows in 1998:

The ICRC, along with other organizations, has made it known that it intends to inform its delegates of the contents of the Guiding Principles and to promote them. When faced with a situation of internal displacement in an armed conflict, the ICRC invokes the principles and rules of humanitarian law. The Guiding Principles could nonetheless serve a useful purpose in contexts where humanitarian law does not make specific provision for certain needs (such as the return of displaced persons in safe and dignified conditions). The Guiding Principles could also play a very useful role in situations not covered by international humanitarian law, such as disturbances or sporadic violence.³

The second strand of thought was represented by the special representative's conviction that gathering existing legal norms in one document would increase awareness of the plight of internally displaced people.⁴ The Guiding Principles were not only normative, they were also political in nature, and were meant to raise awareness.

Thirdly, the special representative stated that "the implementation of existing standards is more urgent than legal reform",⁵ that respect for the law was more urgent than development of new law.

and Article 4(2c) of Additional Protocol II; Principle 13(1) derives from Article 77(2) of Additional Protocol I, Article 4(3c) of Additional Protocol II and Article 38(3) of the Convention on the Rights of the Child; Principle 16 derives from Articles 32 to 34 of Additional Protocol I and Article 8 of Additional Protocol II; Principle 17 derives from Articles 26, 49(3) and 82(2) of the Fourth Geneva Convention, Articles 74, 75 (3b), 75(5), 77(4) of Additional Protocol I, and Articles 4(3b) and 17(1) of Additional Protocol II; Principle 18 derives from a number of human rights and humanitarian law provisions on minimum standards of nutrition, shelter, etc., in particular from Articles 49(3) of the Fourth Geneva Convention and Article 17(1) of Additional Protocol II; Principle 21(2) derives from Articles 23(g), 28 and 47 of the Hague Regulations and Articles 52 to 56 of Additional Protocol I; Principles 25(2 and 3) and 30 derive from Article 70 of Additional Protocol I and Article 18 of Additional Protocol II; and Principle 26 derives from Article 71 of Additional Protocol I.

For more detail on the contribution of international humanitarian law to the Guiding Principles, see Jean-Philippe Lavoyer, *The Guiding Principles on Internal Displacement, A Few Comments on the Contribution of International Humanitarian Law*, *International Review of the Red Cross*, No. 324, 1998, pp. 467-480; Robert K. Goldman, *Codification of international rules on internally displaced persons, An area where both human rights and humanitarian law considerations are being taken into account*, *International Review of the Red Cross*, No. 324, 1998, pp. 463-466; Walter Kälin, *The Guiding Principles on Internal Displacement: Annotations*, 2nd Edition [available at http://www.brookings.edu/reports/2008/spring_guiding_principles.aspx].

³ Jean-Philippe Lavoyer, *op cit*, at 476.

⁴ UN Doc E/CN.4/1996/52, 22 February 1996, para 12.

⁵ *Ibid*.

There is no doubt that the Guiding Principles have been instrumental in raising awareness of the situation of internally displaced people. This has been achieved not only by the text itself but by the work of the special representatives. But what of the two other considerations? To begin with, if the Guiding Principles were meant to fill gaps and clarify grey areas, where do we stand in terms of development of the law now, 10 years later? And secondly, how much progress have we made in "implementing" existing law, or rather in respecting and ensuring respect for existing law?

The legal developments of the past decade have not only strengthened and consolidated the law underpinning the Guiding Principles, they have themselves been influenced by the Principles.

The "gaps" that the special representative mentioned in his study were characterized by the following:⁶

- grey areas caused by the fact that the norms were so vague that they had to be interpreted in order to apply them to internally displaced people in practice (for instance, freedom of movement had to be interpreted as also meaning the prohibition of forced return);
- real gaps in the law (for instance, there were no rules on personal documentation or compensation for property lost during displacement);
- the fact that in tense situations short of armed conflict, human rights could be restricted or derogated from;
- the fact that most international law did not bind non-State actors;
- the fact that some States had not ratified key human rights treaties and/or the Geneva Conventions, and thus were not formally bound by their provisions unless these were part of customary law.

How has the law evolved from there?

One important development is that many more treaties have been ratified by many more States since 1999. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are now ratified by some

⁶ UN Doc E/CN.4/1996/52, 22 February 1996, paras 9, 10.

160 States.⁷ Most spectacularly, all States in the world are now party to the Geneva Conventions, while Additional Protocol I has 168 States Parties and Additional Protocol II 164.

Another significant development is the adoption of the Rome Statute of the International Criminal Court and the jurisprudence of the international criminal tribunals for the former Yugoslavia and Rwanda. While unlawful deportation and transfer in international armed conflict was already a grave breach of the Fourth Geneva Convention (protecting civilians) and of Additional Protocol I, the Rome Statute recognizes that unlawful deportation and transfer is a war crime in any armed conflict⁸ and a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population, even if this occurs outside the scope of an armed conflict.⁹ Furthermore, the International Criminal Tribunal for the former Yugoslavia has recognized that "displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law."¹⁰ Since displacement is only unlawful if it is forced, the Trial Chamber has also defined the term "forced" more precisely: 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",¹¹ the essential element being that displacement is "involuntary in nature, where the relevant persons [have] no real choice".¹²

More broadly, the clarification of customary law has helped consolidate the legal framework protecting persons from, during and after displacement. The ICRC's customary law study identifies a number of customary rules of international humanitarian law that must be applied by all parties in all types of armed conflict, international or non-international:

- the prohibition of forced displacement;¹³

⁷ According to the figures on the OHCHR website, there are 162 States party to the International Covenant on Civil and Political Rights and 159 to the International Covenant on Economic, Social and Cultural Rights.

⁸ Articles 8(2a,vii), 8(2b,viii) and 8(2e,viii) of the Rome Statute of the International Criminal Court.

⁹ Article 7(1d) of the Rome Statute of the International Criminal Court.

¹⁰ Prosecutor v Krnojelac, IT-97-25, Appeals Chamber Judgment of 17 September 2003, para 222.

¹¹ Prosecutor v Krnojelac, IT-97-25, Trial Chamber Judgment of 15 March 2002, para 475.

¹² Ibid.

¹³ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, (2005), Rule 129.

- the obligation to take all possible measures to receive civilians under satisfactory conditions of shelter, hygiene, health, safety and nutrition and to ensure that members of the same family unit are not separated;¹⁴
- the right to voluntary and safe return;¹⁵
- and the protection of the property of civilians.¹⁶

The importance in this respect of weapons treaties should not be underestimated. Explosive remnants of war are one of the main obstacles to safe return, causing as they do immediate dangers to people's lives, **impeding** access to their homes, **and causing** disruption of infrastructure and agricultural production, with all this exacerbated by lack of medical support in a weakened medical system. **The Ottawa Convention, which bans anti-personnel landmines¹⁷, the Protocol V to the Convention on Certain Conventional Weapons, which imposes an obligation to clear explosive remnants of war¹⁸, and the Convention on Cluster Munitions, adopted in Dublin in the spring of 2008 – all help lessen the challenges facing people trying to rebuild their lives.**

At regional level, the African Union is in the process of drafting a Convention for the Protection and Assistance of Internally Displaced Persons in Africa. This draft convention has the potential to contribute to a stronger legal framework at least at regional level.

Beyond new treaties and customary law, much has also been done to incorporate the Guiding Principles – not binding in themselves – into national law, mainly thanks to the efforts of the special representative, Professor Walter Kälin. In addition, the States party to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons **commit themselves to incorporate the Guiding Principles fully into their national legal systems.**¹⁹

¹⁴ Ibid, Rule 131.

¹⁵ Ibid, Rule 132.

¹⁶ Ibid, Rule 133.

¹⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 156 States Parties.

¹⁸ Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003, 45 States Parties.

¹⁹ Article 6 of the Protocol on the Protection and Assistance to Internally Displaced Persons of the Pact on Security, Stability and Development in the Great Lakes Region, adopted on 14 and 15 December 2006.

In light of all this, do we need further development of international law or have the Guiding Principles filled the grey areas and gaps identified in 1998?

A comparison of the current situation with the findings of the 1998 report shows up great progress in some areas, but some of the gaps and weaknesses in the law identified at the time have not been resolved, for example as regards derogations and non-State actors.

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"²⁰ is as true today as it was in 1998.

There are today more structures in place to deal with displacement. States are less prone to simply deny the existence of displaced people. Displacement is taken into account in peace agreements and in national action plans.²¹ The international community is better organized, especially to provide basic shelter and assistance, even if there remains room for improvement of coordination.

However, the main cause for displacement in armed conflict is failure to comply with the existing rules of war. People are obliged to flee because they are forced out by parties to the conflict, because they are threatened, subjected to extortion, forced recruitment, reprisals or other violations. Or they flee because the belligerents fail to spare the civilian population in their attack, because of indiscriminate attacks or because of the destruction of their homes or of vital facilities. Of course, some people flee without there necessarily being a specific violation or threat, but most displacement is induced by unlawful behaviour on the part of the belligerents. Sometimes people are even prevented, in breach of the law, from fleeing the dangers of a conflict.

In other words, the main problem continues to be lack of respect for the basic rules of war. While much has been done to raise awareness of the plight of internally displaced people, we have no cause for complacency since most displacement would never occur at all if the warring parties complied with the laws of armed conflict. And those who were nevertheless obliged to flee would suffer less if the belligerents accorded them the

²⁰ See above, note 5.

²¹ See the study of The Brookings Institution—University of Bern Project on Internal Displacement, Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building [available at <http://www.brookings.edu>, 23.9.2008].

protection to which they are entitled as civilians. In this respect, not much has improved. Humanitarian action can bring some relief, but the parties to conflict must respect and protect the civilian population.