

Comment on “When Does Displacement End?”

The Legal Dimension

by Walter Kälin

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1. The Guiding Principles on Internal Displacement do not explicitly address the question of when displacement ends, i.e. when these principles no longer apply. There are three possible methodological approaches to answering this question.
2. The first approach is to look at how the law upon which the Guiding Principles are based addresses the issue, i.e. human rights law, humanitarian law and refugee law by analogy:
 - The idea of “cessation” is absolutely alien to human rights law. Human rights remain applicable even if someone no longer is an IDP. Thus, for example, the right to leave the country or to seek asylum (Principle 15) are not lost because someone has given up the idea of return and is fully integrated in the location where he or she found refuge before leaving the country. Likewise, the prohibition of discrimination against someone because he or she had been an IDP before return or resettlement in Principle 29 as a specific form of prohibited discrimination based on “other status” (Articles 7 UDHR, 2 CESCR, 2 and 26 CCRP) remains applicable even if several decades have elapsed since the end of displacement.
 - By contrast, humanitarian law guarantees are only applicable *during* an armed conflict. Regarding the applicability of those principles that are based on the Fourth Geneva Convention, e.g., Article 6 of that Convention is relevant, stating that “the application of the present Convention shall cease on the general close of military operations” and, “[i]n the case of occupied territory, ... one year after the general close of military operations”. The prohibition against using IDPs “to shield military objectives from attack...” in Principle 10(2)(c), e.g., has no relevance outside of situations of armed conflict even if some remain IDPs after the end of hostilities.
 - Refugee law contains explicit cessation clauses in Article 1C of the 1951 Convention on the Status of Refugees. Especially relevant is sub-paragraph 5 providing for the cessation of refugee status if “the circumstances in connection with which he has been recognized as a refugee have ceased to exist”. This clause refers to

the cessation of a legal status and, therefore, is not relevant in the case of IDPs who are in a specific factual situation but do not enjoy a specific legal status.

3. The second approach – analogous to the discussion of “solutions” in refugee law and policy – is to look at the factual situation of the IDP. Here, the following situations can be identified:
 - As soon as an IDP leaves his or her country of origin, the Guiding Principles are no longer applicable. Such a person is no longer in the situation of internal displacement but instead becomes a refugee or a migrant as the case may be.
 - Displaced persons are no longer IDPs in the sense of the Guiding Principles if they “have returned to their homes or places of habitual residence” (Principle 29) but they continue to enjoy the rights of returnees (Principles 28 – 30).
 - The same is true if they “have resettled in another part of the country” (Principle 29). Such resettlement, for obvious reasons, must be firm and permanent.
4. The third approach is to look at the *mandates of organizations*: Thus, the mandate of ICRC may terminate at the end or soon after the end of an armed conflict whereas a development agency may continue to be responsible for (former) IDPs who have returned even decades after such return.
5. All three approaches are valid in their own right. This is due to the fact that to be an IDP (or a former IDP) is not a legal status but a factual situation which in most cases changes *gradually* and not abruptly. It is also due to the fact that the Guiding Principles are based on the idea that they respond to specific needs of IDPs which may change gradually over time. For these reasons, it is not possible and would be wrong to try to define cessation clauses analogous to Article 1C Refugee Convention that would terminate the applicability of the Guiding Principles as such.
6. I would recommend:
 - (a) To clearly separate the issue of the mandate of organizations for IDPs (to be decided specifically by each organization) from the issue of ending the application of the Guiding Principles (and the hard law underlying it);
 - (b) To combine, regarding the applicability of the Guiding Principles, the second and the first approach, i.e. (i) to ask whether a particular principle still satisfies a continuing need of a person arising out of the fact that he or she was displaced, and (ii) to examine whether, in legal terms, such application is possible because the underlying hard law is protecting the person concerned in his or her present situation or, at least, is addressing such situation; and

- (c) To stress that relevant human rights and humanitarian law guarantees contained in hard law may remain applicable even if the person concerned, due to return or resettlement, no longer has special needs related to his or her former displacement.