

Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges

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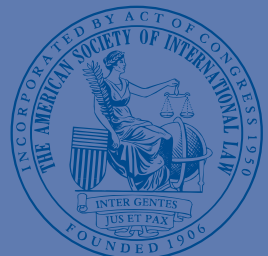
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Chapter 1

Introduction

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INTRODUCTION

This volume of studies on domestic legal responses to internal displacement reflects both the gravity of the deprivations that continue to be suffered by millions of internally displaced persons (IDPs) worldwide and the dedication and resourcefulness of a growing number of states in addressing their plight. The purpose of this volume is to identify problems encountered by internally displaced persons that are typically caused by shortcomings in the legal and institutional frameworks of countries faced with internal displacement in order to better understand what is needed to protect the rights of such persons and how domestic efforts to prevent, mitigate, and end internal displacement could be strengthened.

THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

In the nearly two decades since the end of the Cold War, internal displacement has been recognized as a problem affecting virtually every region of the world and giving rise to legitimate international concern. The number of IDPs—persons forced to flee their homes due to persecution, conflict, or natural and man-made disasters but not seeking shelter in a country outside their own—outstripped the number of refugees worldwide as early as the mid-1990s. The toll of internal displacement due to conflict has remained high and steady at around twenty-five million since 2001, with returns resulting from peace processes in one part of the world often offset by new waves of flight elsewhere.¹

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¹ Jens-Hagen Eschenbacher, *Internal Displacement: Global Overview of Trends and Developments in 2006, 2007* INTERNAL DISPLACEMENT MONITORING CTR. 10.

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Natural disasters drive millions from their homes with increasing frequency. According to a joint World Bank and Columbia University 2005 study about natural disaster hotspots, “about 19 percent of the Earth’s land area...and 3.4 billion people (more than half of the world’s population) are relatively highly exposed to at least one hazard.”² Meanwhile, much remains to be done to ensure that displacement caused by large-scale development projects that are not accompanied by adequate relocation programs does not violate the human rights of affected communities.

The impact of internal displacement is not restricted to the millions of people forced to flee their homes. Internal displacement also takes a political, economic, and social toll on the general population and neighboring countries.

In view of the mounting crisis of internal displacement, the United Nations Human Rights Commission created the mandate of the Representative to the UN Secretary General (RSG) on Internal Displacement in 1992. Secretary General Kofi Annan appointed Dr. Francis Deng as the first mandate-holder. During the Cold War, international attention to displacement had primarily focused on the plight of refugees, or persons seeking protection outside of their country of origin or habitual residence. As a result, the legal status of IDPs was poorly understood and one of the most important components of Dr. Deng’s mandate as RSG would turn out to be the development of a normative framework identifying rules of international law that applied to IDPs. The resulting *Guiding Principles on Internal Displacement* (hereinafter, the *Guiding Principles*) was submitted to the UN Human Rights Commission in 1998.³

The *Guiding Principles* proceed from the conclusion that states continue to be obliged to respect the human rights of all persons on their territory without discrimination, whether they were displaced or not. Likewise, states’ existing

² Maxx Diley et al., *Natural Disaster Hotspots: A Global Risk Analysis 2* (2005), available at <http://go.Worldbank.org/PT8XJZW3K0>.

³ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4 /1998/53/Add.2 (Feb. 11, 1998) (prepared by Francis M. Deng).

humanitarian law duties to protect non-combatants in times of conflict apply to IDPs and those not displaced alike. Thus, without purporting to create new obligations, the *Guiding Principles* identify the extent to which national sovereignty—typically invoked in order to avoid scrutiny of internal displacement situations—actually entails clear, existing responsibilities to respond to the needs of IDPs. Their focus thus is on the “primary duty and responsibility of states” in assisting and protecting IDPs.

At the time of their presentation, a number of states were suspicious of the *Guiding Principles*, deeming them to represent a covert expansion rather than a restatement of their international obligations. This necessitated a period of advocacy work through dialogue with skeptical states and engagement with states that accepted their responsibilities *vis-à-vis* IDPs and began seeking ways to resolve their displacement. Ultimately, this advocacy proved to be successful. Throughout this period, as during the drafting of the *Guiding Principles*, the work of the RSG was assisted by the support of a dedicated unit headed at that time by Roberta Cohen within the Brookings Institution, a leading policy research institution based in Washington D.C.⁴ This support extended from extensive training and research activities to the dissemination of the *Guiding Principles* in numerous relevant languages.

NATIONAL LAWS AND POLICIES

The 2004 appointment of the second RSG, Dr. Walter Kälin, was another important step. By this time, the *Guiding Principles* had gained near universal acceptance and attention could now shift to their implementation, as reflected in Dr. Kälin’s mandate to focus on the “human rights of internally displaced persons.”⁵ The authority attributed to the *Guiding Principles* was reflected in their endorsement by numerous regional organizations and perhaps most notably by the unanimous consent of the UN General Assembly to the 2005 World Summit Outcome Document. This document included both an

⁴ For more information on the Brookings Institution-Bern University Project on Internal Displacement, see <http://www.brookings.edu/idp>.

⁵ For more information on the work of the RSG on the Human Rights of IDPs, see <http://www.ohchr.org/english/issues/idp/index.htm>.

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affirmation of the *Guiding Principles* as “an important international framework for the protection of internally displaced persons” and an undertaking to “take effective measures to increase the protection of internally displaced persons.”⁶

Thus, although international responses to internal displacement remain a key concern in the UN’s ongoing reform of its humanitarian programming, the center of gravity in efforts to protect and assist IDPs has now moved in both theory and practice to the national level. The response of states to this problem has been increasingly informed and systematic, and, in many cases, decisive in ending displacement or ameliorating the circumstances of those affected. About twenty states have issued laws and policies on internal displacement, many of which reference the *Guiding Principles* directly.⁷

However, as Walter Kälin noted in his first report as RSG (E/CN.4/2005/84), these laws have not always succeeded in clarifying “how the rather abstract general principles of international law articulated by the *Guiding Principles* should translate into concrete action on the ground.” In order to address this gap, the RSG proposed:

to convene a series of consultative meetings in 2005 with experts, lawmakers and IDP advocates, with the goal of clarifying the detail of how domestic law should contribute to the protection of IDPs....Based on these consultations, the Representative will develop a guidebook for legislation and executive rule and policy-making at the domestic level with regard to IDPs.

The studies presented in this volume represent an important step in the process of drawing guidance from past laws and policies on internal displacement in order to positively shape future ones. They were commissioned as part of the

⁶ G.A. Res, 60/1, ¶ 132, U.N. Doc. No. A/RES/60/1 (Oct. 24, 2005).

⁷ Walter Kälin, *The Future of the Guiding Principles on Internal Displacement*, FORCED MIGRATION REV. 5 (2006); see also Jessica Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, 14 HUM. RTS. BRIEF 7 (2006).

process of developing the October 2008 Brookings-Bern Project on Internal Displacement publication, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* (hereinafter the *IDP Law and Policy Manual*), setting out more detailed guidelines on domestic implementation of the *Guiding Principles*.

KEY ISSUES AND CHALLENGES

The studies in this volume focus on specific IDP protection issues chosen for their inherent technical complexity and demonstrated significance to the amelioration of the situation of IDPs and resolution of internal displacement. While the authors have been asked to draw on many common sources and follow a standard format, each study also reflects the opinions and conclusions of its author(s), based on their research and experience.

With minor deviations in light of the subject matter, each of the studies follows a similar structure. They start with an overview of the legal framework pertaining to the relevant issue, including identification of the most relevant provisions of the *Guiding Principles*, and an explanation of the legal basis for the cited Principles. The point here is to emphasize that the *Guiding Principles* are based on existing international human rights and humanitarian law. One of the main themes to emerge from these initial overviews in each chapter is the interrelationship among the various rights of internally displaced persons. For example, IDPs have the right to freedom of movement. Restricting that right impinges on their right to food as access to cultivatable land may be denied, their right to health where they are confined within camps with unsanitary conditions, and their right to family life where families are separated and not permitted to reunite.

Next, each chapter considers the main obstacles, both legal and practical, to implementing the *Guiding Principles*. It is striking how the same obstacles recur throughout the volume. Perhaps the main legal obstacle identified is that in light of the non-binding nature of the *Guiding Principles*, states sometimes insist on the applicability of domestic laws that are not beneficial to IDPs. Practical obstacles range from security for humanitarian workers, through a lack of documentation and identification for IDPs, to a lack of capacity of the state, especially at the local levels. One issue that recurs in almost every

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chapter is that discrimination is a major obstacle for IDPs in exercising their rights. Another recurring issue is that women, children, elderly, and disabled people are particularly vulnerable. Another legal and practical obstacle to implementing the *Guiding Principles*, which is present in each chapter but not always addressed directly, is the important role of non-state actors or de facto, as opposed to de jure, authorities.

Most chapters next review the regulatory framework in various countries. Legislative recognition of the rights of IDPs can vary from inclusion in the national Constitution or Bill of Rights to laws, decrees, or administrative regulation. Different legal instruments have varying authority, and the studies' authors tend to agree that the less authoritative the instrument used to protect a right, the greater the implication of the inferiority of that right in terms of policy priorities. Many of the chapters recommend specific inclusion of the rights of IDPs in the national Constitution or equivalent.

The next section in most chapters focuses on substantive and procedural elements of state regulation, distinguishing among regulations and procedures prior to displacement, during displacement, and in the context of durable solutions. The studies review existing provisions in a wide spectrum of countries, ranging from Azerbaijan to Zambia. While it is impossible to generalize across such a variety of experiences, a few issues stand out from the chapters. First, substantive and procedural elements of state regulation are in almost all countries and across all the issues considered, far better developed for the period of displacement, as opposed to prior to or after displacement ends. In countries prone to natural disasters, legislation on disaster management and early warning systems tend to be very poorly developed; while legislation on return often fails to distinguish the particular needs of IDPs from other populations affected by armed conflict or natural disasters. In the context of durable solutions, a particular challenge is to define when displacement ends. Second, a recurring theme is the gap between law and practice. The legislation of many of the countries surveyed in this volume contains important provisions for IDPs—in some cases specifying them as a separate category and in others focusing on the universality of human rights for all citizens—but in practice these rights are rarely fully realized, especially for IDPs.

The chapters then generally go on to review institutional elements of state regulation, again distinguishing different stages of the displacement cycle. There is a variety of institutional responses. Some are centralized, while others are localized. Some are located in the prime minister's or president's office, while others are outside the formal government structure. Some institutional responses consist of designating one responsible ministry, while others bridge ministerial responsibilities. The chapters provide detailed overviews of the more successful models found in the study countries. At the same time, they emphasize the importance of local context and the difficulty, simply, of transferring one model which works in a particular national context to a different context. Nevertheless, the two core principles of coordination between relevant government ministries and consultation with non-governmental actors, including IDPs, are suggested to underpin good practice.

Given the focus for this volume, the majority of each chapter focuses on national mechanisms. A brief section in each is also devoted to the role of the main international actors (from UN agencies to NGOs and research institutions) for each topic and their responsibilities. Again and again, the authors stress that the role of the international system should be to supplement and complement national efforts, and not supplant them.

Finally, each chapter concludes with a list of specific recommendations.

THE IDP LAW AND POLICY MANUAL

The Brookings-Bern Project launched a handbook entitled *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* in November 2008. The Manual is meant to provide guidance to national authorities seeking to prepare and enact domestic legislation and policies addressing internal displacement in their country. It has drawn on the studies in this volume, other relevant sources of expertise, and a series of regional and expert consultations. It is being widely disseminated to national policymakers, competent ministries, legislators, and civil society groups concerned with internal displacement in the hope that it will 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 IDPs and their compatriots worldwide. The Manual will also be of use to the RSG and his

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international partners in their ongoing efforts to promote effective national laws and policies to prevent, address, and resolve internal displacement.