

## **How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework**

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### **The Call for an “Appropriate” Normative Framework and the Representative’s Response**

In 1998, the Representative of the UN Secretary-General on Internally Displaced Persons, Dr. Francis Deng, presented the “Guiding Principles on Internal Displacement”<sup>1</sup> to the UN Commission on Human Rights. in response to a request to prepare an “appropriate framework” for addressing the plight of internally displaced persons (IDPS)<sup>2</sup>. The language of the resolution did not ask him to come up with a “legal” framework or to propose the text of a declaration on the rights of internally displaced persons but gave him a great deal of latitude to decide for himself what kind of framework would be “appropriate” under the circumstances. The Representative, thus, was confronted with the question of what form he should favor for the requested framework. Had they been asked at the time, many international lawyers and NGOs would probably have advised him to opt for a convention or, at least, a UN General Assembly declaration. The Representative did not choose this option. His Guiding Principles are neither a binding treaty nor a declaration adopted by the General Assembly after negotiations of the text by the Member States, but a set of non-binding guidelines submitted by the Representative after a prolonged period of preparation and discussion by legal experts and representatives of intergovernmental agencies and non-governmental organizations.

This choice reflected the considered opinion of Dr. Deng and his team of legal experts. They decided early on that a non-binding document restating existing law and making it specific to the context of displacement would be more appropriate than to prepare a convention on IDPs. They thought that such an approach would provide the Representative within a short period of time with a normative framework that would facilitate the carrying out of his mandate, while the elaboration of a treaty or declaration would lead to

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<sup>1</sup> Guiding Principles on Internal Displacement, Addendum to the Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, 11 February 1998, UN Doc E/CN.4/1998/53/Add.2.

<sup>2</sup> See Commission on Human Rights Resolution 1996/52 (UN Doc E/CN.4/RES/1996/52, 19 April 1996) calling “upon the Representative of the Secretary-General to continue, on the basis of his compilation and analysis of legal norms, to develop an appropriate framework in this regard for the protection of internally displaced persons”.

prolonged negotiations affecting or even blocking the possibility of using international human rights law effectively in the context of internal displacement for a long time. They were also convinced that a document based upon and reflecting existing international law would be sufficient to provide the necessary guidance to States, international agencies, NGOs and others dealing with IDPs.

To what extent were these considerations justified and to what extent can the approach taken by the Representative be regarded as “appropriate” for a normative framework on the rights of IDPs?

This short paper addresses this question on two levels. First, it will argue that the preparation of a treaty or even a General Assembly declaration would not have been a realistic option when it came to protecting IDPs. Second, it will show that despite their non-binding character, the Guiding Principles are not without legal significance and that the approach chosen by the Representative has specific practical advantages.

### **The Difficulties of Treaty Making in the Area of Human Rights**

Why not a treaty? There are several good reasons why it made sense to elaborate a non-binding document on the rights of IDPs. Some of them have to do with the situation of human rights treaty making in general, others are specific to the issue of internal displacement and the law relevant for it.

*First, treaty making in the area of human rights has, in general, become very difficult in the area of human rights.*

Negotiations in the UN Human Rights Commission have become extremely difficult today for several reasons. They include a rapidly growing plurality of ideas and positions among States on human rights since the end of the cold war. Unlike during the decades before 1990, it is no longer possible to adopt a text once the big powers have found a compromise. Today, projects take exceedingly long even to be adopted by the Human Rights Commission before they are passed on to the General Assembly for further negotiation. The Draft Optional Protocol to the Torture Convention, for example, has been negotiated since 1992 at the level of a working group, and a successful outcome might still be far away. In the case of the Guiding Principles, the seriousness and the degree of the problem of internal displacement made it necessary to avoid a long period of legal uncertainty and to have a normative framework that could be used immediately. In addition, there was a real danger that negotiating a text that draws as heavily from existing law as the Guiding Principles do, would have given some States an opportunity to put into question some of the existing treaty provisions or to weaken customary law by expressing the opinion that some of its principles are no longer valid.

*Second, even where a text is adopted, there is no guarantee that the treaty is successful.*

Another problem with treaty making in the field of human rights is that it has become more difficult recently to get enough ratifications for new human rights instruments to enter into force. The 1990 Migrants Workers Convention, which still lacks the necessary 20 ratifications, is the most notable example. An amendment to the Convention on the Elimination of Discrimination against Women (CEDAW)<sup>3</sup> that would allow the Committee to meet more often and for longer sessions is meeting the same fate. If a treaty can enter into force, there is no guarantee that the States most affected by the problem addressed by the instrument will ratify. But even among States that have ratified human rights instruments, there might be an unwillingness to fully implement them. Even States that traditionally have been at the forefront of strengthening the role of international law<sup>4</sup> have developed techniques that allow them to avoid implementation in ways which do not technically violate international law, but will weaken international law in the long run<sup>5</sup>.

One way is to use *reservations in order to exclude new obligations going beyond those already accepted by the State concerned*: Most multilateral treaties allow for ratification with reservations. Reservations are unilateral statements regarding the exclusion or modification of the legal effect of specific provisions in their application to a particular State<sup>6</sup>. While the possibility to make reservations is positive insofar as they facilitate a State's acceptance of a treaty, the proliferation of reservations in recent times is troubling. The increasing number of reservations that show a lack of willingness to accept new obligations is particularly worrisome<sup>7</sup>.

Another technique consists of the *exclusion of the self-executing character of the treaty without enacting implementing legislation* in order to avoid the possibility that individuals will invoke it vis-à-vis authorities and courts in domestic procedures. In countries looking at international and domestic law as part of the same legal order, i.e. following the tradition of monism, treaty provisions at the domestic level must be directly applied by courts as self-executing norms unless they need implementing legislation. However, there are

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<sup>3</sup> Amendment relating to Article 20, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, decided by the States parties to the Convention on the Elimination of All Forms of Discrimination against Women of 22 May 1995, CEDAW/SP/1995/2, annex.

<sup>4</sup> See the examples, *infra* notes 7 and 8.

<sup>5</sup> See Walter Kälin, *Implementing Treaties in Domestic Law: From "Pacta sunt servanda" to "Anything goes"?*, in: Vera Gowlland (Ed.), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, The Hague/London/Boston 2000, pp. 95 – 112.

<sup>6</sup> See the definition of reservation in Article 2(1)(d) Vienna Convention on the Law of Treaties.

<sup>7</sup> When ratifying the 1966 International Covenant on Civil and Political Rights in 1992, the Swiss government, for instance, entered eight reservations stripping the Covenant of any legal effects going beyond those of the 1950 European Convention on Human Rights (see Giorgio Malinverni, *Les réserves de la Suisse*, in: Walter Kälin/Giorgio Malinverni/Manfred Nowak, *La Suisse et les Pactes des Nations Unies relatifs aux droits de l'homme*, 2nd ed., Basel 1997, pp. 83-104). Thus, Switzerland avoided assuming any additional obligations to improve the legal status of its citizens. Similarly, the United States ratified the Covenant with reservations making sure that its obligations under the agreement would only extend to the degree of protection provided by the U.S. Constitution.

examples of States whose legislature declared a treaty to be non-self-executing although the agreement was suitable for direct application and, at the same time, did not enact implementing legislation<sup>8</sup>. Such declarations give rise to legitimate concerns about a State's willingness to abide by international law in any meaningful way.

In the case of the Guiding Principles, all these difficulties would have increased the risk of not having an effective normative framework in place for IDPs for a long time.

*Third, to draft a treaty that combines human rights and humanitarian law is probably premature.*

From a legal perspective, one of the main challenges in drafting the Guiding Principles was to make sure that they cover all situations where displacement occurs, i.e. situations of tensions and disturbances, situations of internal armed conflict as well as times of interstate armed conflict. This necessitated a merger of international human rights and humanitarian law not only into one document but often also into one provision in a way that would do justice to both bodies of law. An informed reader of the Guiding Principles will often be able to trace the formulations back to specific guarantees either of human rights or of humanitarian law, while the uninitiated might get the feeling that the principles rest on one coherent concept. The approach taken by the Representative and his team reflects a growing trend in contemporary legal doctrine to treat human rights and humanitarian law as a unified complex of HUMAN RIGHTS norms under different institutional umbrellas<sup>9</sup>. However, in legal, institutional and political terms the distinction between human rights applicable mainly in peacetime and humanitarian law made for times of armed conflict is still so fundamental that many States and organizations probably would have opposed an attempt to combine both areas of law in one convention elaborated within the framework of the United Nations.

*Finally, to negotiate a new treaty was not really necessary as existing treaties already cover, at least implicitly, the rights of IDPs to a large extent.*

When the Representative began his work, it was far from clear how strongly and to what extent present international law protects IDPs. Of course, he knew from the beginning that international human rights law does not contain specific norms on IDPs but that most of its guarantees can be invoked by the displaced. He also knew that international

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<sup>8</sup> The U.S. Congress has been one of the most active proponents of the use of the explicit statement of non-self-execution for avoiding full implementation of international agreements when giving its advice and consent to the ratification not only of important trade agreements but also of human rights treaties such as the Convention against Torture or the Covenant on Civil and Political Rights. See Lori Fisler Damrosch The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties, in: Stefan A. Riesenfeld/Frederick M. Abbott (Eds.), Parliamentary Participation in the Making and Operation of Treaties, A Comparative Study, Dordrecht/Boston/London 1994, pp. 205, at 207- 213.

<sup>9</sup> See notably THEODOR MERON, Human Rights in Internal Strife: Their International Protection, Cambridge 1987, p. 28.

humanitarian law applicable in times of armed conflict contains a few scattered provisions on the treatment of the displaced which, however, do not constitute a comprehensive legal regime for this group of persons. Finally, it was clear that international refugee law has a lot to say about persons in flight but only applies to those who, unlike internally displaced persons, have left their country of origin and crossed an international frontier. Thus, the challenge was to identify and analyze those norms which are of special significance to IDPs but also to detect relevant gaps and gray areas in international law.

The Representative and his team addressed this challenge by starting their work with a careful examination of all those provisions of international human rights and humanitarian law that address the specific needs of displaced men, women and children. This work resulted in a study entitled “Compilation and Analysis of Legal Norms pertaining to internally displaced persons” which was submitted to the Commission on Human Rights in 1996<sup>10</sup>. The study came to the conclusion that present international law contains sufficient protection for the specific needs of internally displaced persons in many areas, but that there are a number of limited gaps as well as certain gray areas where clarification was needed. In this regard, the study distinguished two categories:

“... one area of insufficient coverage results from gaps in legal protection which occur where no explicit norms exist to address identifiable needs of the displaced. In some cases, there may be a norm in human rights law but not in humanitarian law and *vice versa*. In such cases, it is only possible to articulate rights by analogizing from existing provisions of law that apply only in limited situations or only to certain categories of persons such as children, refugees or minorities. The second area of insufficient coverage results where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm in areas of particular need to internally displaced persons. In such cases, it is possible to infer specific legal rights from existing general norms; however, the protection of internally displaced persons would be strengthened by spelling out these specific guarantees in an international instrument.”<sup>11</sup>

To examine how binding norms of existing law can be made fruitful for IDPs by analogous application and which specific norms can be deduced from more general provisions is a task that may be left to experts.

### **The Legal Nature of the Guiding Principles**

All these reasons were sufficient to decide not to make the Guiding Principles into a treaty. What, then, is the legal nature of the Principles if they are not binding?

As stated above, the Guiding Principles are not a binding document. Unlike declarations, resolutions or recommendations by international organizations, they have not been ne-

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<sup>10</sup>Compilation and Analysis of Legal Norms pertaining to internally displaced persons, U.N. Doc. E/CN.4/1996/52/Add. 2.

<sup>11</sup> Id., para. 411.

gotiated by States. Thus, they do not even constitute typical soft law, i.e. recommendations that rest on the consensus of States and thereby assume some authority that may be taken into account in legal proceedings, but whose breach does not constitute a violation of international law in the strict sense, and thus does not entail State responsibility. Because the Guiding Principles have been written by a group of independent experts one might argue that they are even softer than soft law. In a state-centered international legal system, a group of well-intentioned legal experts simply does not have the power to create law.

However, a closer look at the Guiding Principles might reveal that this very soft instrument might actually turn out to be much harder than many well-known soft law instruments. The reason for this is that the Guiding Principles are very well grounded in international law. It is possible to cite a multitude of existing legal provisions for almost every principle,<sup>12</sup> which provided the drafters with strong normative guidance. Even where language was used that was not to be found in existing treaty law, no new law in the strict sense of the word was created in most cases. Instead, similar to a judge who has to decide to what extent a human rights guarantee invoked by an IDP does provide protection to that person, Dr. Deng's legal team tried to deduce specific norms from more general principles that are part of existing international law. One example of this technique is Principle 6 on "the right to be protected against being arbitrarily displaced". No existing instrument mentions such a right explicitly. However, humanitarian law prohibits displacement in some specific and limited situations and human rights law, in a more general sense, guarantees not only freedom of movement but also the right to choose one's own residence, and thus, a right to remain<sup>13</sup>. A right not to be displaced can also be found in instruments on the rights of indigenous peoples<sup>14</sup>. From this it can be inferred that a right not to be arbitrarily displaced is already implicit in international law. Another example is the prohibition of return to situations of imminent danger<sup>15</sup>. Such a prohibition can be deduced from the prohibition of inhuman treatment, as it has been recognized by international monitoring bodies that it is inhuman to send a person to a country where he or she will face torture, death or another very serious human rights violation. However, as all the case law refers to return across international frontiers, a prohibition of inhuman return of internally displaced persons to dangerous areas within their own country needs to be articulated. Therefore, Principle 15 states the right of internally displaced persons "to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk". Such a principle, though not stated yet in an authoritative document, is in line with the spirit of existing international law and re-

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<sup>12</sup> See Walter Kälin, *Guiding Principles on Internal Displacement, Annotations*, Washington D.C. 2000, highlighting in detail the legal basis for each of the Principles.

<sup>13</sup> See article 12(1) of the International Covenant on Civil and Political Rights, articles 49 and 147 Geneva Convention IV, Articles 51(7), 78(1) and 85(4) of Protocol I, Articles 4(3)(e) and 17 of Protocol II.

<sup>14</sup> Article 16 of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>15</sup> See Article 3 of the 1984 Convention against Torture and the case law of Article 3 of the 1950 European Convention on Human Rights.

flects its underlining principles. These and other examples show that the drafters of these guidelines have been very careful not to go beyond what can be based on existing international law. Thus, it is justified to claim, as is stated in paragraph 3 of the Introduction, that “these principles reflect and are consistent with international human rights law and international humanitarian law”.

Contemporary legal theory teaches us that the creation and the application of law cannot be clearly separated but are closely related to each other. Seen in the perspective described above, the Guiding Principles are a good illustration of this complex relationship. They also show that in the field of international human rights law, it might be advisable for those promoting new standards to move away from traditional channels and forms of standard-setting. At least in certain cases, it might be more appropriate to look at standard-setting more in the light of how the rich body of existing, more general norms should be applied to specific situations in a particular area and to restate and expand existing law in the narrower context of a given problem. In that sense, the Guiding Principles may provide a model on how to promote human rights standards at a time when all basic human rights have found a sound basis in international law and, at the same time, treaty making has become difficult.

### **Assessment of the Non-Binding Nature of the Guiding Principles**

What are the disadvantages and advantages of the non-binding nature of the Guiding Principles? An obvious disadvantage of the non-binding nature of the Guiding Principles is the fact that States cannot be held accountable if they disregard them and that, as such, they cannot be invoked in legal proceedings at the domestic level. One should, however, not overestimate this weakness as it is always possible to invoke the hard law that lies behind the Guiding Principles where necessary. Overall, the non-binding character of the document has been an advantage, and where the Guiding Principles were met with resistance, it was not because of their content but because of a suspicion that they might be binding regardless of all assertions to the contrary. The Representative’s experience has shown that it is much easier to negotiate with governments if the questions of violations does not loom in the background but, instead, problems can be approached by looking at what kind of guidance is provided by international standards.

Experience has also shown that some governments and domestic courts are ready to use the Guiding Principles in a legal sense insofar as they incorporate them into domestic law or policies or accept them as a valid expression of what human rights conventions ratified by that country mean in situations of internal displacement. Several governments have accepted the authoritative character of the Guiding Principles in this sense, for example in Burundi<sup>16</sup> or Angola<sup>17</sup>, as has the Supreme Court of Colombia<sup>18</sup>.

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<sup>16</sup> Burundi, Protocole relatif à la création d’un cadre permanent de concentration pour la protection des personnes déplacées, (C.P.C./P.P.D.), 7 February 2001. On file with the author.

The same has happened at the international level where the Inter-American Commission on Human Rights<sup>19</sup>, UN Treaty Bodies<sup>20</sup>, Special Rapporteurs of the UN Human Rights Commission<sup>21</sup>, the General Assembly<sup>22</sup> and even the UN Security Council<sup>23</sup> have referred to the Guiding Principles either as a valid restatement of present international law or as a useful tool for properly addressing situations of internal displacement.

Whether or not a normative framework for the treatment of internally displaced persons is or becomes a reality, is much more dependent on the actual acceptance and use of the Guiding Principles than on their legal form. To the extent that the Principles achieve that level of authority, they become hard standards even if they are still not hard law.

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<sup>17</sup> Angola, Conselho de Ministros, Decreto No. 1/01 de 5 Janeiro, Normas sobre o reassentamento das populações deslocadas, Diário da República, I Série N.º 1, Sexta-feira, 5 Janeiro de 2001. On file with the author.

<sup>18</sup> Judgements of the Constitutional Court of Colombia in its cases T-227/97 and T-186589/T-201615/T-2459, referred to in E/CN.4/2001/5, para. 29.

<sup>19</sup> Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia (26 February 1999), chapter IV.

<sup>20</sup> E.g. Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: democratic republic of Congo, CRC/C/15/Add.153, 9 July 2001, para. 63, recommending “that the State party make every effort to respect and implement the Guiding Principles on Internal Displacement”.

<sup>21</sup> Examples can be found in E/CN.4/2000/3, para. 4 (Asma Jahangir), E/CN.4/2000/71, para 28 (Olara Otunou), E/CN.4/ E/CN.4/2000/41, para. 214 (Michel Moussali), E/CN.4/2000/110, paras. 51-52 (Mona Rishmawi).

<sup>22</sup> See, e.g. General Assembly resolution 56/172, Situation of human rights in parts of South-Eastern Europe (A/RES/56/172).

<sup>23</sup> Statement by the President of the Security Council of 13 January 2000 on humanitarian assistance to refugees in Africa (S/PRST/2000/1, 13 January 2000), taking note of the fact “that the United Nations agencies, regional and non-governmental organizations, in cooperation with host Governments, are making use of the Guiding Principles on Internal Displacement, inter alia, in Africa”.