

The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting



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In the last decade of the twentieth century, an explosion of civil wars brought a pressing new problem onto the international agenda—the plight of internally displaced persons (IDPs), people forced from their homes by conflict, communal violence, or egregious human rights violations who remain uprooted and at risk within the borders of their own countries. The 1951 Convention Relating to the Status of Refugees did not apply to them, and the UN High Commissioner for Refugees (UNHCR) had no automatic mandate to assist them, because unlike refugees they did not flee across borders. Rather, they remained inside their own countries under the jurisdiction of their own governments, the very governments that may have caused their displacement in the first place and that were often unwilling or unable to provide for their well-being and security.

It was not until the 1990s that the absence of an international system for IDPs began to be noticed and more traditional notions of sovereignty questioned. One of the more vivid examples of this change in attitude was a new set of international standards to protect persons forcibly uprooted in their own countries—the Guiding Principles on Internal Displacement.¹ Introduced into the UN Commission on Human Rights in 1998, they set forth the rights of internally displaced persons and the obligations of governments and the international community toward these populations. While acknowledging that primary responsibility rests with national authorities, the Guiding Principles recast sovereignty as a form of national responsibility toward one's vulnerable populations with a role provided for the international community when governments did not have the capacity or willingness to protect their uprooted populations.

Although not a legally binding instrument like a treaty, the Guiding Principles quickly gained substantial international acceptance and authority. From the time they were introduced into the commission, governments, international organizations, regional bodies, and nongovernmental organizations (NGOs) began to cite and apply them. Indeed, a

2003 resolution of the commission, cosponsored by fifty-three states, expressed “appreciation” of the Guiding Principles “as an important tool for dealing with situations of internal displacement” and welcomed the fact that “an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying them as a standard.”² General Assembly resolutions used the same language.³

Yet their background and development were unusual in the history of international standard setting. To be sure, governmental bodies—the fifty-three-member commission and the General Assembly—requested the creation of a normative framework for IDPs, but the drafting, review process, and finalization were done *outside* the traditional intergovernmental process. Unlike other standards accepted and widely used by the international community, the principles were not drafted by an expert body of the commission, such as the Sub-Commission on the Promotion and Protection of Human Rights. Nor were they later revised or formally “adopted” by a governmental body. Rather, they were prepared and finalized by outside international experts, albeit under the direction of the representative of the UN secretary-general on internally displaced persons. This led a number of governments to raise concerns about the process by which the principles were developed and to question their international standing as a result. Egypt, Sudan, and India in particular expressed concerns about standard setting by nongovernmental actors, even though these states joined the consensus on resolutions calling for the dissemination of the principles.

In this article, I analyze the origin and development of the Guiding Principles, the reasons for their growing international usage, the validity of the reservations about them, and finally the question of whether the process that developed them truly constitutes a turning point in standard setting reflecting a greater role for the nongovernmental community in developing international norms of conduct for states.

Origin of the Principles

The need for international standards for internally displaced persons first became apparent in the 1990s when the number of persons uprooted within their own countries by armed conflict, ethnic strife, and human rights abuse began to soar. When first counted in 1982, only 1.2 million people could be found forcibly displaced in eleven countries. By 1995, there were an estimated 20 to 25 million in more than forty countries, almost twice as many as refugees.⁴ Many were separated from their families or communities, trapped in the midst of conflicts, and

often deprived of food, medicine, and shelter. They were also easy targets for physical violence.

When relief organizations in the field began to try to help IDPs, they found that they had no clear rules for doing so. Indeed, the UNHCR, the UN Children's Fund (UNICEF), and NGOs began to appeal for a document they could turn to that would define IDPs and their entitlements.

For many at the UN, the problem was not only a humanitarian emergency but also a potential political and security crisis. If left unaddressed, conflict and displacement in one country could disrupt national stability and also create political and economic turmoil throughout geographic regions. Whether in the Great Lakes region of Africa, the former Yugoslavia, or West Africa, conflict and displacement in one country could be seen spilling over borders, overwhelming neighboring countries with refugees, and helping to ignite regional wars.

The end of the Cold War helped bring the plight of internally displaced populations to the fore. As superpower competition waned, possibilities opened up for crossing borders and for reaching people in need, reinforced by changing notions of sovereignty. The view that people at risk inside their own countries should be a legitimate concern of the international community had long been championed by the human rights movement. Now, humanitarian organizations began to demand international access to people whose survival was at stake. In 1989, the UN aggressively pressed the Khartoum government to accept Operation Lifeline Sudan to bring in food and supplies to starving Sudanese under both government and insurgent rule. Two years later, in Iraq, with hundreds of thousands of Kurds stranded at the Turkish border in the wake of the Gulf War, a U.S.-led coalition carved out a security zone in the north, and the Security Council demanded "immediate access" for humanitarian organizations so that they could reach people *inside*. Subsequent UN resolutions also insisted on "unimpeded access" to persons displaced internally, whether in Somalia, Bosnia, Rwanda, or East Timor. In some instances, the UN authorized the use of force to ensure the delivery of relief and to provide protection for IDPs.

But no coherent institutional approach was developed to deal with internally displaced persons. Neither an institution nor a convention existed that was applicable to IDPs. As UNICEF's former executive director, James Grant, observed, "The world has established a minimum safety net for refugees. Whenever people are forced into exile . . . refugees can expect UNHCR to be on the scene in a matter of days or on the outside, a matter of weeks. This is not yet the case with respect to internally displaced populations."⁵ Of course, the International Committee of the Red Cross (ICRC) had long been engaged in the protection

of civilians in armed conflict, including internally displaced persons, but the magnitude of the problem was clearly beyond its scope. ICRC access was often limited, and in situations of “internal strife”—below the threshold of civil war—ICRC was often precluded from involvement.

With international concern mounting about the growing numbers and desperate needs of IDPs, a group of NGOs—the Friends World Committee for Consultation (Quakers), the Refugee Policy Group, and the World Council of Churches—undertook a joint campaign in 1990 to spotlight the legal and institutional gaps in the international system and to mobilize support both for the appointment of a UN representative on IDPs and for the development of international standards to protect them.⁶ In these organizations’ view, so many governments were causing or tolerating displacement, or proving unwilling or unable to meet the needs of the displaced, that it was essential to develop institutional arrangements and to determine the degree to which international law provided an adequate basis for the protection of IDPs.

More quickly than they anticipated, a commission resolution in 1992 called on the secretary-general to appoint a representative on IDPs and asked the representative, as one of his first assignments, to examine the applicability of international human rights and humanitarian and refugee law to the protection of IDPs.⁷ Francis M. Deng, a distinguished scholar and diplomat from Sudan who was chosen to be the representative, immediately set about to identify persons and institutions to provide him with legal guidance and also donors to underwrite the process. Deng’s position, like that of other representatives and rapporteurs emanating from the Commission on Human Rights, was a voluntary one, with only limited human and material resources made available by the UN. Although governments had requested him to undertake a major legal analysis for the world community, it was basically left up to him to find the people and the funds to do it. When Deng traveled to New Haven to meet with legal scholars assembled from Yale and Harvard, the UN did not even pay his train fare; nor did it fund the meetings that brought together experts to discuss the relevant legal issues.

It was from their offices at the Brookings Institution that the representative and I directly contacted individual lawyers and institutions to seek their pro bono involvement and solicited foundations and donor governments for funds to carry through the process of developing a legal framework. The then UN Secretary-General Boutros Boutros-Ghali strongly supported this outreach effort, acknowledging it to be the most effective and resourceful way to carry out the representative’s mandate. UN member states, in resolutions, also encouraged the representative to

seek the contribution of academic and research institutions to help him with his work.⁸

Of the institutions consulted, the Washington College of Law at American University, the Faculty of Law at the University of Bern (Switzerland), and leading NGOs such as the American Society of International Law, the Ludwig Boltzmann Institute of Human Rights (Vienna), and the International Human Rights Law Group generously gave of their time and expertise. So too did the ICRC and UNHCR. Following various exploratory meetings, a team of international legal experts formed and began to meet in Geneva, Vienna, and Washington from 1993 to 1995 and also to consult with a wide range of experts from international organizations and NGOs. Deng was able to present the team's *Compilation and Analysis of Legal Norms* applicable to the internally displaced to the commission in 1996 (with a supplement in 1998).⁹

One of the first major decisions the legal team made in developing the *Compilation and Analysis* was to adopt what they called a "needs-based approach." That meant identifying the needs of the internally displaced and then examining the extent to which the law adequately addressed those needs. This contrasted with a "rights-based approach" proposed by others. But as two of the team's principal members, Robert Goldman and Walter Kälin, pointed out, displacement "breaks up the immediate family . . . cuts off important social and cultural community ties; terminates stable employment relationships; precludes or forecloses formal educational opportunities; deprives infants, expectant mothers, and the sick of access to food, adequate shelter, or vital health services; and makes the displaced population especially vulnerable to acts of violence, such as attacks on camps, disappearances, or rape."¹⁰ Any examination of IDP rights would have to be based on the special needs of this distinct category of persons.

A second major issue the team had to address was the fear expressed that singling out one group of people could end up discriminating against others. The *Compilation and Analysis* therefore pointed out that precedents abound in international law to provide special protections for particularly disadvantaged groups, whether refugees, minorities, indigenous people, the disabled, women, or children. The purpose of the exercise was not to create a privileged status for IDPs but rather to ensure that, in a given situation, they, like others, would be protected and that their unique needs would be acknowledged and addressed.

Overall, the legal team found that IDPs receive a good deal of coverage under existing international human rights and humanitarian law and analogous refugee law. However, IDPs are not explicitly mentioned in that

law, and there are significant areas in which the law fails to provide adequate protection.¹¹ Indeed, the *Compilation and Analysis* identified seventeen areas of insufficient protection, owing to inexplicit articulation of the law, and eight areas of clear gaps in the law. In the case of inexplicit articulation, the lawyers found that, although a general norm might exist in the law, a more specific articulation of that norm was needed to make it relevant to the needs of the internally displaced. For example, although there may be a general norm prohibiting cruel and inhuman treatment, there is no explicit prohibition against the forcible return of IDPs to places of danger. Or, although there may be a general norm covering essential medical care, the special needs of internally displaced women in the areas of reproductive and psychological health care would need to be spelled out. As for clear gaps in the law, the legal team found that in a number of instances the law is silent. For example, there exists no explicit norm on the restitution of property lost as a consequence of displacement during conflict or on the need of IDPs for personal identification and documentation. In such cases, the team pointed out, rights would have to be inferred from other provisions of law.

Although the *Compilation and Analysis* did not recommend the precise form a future international instrument should take, the legal team did conclude that to improve protection for IDPs, a restatement of the law would be needed to make it more relevant to IDPs and to clarify gaps and gray areas. Deng himself spoke of the need to develop a “body of principles” or “guiding principles” in several reports to the commission, and commission resolutions took note of the preparation of guiding principles.¹²

There were three main reasons for the decision to develop the Guiding Principles. First, there was no support from governments for a convention. The subject of internal displacement was still too sensitive. It was feared that a treaty on IDPs would be an infringement on sovereignty. Thus, the Commission on Human Rights, in requesting Deng to develop an “appropriate” framework based on the *Compilation and Analysis*,¹³ generally avoided the term *legal* to modify the word *framework* in the resolution. International organizations like the ICRC also expressed reservations about embarking on a treaty, fearing that it might undermine the Geneva Conventions, whereas restatement of the law through guiding principles was viewed differently: it could reinforce and strengthen existing protections.

Second, time was a factor. Treaty making could take decades, whereas there was urgent need for a document *now* to address the emergency needs of IDPs. It bears underscoring that humanitarian organizations in the field

that had increasingly become involved in helping IDPs needed a clear and concise document to guide their work.

Third, sufficient international law applicable to internally displaced persons already existed. What was required was to bring together the myriad of provisions now dispersed in a large number of instruments and to tailor them to the specific needs of the internally displaced.

Development and Content of the Principles

It took two years, from 1996 to 1998, to draft the Guiding Principles. During that period, Deng regularly informed the Commission on Human Rights and the General Assembly about the progress being made, and UN resolutions acknowledged the preparation of the principles.

Although a core legal team under Deng's direction did the actual drafting, the consultation process was broad based. Indeed, Deng and I recognized that principles developed in a closed room by a team of lawyers would never see the light of day unless there was international understanding and support for those principles. The Brookings Project on Internal Displacement, set up to support Deng's mandate, therefore organized a series of meetings in Europe and the United States to bring together a wide range of experts from regional and international organizations, humanitarian and human rights NGOs, women's and children's advocacy groups, legal associations, and research institutions. It was at a conference of fifty international experts in Vienna in 1998, hosted by the government of Austria, that the Guiding Principles were finalized.

The principles, thirty in number, provide guidance to all actors that deal with the internally displaced, whether governments, insurgent groups, international organizations, or NGOs. They apply to all phases of displacement. They offer standards for protection *against* arbitrary displacement, innovatively enunciating a right *not* to be arbitrarily displaced. They set forth standards for protection during displacement, tailoring the full range of civil, political, economic, social, and cultural rights to the specific needs of IDPs. Finally, they offer standards for protection during return, resettlement, and reintegration. In short, they provide a comprehensive international minimum standard for the treatment of IDPs.¹⁴

The principles define IDPs as

Persons who have been forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of, or in order to

avoid the effects of, armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.

The two crucial features are being coerced to move and remaining within one's national borders. Economic migrants were not included because the element of coercion was not considered to be so clear. However, those uprooted by floods, earthquakes, famine, or nuclear plant eruptions, or forced by development projects to relocate, were included, in addition to the more traditionally accepted IDPs—those uprooted by conflict and human rights violations. Not all humanitarian or human rights groups wanted to include these other groups, preferring to limit the IDP definition to those subject to persecution or who would be considered refugees if they crossed a border. But the overriding opinion was that persons uprooted by natural and human-made disasters or development projects are also displaced and in need of attention; moreover, they can be neglected or discriminated against by their governments on political or ethnic grounds or have their human rights violated in other ways.

If there can be said to be a philosophical foundation behind the principles, it is the concept of sovereignty as a form of responsibility, developed by Deng and other scholars. Besides positing primary responsibility for the welfare and safety of IDPs with their governments, the concept also considers it an obligation of the international community to provide humanitarian assistance and protection to IDPs when the governments concerned are unable to fulfill their responsibilities. In such an instance, governments are supposed to request and accept outside offers of aid. If they refuse or deliberately obstruct access and put large numbers of persons at risk, the international community, under this concept, has a right—and even a responsibility—to step in and assert its concern.

It is worth noting that no government has ever explicitly challenged the concept of sovereignty as responsibility, no doubt because any government that did so would have to argue that sovereignty allows a state to deny life-sustaining support to its citizens. At the same time, governments have loudly opposed international humanitarian action that overrides sovereignty, fearing that humanitarian action could be a cover for the interference of powerful countries in the affairs of weaker states. In fact, Secretary-General Annan has at times found himself at odds with UN member states over his assertions that sovereignty cannot be an acceptable justification for committing crimes against humanity and that the international community in such cases has a right to become involved.

The Guiding Principles reflect this effort to balance state sovereignty with humanitarian imperatives. They clearly acknowledge that primary responsibility for the displaced rests with their governments (Principles 3, 25), but they also stipulate that offers of aid from international humanitarian organizations shall not be regarded “as an unfriendly act or an interference in a State’s internal affairs.” Consent for international aid is not to be “arbitrarily withheld,” particularly when the authorities concerned are “unable or unwilling” to provide the required assistance. Further they emphasize that, in providing assistance, international humanitarian organizations should pay attention to “protection needs and human rights” and take “measures” in this regard (Principle 27). Therefore, under the principles, IDPs must have access not only to material assistance but also to protection from violence and abuse—in short, to enjoy the full range of human rights.

Impact of the Principles

Despite the fact that the principles were not drafted or formally approved by an intergovernmental process, UN agencies, regional organizations, NGOs, and a growing number of governments have begun to cite them and to use them as the basis for policies, laws, and programs for the internally displaced.

First and foremost among the reasons for this receptiveness was that the principles answered a profound international need for a document to turn to in the field. Operational agencies in particular welcomed their completion.

Second, the fact that the principles reflect existing law already negotiated and accepted by states gave many governments confidence to use them. The legal team never envisaged its role as one of creating new law even though the temptation was often there to improve on the law when gaps and gray areas were found. For example, some NGOs urged the legal team to strengthen the obligation of governments to accept international humanitarian aid, but the principles do not go beyond existing law. They do not say governments must accept offers of international aid in *all* circumstances. What they say is that consent shall not be “arbitrarily withheld,” especially when governments cannot provide the necessary assistance themselves (Principle 25). In the *Annotations* to the principles, Kälin explains that states must have valid reasons to refuse humanitarian aid, because otherwise they would violate other international rules, such as the duty to protect the right to life and not to use starvation as a method of combat.¹⁵ In cases where the principles go

beyond restatement of existing written law, such as the elaboration of a right not to be arbitrarily displaced, the legal team was careful not to stray from what could be said was implicit in the law. The *Annotations* to the principles, published in 2000, carefully set forth the provisions of law on which each principle is based.

Another reason for the support the principles received was the inclusive process by which they were developed. Although it was time consuming, expensive, and sometimes contentious, the considerable outreach that a broad-based process achieved paid off handsomely. By the time Deng presented the principles to the Commission on Human Rights in 1998, a substantial number of influential international organizations and NGOs had already endorsed them. Most notably, all the international humanitarian, human rights, and development organizations and NGO umbrella groups that constituted the UN's Inter-Agency Standing Committee (IASC), chaired by then Under Secretary-General Sergio Vieira de Mello, endorsed the principles. In addition, leading IASC members like UNHCR, the ICRC, UNICEF, and the World Food Programme declared their support for the principles in interventions before the commission, which influenced many governments to respond positively. NGOs such as the International Commission of Jurists, the Norwegian Refugee Council, the Friends World Committee for Consultation, and the Refugee Policy Group undertook a lobbying campaign on behalf of the principles.

The role governments played was also noteworthy. Ambassador Christian Strohal of Austria made IDPs one of his government's principal issues at the commission. He skillfully mobilized more than fifty states to cosponsor the resolution to take note of the Guiding Principles. Various African and Latin American states, the Nordic countries, and the United States also helped in this endeavor. As a public member of the U.S. delegation that year, I was able to speak in support of the principles before the commission and to lobby delegations about the text. When the principles came before the General Assembly, it was the government of Norway that took the lead, shepherding through a unanimous resolution in 1999 taking note of the Guiding Principles. Indeed, the combination of Austria in the commission and Norway in the General Assembly ensured increasingly supportive resolutions in both bodies.

The representative himself was a significant actor in this process. With diplomatic skill, eloquence, and acknowledged charm, Deng always assured governments that he respected their sovereignty and that the principles would help them exercise their responsibility more effectively.

Although some in the human rights community would have liked to see him engage in stronger advocacy and in “finger pointing,” his reputation for engaging with governments helped galvanize support for the principles.

Initially, both the Commission on Human Rights and the General Assembly were cautious in receiving the principles, going only so far as to “take note” of them and of the representative’s intention to use them in his work. But with each passing year, the language in the resolutions became stronger as the principles became better known and began to be used internationally. By 2003, the commission expressed “appreciation” of the Guiding Principles, called them “a standard” and an “important tool,” welcomed the fact that “an increasing number of States, United Nations agencies and regional and non-governmental organizations [were] applying them,” and also welcomed their “dissemination, promotion and application” worldwide.¹⁶ This certainly came close to endorsement even if not adoption. Even the Security Council began to cite the principles in its resolutions and presidential statements.

Secretary-General Kofi Annan supported the principles as soon as they were completed, calling them one of the “notable achievements” in the humanitarian area.¹⁷ In a report to the Security Council in 1999, he called on that body to encourage states to observe the principles in situations of mass displacement¹⁸ and also recommended that the General Assembly and the Economic and Social Council (ECOSOC) encourage member states to develop national laws and policies “consistent with” the Guiding Principles.¹⁹

In the field, UN humanitarian and development agencies began to use the principles. UNHCR developed programs based on the principles to benefit IDPs in Sri Lanka. Other agencies used the principles as a checklist to monitor and assess IDP needs. Still others organized training sessions around the principles to raise awareness of the problems of the internally displaced. The Office for the Coordination of Humanitarian Affairs (OCHA) printed 10,000 copies of the principles and began disseminating them worldwide.

At the regional level, a growing number of intergovernmental organizations began to rely on the principles. The Inter-American Commission on Human Rights of the Organization of American States (OAS) began to use the principles as a benchmark for evaluating conditions in member states and as a basis for advocacy, most notably with Colombia and its estimated 2 million IDPs. In Africa, which has more IDPs than any other continent, the Organization of African Unity (now

the African Union) formally acknowledged the principles; the Economic Community of West African States (ECOWAS) called on its member states to disseminate and apply them; and in the Horn of Africa, the Intergovernmental Authority on Development (IGAD), in a ministerial declaration, called the principles a “useful tool” in the development of national policies on internal displacement. In Europe, the fifty-five-member Organization for Security and Cooperation in Europe (OSCE) acknowledged the principles as “a useful framework for the work of the OSCE” in dealing with internal displacement, which should affect its policies toward the Russian Federation and Turkey, among others. In 2003, the Parliamentary Assembly of the Council of Europe urged its member states to incorporate the principles into their domestic laws.

Such steps at the regional and international levels are promising, but it will take some time before they translate into concrete actions on the ground that will actually improve conditions for IDPs. As the representative of the secretary-general commented in 2002, “While the Guiding Principles have been well received at the rhetorical level, their implementation remains problematic, and often rudimentary.”²⁰ Some international organizations have found it difficult to translate the principles into practical steps on the ground, and regional organizations in Asia, like the South Asian Association for Regional Cooperation (SAARC) and the Association of Southeast Asian Nations (ASEAN), have resisted acknowledging them at all, in deference to concerns about sovereignty.

Nonetheless, a process of acceptance has begun. As aptly put by a past chair of the Inter-American Commission on Human Rights, “The train has left the station.” The impact of the principles has begun to be felt at the national level, where a small but increasing number of governments have begun to develop policies based on them and have also incorporated their provisions into national law. In Colombia, for example, the Constitutional Court cited the Guiding Principles as a basis for two of its judgments in support of IDPs who had claimed that social service agencies were not providing them with timely, sufficient assistance. In Peru, the Congress in 2004 adopted a law based on the principles that establishes material benefits for IDPs. In Angola, the government incorporated the Guiding Principles into its law on resettlement in order to guide IDP returns after the civil war. In Afghanistan, the principles are being used to draft a decree for safe return. Other governments (e.g., Burundi, Colombia, the Philippines, Sri Lanka, and Uganda) have developed national policies based on the principles.²¹ In Georgia, the government discussed with local lawyers its national legislation and administrative procedures in terms of the Guiding Principles and announced at the UN that it would bring its laws into line with the principles.

Even nonstate actors have begun to acknowledge and use the principles. The Sudan People's Liberation Movement and Army (SPLM/A) drafted a policy on internal displacement based on the principles, and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka have begun to receive training in them.

Of course, acknowledging the Guiding Principles and basing laws and policies on them do not guarantee that these laws and policies will be implemented. In Angola, the government has been slow to implement its law.²² In Colombia too, the announcement of laws and policies on IDPs has not been matched by the will to carry them out. Much is needed in the way of monitoring, advocacy, and the engagement of a full range of international and local actors to hold governments and nonstate actors accountable.

Local NGOs, lawyers' groups, women's associations, academics, and other members of civil society are at the forefront of such efforts. To date, their main thrust has been to disseminate the principles and make them better known. They have translated the principles into local languages, organized training sessions, and developed Power Point presentations, comic strips, and handbooks to make them relevant to local conditions.²³ In Sri Lanka, an NGO—the Consortium of Humanitarian Agencies—organized a meeting at an IDP camp at which the IDP representatives used the principles to make their concerns known to camp commanders about inadequate food rations, lack of clean water, and attacks on their personal security. In Georgia, IDP leaders and lawyers conversant in the Guiding Principles brought to their government's attention the need to expand voting rights for IDPs. In response, the government changed its law to enable IDPs to vote in the areas where they reside without sacrificing their IDP status and benefits. In Colombia, local groups have also made gains for IDPs when using the principles as an advocacy tool.

IDP associations and displaced communities themselves have found the principles a source of empowerment. In Sierra Leone, after learning of their rights, IDPs used the principles to call on UN agencies to provide education in camps. Most poignant are the words of a widow and mother of four in Angola who received UN training in the principles at Salga Camp in Luanda Province:

I knew that we had rights, just like any other person. Now that I know exactly what they are, it is my responsibility to ensure that my community understands them too. I am thankful for this opportunity to learn and teach about our rights. If we know about the Guiding Principles and the Norms [on resettlement based on the principles], we know our lives can improve.²⁴

Reservations About the Principles

Perhaps it was the speed with which the principles made their way through UN bodies, UN reports, and even resolutions of the Security Council, and their growing usage internationally, that best explains the unease manifested toward them by several third world states. While none publicly took issue with the content of the principles, several began to question the process—the fact that the principles had not been drafted or adopted by governments. Egypt, Sudan, and India in particular made a point of reminding states in ECOSOC and the General Assembly that the principles were not legally binding. India even went so far as to challenge a 1999 report of the secretary-general, asserting that before the secretary-general could call on member states to abide by the principles, they would have to become widely accepted.²⁵

At base was the concern that the promotion of international standards not negotiated by governments and on a subject as sensitive as IDPs could mean an erosion of state sovereignty. At the UN in 1999 and 2000, there were heightened sensitivities about infringements on sovereignty following NATO's "humanitarian intervention" in Kosovo *without* Security Council approval, albeit with what seemed to be the tacit acceptance of the secretary-general. Egypt, paradoxically a country without IDPs, raised the prospect that internal displacement might be used as a cover to trigger humanitarian intervention and override sovereignty.

Regional politics also seemed to influence Egypt's decision to take a lead in questioning the principles. Sudan, its neighbor to the south, regularly came in for international criticism for its obstruction of international aid to its more than 4 million IDPs and was believed to have asked for Egypt's help. Standing up for Sudan meant not only defending its record but in this case also taking issue with the right of the international community to offer humanitarian aid, as reflected in the Guiding Principles. Rather, Egypt and Sudan insisted that humanitarian aid could be provided only at the request and with the consent of governments, and they unsuccessfully suggested amending an earlier General Assembly resolution specifying a right of international initiative,²⁶ one of the documents on which the principles are based.

For Sudan, too, the fact that the representative of the secretary-general came from the Dinka tribe, the main group locked in civil war with the government, also contributed to its questioning of the Guiding Principles. Although the Sudanese government was enormously proud that one of its nationals had been appointed representative, Deng's role and the principles were a constant point of scrutiny and comment.

That the process by which the principles were developed could become “a precedent” for other standard-setting exercises was also a concern expressed. To be sure, nongovernmental actors and experts have often played important roles in initiating and influencing the development of international norms, most recently the landmines treaty and the international criminal court.²⁷ But it is governments that then revise the texts and adopt them. When it came to the Guiding Principles, the document prepared by the experts became the final text. There was, of course, a reason for this—the experts who drafted the principles did not create new law but simply compiled and restated existing law that had already been negotiated and agreed to by states. But “standard setting by the back door” was nonetheless initially charged by Mexico,²⁸ though its government subsequently changed its view and became a strong supporter of the principles after the election of President Vicente Fox.

Egypt did not actually begin to articulate its concerns until two years after Deng presented the Guiding Principles to the Commission on Human Rights. Other states, particularly those who were using the principles and supported them, took issue with Egypt’s objections. After all, successive resolutions of the commission and the General Assembly had asked Deng to prepare a normative framework for IDPs based on the *Compilation and Analysis of Legal Norms*. Moreover, every report and statement made by Deng to these bodies regularly informed them of the progress made by the legal team in developing the principles. It was also a fact that Egypt and Sudan had voted in favor of the resolutions calling for the promotion and dissemination of the principles. In 1999, it was Algeria that had recommended that the Organization of African Unity’s Commission on Refugees and Displaced Persons express appreciation of the principles.

Yet two years later, Algeria, working closely with Sudan and Egypt, posed the following question to the representative in the General Assembly: Would discussion of the Guiding Principles in an intergovernmental body, such as the General Assembly, lead to their broad adoption or application? Behind the question was the view that the principles did not have intergovernmental approval and that without such formal approval the principles could not be viewed as an authoritative document. Deng, in a carefully worded response read out to the assembly, pointed out:

Considering that the Guiding Principles were developed in response to successive resolutions of the Commission on Human Rights and the General Assembly and the wide support they have received since their presentation to the appropriate UN bodies, it would not be strictly

correct to assume that they have not been considered in pertinent intergovernmental bodies, even though formal adoption was not called for, given their nature as guidelines restating existing law and thereby facilitating their implementation.²⁹

Egypt and Sudan also sought to block references to the principles from newly drafted documents in other forums. For example, at the World Conference Against Racism in 2001, Egypt, Sudan, and the Russian Federation tried but failed to keep reference to the Guiding Principles out of the Program of Action. However, at the Second World Assembly on Aging and also the Special Session on Children, Egypt, joined by Algeria, India, and others, did succeed in excluding reference to the Guiding Principles from the main documents. Egypt also managed to ensure that reference to the principles would be excised from the annual General Assembly resolution on UNHCR.³⁰ As a result, an inconsistency began to develop in UN forums, with some strongly promoting the principles and others deliberately not mentioning them.

Against this background, the government of Switzerland decided in 2001 to host a series of informal meetings to facilitate dialogue between governments with reservations about the principles and the representative and his team. Also invited were other governments, including those that supported the principles from the Group of 77 (G-77), as well as international and regional organizations. By 2003, this process proved quite constructive in allowing governments with reservations to air their views, hear responses to their concerns, and learn how other governments in the G-77 were using the principles. With sensitivities about humanitarian intervention having eased, Egypt indicated in 2002 before ECOSOC that “it [was] ready to overcome the differences” that stemmed from the development of the Guiding Principles “through the holding of consultations.”³¹ Algeria, in a statement before the commission in 2003, expressed support for the representative and acknowledged that among the initiatives the international community had taken to redress the suffering of displaced populations was the development and growing application of the Guiding Principles.³² That same year, the Sudanese government hosted IGAD’s first regional conference on internal displacement, which called the Guiding Principles “a useful tool” in building national policies on internal displacement.

Although it is too early for a final judgment, it would appear that states skeptical of the principles have begun to acknowledge their value in dealing with displacement. Egypt and Sudan, as well as India, have begun to describe the principles as “important” guidelines even though they questioned “the process” by which they were developed. Indeed,

it has become evident that these states do not want to be seen as undermining a document that so many of their partners in the G-77 find of value. After all, Angola, Azerbaijan, Brazil, Burundi, Cameroon, Colombia, Georgia, Mexico, South Africa, and Uganda, among others, including regional intergovernmental bodies and UN agencies, have all stood up publicly to endorse the utility of the principles. UN resolutions can therefore be expected to continue to call for their wide dissemination and application, whereas states with reservations will likely persist in pointing to their nonbinding nature.

The Convention Route

Whether governments should adopt a legally binding treaty on IDPs remains a legitimate question. Those in favor of a convention argue that a binding instrument would have more authority and international recognition and would hold states accountable if they disregard its provisions.³³ Those opposed argue that despite their nonbinding character the Guiding Principles do have “legal significance” and are being applied internationally.³⁴ A growing number of governments have been showing themselves ready to apply the Guiding Principles in a legal sense.

Walter Kälin, in a paper on this question, sets forth very practical and persuasive reasons to avoid the convention route at this time.³⁵ To begin with, human rights treaty making is a very cumbersome process and has become even more complicated in recent years. Not only could it take a decade or more to complete a treaty, but there is then no guarantee that the necessary ratifications will be secured or that the states most affected by the problem will ratify the instrument or do so without crippling reservations. India, for example, has refused to ratify the refugee convention. It calls attention to the nonbinding nature of the Guiding Principles, but it would probably also refuse to ratify an IDP treaty—being opposed to any international involvement with its refugees or IDPs.

Moreover, states do not always comply with the treaties they ratify. Although treaties are “legally binding,” their provisions are often flouted. A recent study, for example, found that since the entry into force of the Convention on the Rights of the Child and its Optional Protocol more child soldiers have been recruited than ever before.³⁶ The fact that the principles are nonbinding can in some respects prove an advantage. Indeed, the UN representative on IDPs has found it easier to negotiate with governments on the basis of guidelines. Governments find them less threatening since they cannot be formally charged with noncompliance.

The treaty route also holds particular dangers. While waiting for a treaty to be drafted, governments might be encouraged to argue that IDP rights are “on hold.” Negotiating a treaty could also become a pretext to watering down accepted provisions of international human rights and humanitarian law on which the principles are based. Finally, many states see no need for a treaty on IDPs when existing law provides adequate protection as restated in the Guiding Principles. Nor do most leading experts favor a treaty. At a meeting in Vienna in 2002, a group of about forty experts from international organizations, regional bodies, NGOs, and IDP associations reached a broad consensus in favor of the more evolutionary approach of the Guiding Principles.³⁷ Most believed that the standing and authority of the principles would continue to increase over time with expanded usage. Some even argued that if a sufficient number of states make them part of national law, and international legal bodies regularly cite them as a source of law, the nonbinding elements of the principles might evolve in time into customary law.

But it is also true that if there is sustained usage and acceptance of the Guiding Principles, a legally binding instrument might follow, but in my view it should only be pursued at a time of considerable international consensus and when the pitfalls outlined above are not so pronounced. A possible stepping-stone could be a regional instrument—for example, in the African or inter-American system.

For now, however, the Guiding Principles are proving a powerful tool “shaping the political and legal debate on how to assist the millions of IDPs in the world.”³⁸ That is because legally nonbinding instruments can wield a great deal of influence, especially when they are based on existing obligations of states—in this case to provide food, medicine, shelter, and protection to IDPs. Nonetheless, it remains to be seen whether worldwide usage and implementation of the Guiding Principles will bring broader acceptance to a document developed outside the traditional intergovernmental process.

Conclusion

The Guiding Principles fill a major gap in the international protection system for uprooted peoples. Since 1951, standards have existed for refugees forced to flee their countries in search of international protection abroad. Now those forcibly displaced within their own countries have a document to turn to when they are denied life-saving protection and assistance.

The fact that the principles are being widely promoted and disseminated by the UN, even though they have not been “adopted” by an intergovernmental process, constitutes an innovation in standard setting. However, the innovation cannot be easily replicated. To work in other cases, sufficient law would have to exist to make the intergovernmental process unnecessary. As Kälin, the chair of the process, has pointed out, “No new law in the strict sense of the word” needed to be created “in most cases” when it came to the Guiding Principles.³⁹

No doubt the unease caused by the process is more related to the fact that the principles reinforce the idea that governments have an obligation to protect and assist their displaced populations, and that if they lack capacity or are unwilling to do so the international community has an obligation to become involved. It is this evolution in thinking about sovereignty that is at the core of the controversy about the principles.

The Guiding Principles come with no monitoring or enforcement machinery, but a global effort has begun to monitor and oversee compliance with their provisions. Governments, UN agencies, regional bodies, international and local NGOs, and the displaced themselves are all involved. Over time and with sustained usage, the Guiding Principles are bound to make a difference in the lives of displaced people throughout the world. 🌐

Notes

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1. United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (1998).

2. United Nations, Commission on Human Rights, Res. 2003/51 (23 April 2003).

3. United Nations, General Assembly, Res. 54/167 (17 December 1999) and Res. 56/164 (19 December 2001).

4. Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution Press, 1998), pp. 3, 32.

5. James P. Grant, “Refugees, Internally Displaced and the Poor: An Evolving Ethos of Responsibility,” address at Round Table on the Papal Document, UNICEF, 9 March 1993.

6. See, for example, statement of Roberta Cohen, Refugee Policy Group (RPG), “UN Human Rights Bodies Should Deal with the Internally Displaced,” before a meeting of delegates to the UN Commission on Human Rights, organized by the Quaker UN Office and the World Council of Churches (WCC), Geneva, 7 February 1990; see also statement of the Quakers and WCC to the Commission on Human Rights, UN Doc. E/CN.4/1991/NGO/1 (1991); RPG, *Human Rights Protection for Internally Displaced Persons: An International Conference*, 24–25 June 1991; and United Nations, Commission on Human Rights, Comprehensive Study prepared by Francis M. Deng, UN Doc. E/CN.4/1993/35 (21 January 1993), par. 79.

7. United Nations, Commission on Human Rights, Res. 1992/73 (5 March 1992).

8. See, for example, United Nations, Commission on Human Rights, Res. 1994/68 (9 March 1994); and General Assembly Res. A/C.3/50/L.54 (5 December 1995).

9. United Nations, *Compilation and Analysis of Legal Norms*, Report of the Representative of the Secretary-General on Internally Displaced Persons, UN Doc. E/CN.4/1996/52/Add.2 (1995). Part II, *Legal Aspects Relating to Protection Against Arbitrary Displacement*, was completed in 1998, UN Doc. E/CN.4/1998/53/Add.1 (1998).

10. Robert Goldman and Walter Kälin, “Legal Framework,” in Cohen and Deng, *Masses in Flight*, pp. 74, 92.

11. United Nations, *Compilation and Analysis of Legal Norms*.

12. See United Nations, Commission on Human Rights, Res. 1993/95 (11 March 1993) and Res. 1997/39 (11 April 1997); and General Assembly Res. 52/107 (12 December 1997), which called upon the representative to take into account internally displaced children “in his preparation of guiding principles.”

13. See, for example, United Nations, Commission on Human Rights, Res. 1996/52 (19 April 1996).

14. United Nations, Office for the Coordination of Humanitarian Affairs (OCHA), *The Guiding Principles on Internal Displacement*, December 2000.

15. Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (Washington, D.C.: American Society of International Law and Brookings Institution Project on Internal Displacement, 2000), p. 64.

16. United Nations, Commission on Human Rights, Res. 2003/51 (23 April 2003).

17. United Nations, Report of the Secretary-General to the Economic and Social Council, Strengthening the Coordination of Humanitarian Assistance, UN Doc. E/1998/67 (12 June 1998).

18. United Nations, Report of the Secretary-General to the Security Council, *Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957, recommendation 7.

19. United Nations, Report of the Secretary-General to the Economic and Social Council, *Strengthening the Coordination of Emergency Humanitarian Assistance*, UN Doc. E/2003/85 (2003).

20. United Nations, Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng, UN Doc. E/CN.4/2002/95 (16 January 2002), par. 98.

21. The government of Burundi, for example, in 2001 signed a protocol to create a framework for the protection of IDPs and accepted to be “bound” by

the Guiding Principles. The Ugandan government drafted a policy on IDPs in 2003, which commits it to take the Guiding Principles into account. The Sri Lankan government in 2002 adopted a national framework for relief, rehabilitation, and reconciliation based in part on the Guiding Principles.

22. Andrea Lari, "Returning Home to a Normal Life? The Plight of Angola's Internally Displaced," Occasional Paper, African Security Analysis Programme, 5 February 2004, p. 9.

23. Roberta Cohen, "The Guiding Principles: How Do They Support IDP Response Strategies?" in Walter Kälin, Francis M. Deng, and Roberta Cohen, *Recent Commentaries About the Nature and Application of the Guiding Principles on Internal Displacement*, Brookings-CUNY Project on Internal Displacement, April 2002.

24. E-mail provided by UN Angola, 2001.

25. See statement by India before the Security Council in 1999, S/PV.4046 and resumption 1; and in 2000, S/PV.4176 and resumption 1.

26. See United Nations, General Assembly, Res. 46/182 (19 December 1991), which allows the UN to initiate action to help the victims of emergencies.

27. Charlotte Ku, *Global Governance and the Changing Face of International Law*, ACUNS Reports and Papers, No. 2, 2001, p. 33.

28. See Simon Bagshaw, "Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights, 16 March–24 April 1998," *International Journal of Refugee Law* 10 (1998): 548, 551.

29. Response from the Representative of the UN Secretary-General on Internally Displaced Persons, Francis M. Deng, to Questions Posed by the Delegate of Algeria, Third Committee of the General Assembly, 12 November 2001, on file at the Brookings-SAIS Project on Internal Displacement.

30. It did this by calling for a vote on a paragraph that had always been adopted by consensus. Although the vote was 139 in favor of maintaining the reference, 0 opposed, and 31 abstentions, to avoid controversy no one reinserted the provision in subsequent years.

31. Phil Orchard, "Events at the 2002 ECOSOC Humanitarian Segment," 26 July 2002, on file at the Brookings-SAIS Project on Internal Displacement.

32. David Fisher, Report on the 2003 Commission on Human Rights, on file at the Brookings-SAIS Project on Internal Displacement.

33. See, for example, Luke T. Lee, "The Case for an International Convention on Displaced People," in James H. Williams, ed., *Invisible Refugees* (Washington, D.C.: Chicago-Kent College of Law and Pax International, 2003).

34. See, for example, Walter Kälin, "How Hard Is Soft Law?" in Kälin, Deng, and Cohen, *Recent Commentaries*; and Doug Cassell, "Enhancing Human Rights and Legal Protection," and Bartram Brown, "Reconciling State Sovereignty and Protections for the Internally Displaced," in Williams, *Invisible Refugees*, pp. 17, 29.

35. Kälin, "How Hard Is Soft Law?"

36. Peter Singer, *Caution: Children at War* (Washington, D.C.: Brookings Institution Press, 2004), chap. 10. See also Coalition to Stop the Use of Child Soldiers, "Child Soldier Use in 2003: A Briefing for the 4th UN Security Council Open Debate on Children and Armed Conflict," January 2004.

37. *International Symposium on the Mandate of the Representative of the UN Secretary-General on Internally Displaced Persons: Taking Stock and*

Charting the Future, Brookings Institution-SAIS Project on Internal Displacement, Vienna, Austria, 12–13 December 2002, pp. 8–11, 21. See also Thomas G. Weiss's background paper to the symposium, "International Efforts for IDPs After a Decade: What Next?" p. 57.

38. Patrick L. Schmidt, "The Process and Prospects for the Guiding Principles on Internal Displacement to Become Customary International Law," *Georgetown Journal of International Law* 35 (spring 2004).

39. Kälin, "How Hard Is Soft Law?" p. 8.