

Complementarity between key instruments of international law

International human rights and humanitarian law merged into one operational instrument: the UN Guiding Principles on Internal Displacement

Introduction

At the beginning of the 1990s the international community, including the UN, became aware of the fact that the number of Internally Displaced Persons (IDPs)¹ far exceeded the number of refugees. One of the UN's first steps to address the lack of attention to a quickly growing number of unprotected and unattended IDPs was the assignment of a Special Representative of the Secretary General on Internally Displaced Persons.

This Representative, Mr. Francis Deng, was given a mandate by the Commission on Human Rights, which included an assessment of existing international norms and the protection they provide to displaced persons. A legal team under the direction of Mr. Deng concluded that international protection provisions relevant to IDPs were not only dispersed in an unmanageable number of instruments but also revealed some grey areas and some serious gaps to be filled. Hence, the need for an international instrument specialized in IDP rights. Determined to develop such an instrument, Mr. Deng was left with two alternatives: 1) to initiate an intergovernmental process to develop a binding international treaty protecting IDPs, or 2) to gather, restate, deduce and interpret from existing international norms in order to draft a non-binding instrument. Mr. Deng chose the latter alternative and from 1995 to 1997 his legal team developed the UN Guiding Principles on Internal Displacement, which were launched

¹ For the purposes of the UN Guiding Principles, internally displaced persons are persons or groups of 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 (Guiding Principles, Introduction, Par.2).

in 1998. Given recent treaty history, it was believed that the elaboration of a binding treaty would have taken much longer and might not have allowed for the inclusion of concrete operational guidance on how to achieve durable protection and solutions to IDPs' plight.² In short, a set of principles had the potential to be a more operational and effective instrument than a legally binding treaty.

The fact that the Guiding Principles do not create new norms but restate and to some extent interpret existing instruments of human rights and humanitarian law has drawn criticism from a number of individuals and some organizations. They argue that the international community should rather focus on implementing existing human rights and humanitarian law treaties and not create new instruments. Contrary to that belief, this article aims to show how the Principles have effectively made maximum use of international human rights and humanitarian law and how the end product provides more comprehensive protection of IDPs and more concrete guidance than each individual instrument alone. The Guiding Principles are therefore a concrete and applicable example of the complementarity between human rights and humanitarian law. In addition, the article highlights how the Principles interpret and apply existing norms to the situation of displaced persons, thereby covering the identified gaps and grey areas in international protection of IDPs.

Complementarity between human rights law and humanitarian law provides enhanced protection of displaced persons

To illustrate the complementarity between human rights and humanitarian law we have chosen to take a closer look at two concrete Guiding Principles, one assuring civil rights and the other exemplifying the economic rights guaranteed in the Principles. Guiding Principle No. 10 covers the right to life and physical integrity while Principle No. 21 addresses IDPs' right to property.

² The elaboration of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families for example was initiated already in 1990 but as of August 2002 the treaty has not yet entered into force.

Guiding Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:

- (a) Genocide;*
- (b) Murder;*
- (c) Summary or arbitrary executions; and*
- (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.*

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

- (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;*
- (b) Starvation as a method of combat;*
- (c) Their use to shield military objectives from attack or to shield, favor or impede military operations;*
- (d) Attacks against their camps or settlements; and*
- (e) The use of anti-personnel landmines.*

As you can see above, Guiding Principle No.10 is divided into two paragraphs. The first one is primarily derived from human rights law, particularly from the Covenant on Civil and Political Rights, and the second one addresses the right to life and physical integrity in situations of armed conflict. Focusing our attention on the first paragraph we see that some elements of IHL complement the human rights concept of right to life. The first of them is the category of “murder” (GP 10.1.b) followed by the last phrase prohibiting “*threats and incitement to commit any of the foregoing acts*”. The category “murder” is derived from Common Article 3 of the Geneva Conventions and would therefore, as opposed to the traditional human rights category of “summary and arbitrary executions” (GP 10.1c), apply to both state agents and non-state actors. Given that the Principles

have the ambition to be applicable to non-state actors³ the inclusion of the category of “murder”, derived from IHL, is an important complement to human rights law.

The last phrase in Principle 10.1 states that “threats and incitement to commit any of the foregoing acts shall be prohibited”. This prohibition is directly derived from IHL, particularly from the two Additional Protocols to the Geneva Conventions (Protocol I and II). Given that a majority of internally displaced persons do not flee direct physical attacks but rather credible threats to their life, physical integrity and property this IHL contribution to Guiding Principle 10 provides for a more comprehensive protection of IDPs.

The second paragraph of Principle 10 protects IDPs’ right to life and physical integrity in situations of armed conflict, which is the most common context in which displacement takes place. The protection provisions in this paragraph are clearly copied from IHL, particularly from the fourth Geneva Convention and the two Additional Protocols.

This complementarity between HRL and IHL is also apparent in the Principles covering economic rights. Let us look at how this plays out in Guiding Principle No.21 protecting property rights:

Guiding Principle 21

- 1. No one shall be arbitrarily deprived of property and possessions.*
- 2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:*
 - (a) Pillage;*
 - (b) Direct or indiscriminate attacks or other acts of violence;*
 - (c) Being used to shield military operations or objectives;*
 - (d) Being made the object of reprisal; and*
 - (e) Being destroyed or appropriated as a form of collective punishment.*

³ In the introduction to the Principles their applicability to “all other authorities, groups and persons...” is clearly stated, with the intention to include non-state actors such as armed insurgent groups.

3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Private property is not very well protected in international law and it can therefore be useful to identify protection provisions derived from both human rights and humanitarian law, which has been effectively done in Guiding Principle No.21 above. In a first paragraph, Principle 21 states that “*no one shall be arbitrarily deprived of property and possessions*”, which is directly derived from the Universal Declaration of Human Rights (Art.17) and the regional human rights instruments. Such a general property right cannot be found under humanitarian law, but IHL effectively protect property from destruction and illegal appropriation in several specific situations listed in the second paragraph of Principle 21.

The third paragraph is not based on any specific instrument but reflects a growing consensus that states should not only refrain from committing violations but also provide protection from violations carried out by other actors. In the case of property rights, the authorities have an obligation to prevent non-state actors and private individuals from destroying or illegally appropriating property left behind by the displaced population. Once again we have an interesting mix of human rights and humanitarian law provisions amounting to a very comprehensive protection of IDPs’ rights.

Important gaps in human rights and humanitarian law filled by the Guiding Principles

The Guiding Principles not only bring together the most important provisions from human rights and humanitarian law, but also fill some important gaps in IDP protection by explicitly stating what is only implicitly covered by international law. Let us look at a couple of examples.

Prohibition of forced displacement

Already during the initial stages of analyzing the international normative protection of IDPs and preparing the Guiding Principles, it was noted that human rights law did not include an explicit prohibition of forced displacement⁴, except in the case of indigenous population (ILO Convention No.169, Art.16). However, human rights provisions such as freedom of

⁴ See Compilation and Analysis of Legal Norms, Francis M. Deng, UN New York and Geneva, 1998

movement, right to housing, right to choose one's residence and right to non-interference with one's home can be interpreted as, and arguably amount to, a prohibition to also displace individuals or groups.

Humanitarian law, on the other hand, clearly prohibits "ordering" the displacement of the civilian population (Protocol II, Art 17). However it is unclear whether such a phrasing also covers a prohibition against indirectly causing the displacement. Fortunately the drafters of the Guiding Principles have overcome these gaps and ambiguities by including an explicit right to be protected from forced displacement in Principle No.6.

Right to personal identification documents

Few human rights documents address explicitly the issue of individuals' right to personal identity documents. However, the Guiding Principles have taken the right of each individual to be recognized as a person before the law as a point of departure. This recognition is clearly stated in several fundamental human rights instruments (UDHR, Art 6, CCPR, Art 16). To give effect to this right for IDPs, the Principles argue, "*the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights*" (GP No.20.2).

Principle 20 does not only fill a gap in existing human rights law but also provides us with a good example of how the Principles often offer guidance on the process of fulfilling rights. It addresses the need for gender equality by explicitly stating women's right to have documentation issued in their own names. Other process-oriented issues included in the Principles, such as the importance of IDPs' own participation in the process of fulfilling their rights or the importance of maintaining community unity, can only be found in more modern human rights instruments, such as the Convention on the Rights of the Child.

Right to not be forced to return or resettle

Finally, an explicit protection against forced return and resettlement has been included in the Principles (GP 15d). Such prohibition was only to be found in refugee law, not directly applicable to IDPs. Also, the Convention against Torture prohibits the extradition of individuals to countries where they risk being subject to torture, which to some extent supports the explicit prohibition of forced return and resettlement included in the Guiding Principles.

Grey areas of international IDP protection clarified in the Principles

All fundamental human rights are of course applicable to internally displaced persons given that they have not crossed an internationally recognized border and continue as full-worthy citizens of their own country. However, the Principles have taken the important step to explicitly state what some of the most important rights mean in relation to the particular situation of displaced persons. Some of the most fundamental rights made explicit to IDPs in the Principles are the right to non-discrimination and the right to freedom of movement.

The risk of facing discrimination as a displaced person is universal to all IDP situations and, in addition to constitute a violation *per se*, has proven to be a very real obstacle to the fulfillment of other rights. IDPs are often seen with suspicion for having had to flee, for having lived in “enemy” controlled territory or simply because they come from a different ethnic, national or religious group than the host community. Therefore, the Guiding Principles address the issue of discrimination in no fewer than three different Principles (No.1, 4 and 22), explicitly highlighting IDPs’ right to freedom from discrimination. In this respect, Guiding Principle No.1 is particularly interesting given that it clarifies a gray area left by human rights and humanitarian law. Principle No.1 states that:

Guiding Principle 1

Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.

As a fundamental right, freedom from discrimination is guaranteed in both human rights and humanitarian law. In their respective prohibition of discrimination, both these branches of international law list a number of conditions upon which discrimination cannot be based (race, sex color, language, religion, nationality, etc.) Displacement does not appear among these conditions, but when listing the conditions, IHL and HR respectively include prohibition of discrimination based on “other similar criteria” and “other status”. In this general category enter conditions of disability, for example. The drafters of the Guiding Principles have therefore considered

that a person's condition as displaced is just as applicable and have included an explicit prohibition of discrimination against IDPs based on the mere fact that the person is displaced. This sends a clear message that discrimination impeding IDPs' access to social services, schooling, the job market and public offices, for example, is intolerable.

Another grey area clarified by explicit statements in the Guiding Principles is the area of freedom of movement. As in the case of discrimination, human rights law guarantees individuals' freedom of movement in a number of instruments.⁵ However, this right is subject to restrictions to protect national security, public order, public health and the rights of others. These restrictions have often been applied arbitrarily to groups of IDPs, giving the impression that some authorities do not consider IDPs as entitled to rights as other citizens. Displaced persons are sometimes arbitrarily prevented by military roadblocks from arriving in areas they consider safe. Once in a camp or collective settlement, their right to leave the camp and come back is sometimes restricted. These limitations on the right to freedom of movement are often not based strictly on the criteria for legitimate restrictions of this right (listed above), but rather seem to reflect a generalized attitude among some authorities that vulnerable persons have limited rights.

The Guiding Principles have tried to address this issue by including not only the general right to freedom of movement enjoyed by all persons, including IDPs, but also specific movement rights, deduced from the general right. For example, the Principles explicitly state the right of displaced persons "*to move freely in and out of camps or other settlements*" (GP No.14.2) and "*to seek safety in another part of the country*" (GP No.15a).

Conclusions

There is clearly a consensus within the human rights and humanitarian community regarding the importance of enhancing implementation of existing international law, rather than creating new instruments that might duplicate and distract the attention from existing norms. That was never the intention or the effect of the UN Guiding Principles. As we have seen, the Principles have rather strengthened and complemented the protection of

⁵ See for example the International Covenant on Civil and Political Rights (Art.12.1) or the Universal Declaration of Human Rights (Art.13.1)

displaced persons by interpreting and spelling out what existing norms mean for IDPs.

By using the most IDP-relevant provisions of both human rights and humanitarian law certain protection needs have been better met in the Principles than if we were to use the isolated instruments separately. This complementarity is particularly evident in situations of armed conflict (the major cause of displacement) where it is necessary to be able to draw on both human rights and humanitarian law.

Also, without creating new norms, the Principles state both what the authorities should do and refrain from doing in order to give effect to a particular right. Such quite specific demands on the authorities have gained the Principles a more operational role than most general instruments. Without being a concrete action plan for humanitarian organizations in the field, the Guiding Principles have at least become a useful framework for implementation of humanitarian programmes. They speak not only to human rights practitioners but also to relief workers, which might be the most numerous category of professionals in direct contact with the displaced population.

Finally, humanitarian staff has little capacity to gain familiarity with the large number of human rights and humanitarian law instruments that make up the Guiding Principles. However, they are more likely to study and hopefully use 30 guiding principles gathered in one booklet than to take on the task of becoming versed in all instruments relevant to IDPs. The success of the Convention on the Rights of the Child (CRC) has proven this point. In the field of child protection, the transition from “needs to rights” did not take place until one unified child rights instruments came into force, the CRC. That convention has since become the leading star for child rights advocacy and intervention. The Guiding Principles are already far down that road. Not in legal terms, but as a useful, unified, tool for everyone in direct contact with the world’s growing number of internally displaced persons.

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