

**THE PROTECTION OF INTERNALLY DISPLACED PERSONS IN
INTERNATIONAL LAW**

WALTER KAELIN*

* Dr. iur., LL.M (Harvard Law School); professor of constitutional and international law at the Faculty of Law, University of Berne, Switzerland. Former Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons (2004 – 2010).

Summary: I. Shattered Lives: The Realities of Internal Displacement; II. The Legal Framework for the Protection of Internally Displaced Persons: The UN Guiding Principles on Internal Displacement; III. Implementation; IV. Achievements and Challenges.

I. Shattered Lives: The Realities of Internal Displacement

1. Facts and figures

To be displaced is a devastating experience. From one moment to another, those affected lose their homes, livelihoods, the security provided by community ties and much of what they cherished in their daily lives. Disoriented and frequently traumatized, fleeing with often no more than they can carry on themselves, displaced people are desperately looking for safety, a place to stay, some food to eat, clean water to drink and a minimum of medical assistance. In other words: Displacement shatters lives and often it takes very long time to rebuild them.

(a) Causes

Internal displacement is among the most serious but yet largely forgotten humanitarian crises in today's world, and it has many causes.

One of the tragic and yet regular consequences of the absence of peace is forced displacement: All too often, civilian populations become the target of armed forces and insurgents who drive them away from their lands in order to punish them for supporting the other party to the conflict or to commit ethnic cleansing. Even more often, civilians must simply flee the dangers of warfare. Displacement also occurs as a consequence of systematic human rights violations, state sponsored violence that force people out of their homes, or violent conflicts between communities. Natural and man-made disasters are another huge cause of displacement and instances of such displacement are likely to increase as a consequence of the multiple effects of climate change. Finally, where people have to move to make place for development projects such as dams, highways, or the upgrading of certain parts of a city and are not properly relocated, they, too become victims of forced displacement.

Today, most of those who have been forced or obliged to flee or to leave their homes for these and similar reasons remain within their own country. Because they do not cross international borders, they are internally displaced persons (hereinafter: IDPs), not refugees.

(b) Numbers and trends

Their numbers are huge and still growing. Compare the 27.1 million persons displaced within more than 50 countries by armed conflict, violence and human

W. KAELIN

rights violations with 10.4 million¹ refugees under the UNHCR mandate world-wide;² in addition to an estimated 30 – 50 million or even more displaced by natural disasters³ in the developing and developed world and other non-conflict related causes including large-scale development projects, you end up with almost one percent of the world's population being displaced. This is why UN Secretary General Ban Ki-Moon recently stressed that “Displacement remains arguably the most significant humanitarian challenge we face.”⁴

The largest number of those displaced by conflict and violence can be found in Africa⁵ with 11.6 million IDPs in 21 countries at the end of 2009. Sudan had the largest of IDPs in Africa – and the world - with about 4.9 million IDPs, followed by the Democratic Republic of Congo (DRC) with 1.9 million and Somalia with 1.5 million internally displaced persons.

As regards the Americas, IDMC, the Geneva based Internal Displacement Monitoring Centre, reported:

“At the end of 2009, about five million people were internally displaced in the Americas. As in previous years, the growing number of IDPs in the region was due mostly to the ongoing displacement in Colombia, which brought it alongside Sudan as the country with the most IDPs in the world. [...]. New displacement was also reported in Mexico and Guatemala in 2009, as a result of the actions of drug cartels and gang-induced violence. In 2009, the Colombian government's strategy against the country's various armed groups suffered a number of setbacks following some successes in 2008, all of which led to further forced displacement. As in 2008, armed groups that had emerged after the demobilization of paramilitary organizations in 2006 gained strength, and the widespread human rights abuses which these groups committed were an important cause of displacement in 2009. In addition, violence in urban areas, which appeared

¹ This figure does not include the 4.76 Palestinian refugees registered by UNWRA: see statistics at <http://www.unrwa.org/etemplate.php?id=253>; (last visited 8 February 2011).

² IDMC, Internal Displacement, Global Overview of Trends and Developments in 2009, Geneva 2010, p. 8; UNHCR Statistics, 30 August 2010 (<http://www.unhcr.org/4c7bb60f9.html>).

³ The number of people displaced by natural disasters in 2008 was estimated 36 million (Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study by the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre, Geneva, 2009, p. 8f).

⁴ See: <http://ochaonline.un.org/ochahome/InFocus/InternallyDisplacedPeopleIDPs/tabid/5893/en-US/Default.aspx>.

⁵ IDMC, Internal Displacement, Global Overview of Trends and Developments in 2009, Geneva 2010, p. 21.

INTERNALLY DISPLACED PERSONS IN INTERNATIONAL LAW

to be linked to these groups, increased in 2009 after a decline recorded in 2008.”⁶

In the last few years, the situation of internal displacement in *Europe and Central Asia* has continued to remain stagnant. Europe continues to have more than 2.4 million IDPs displaced by armed conflict, mainly in the Central Caucasus, Turkey, the Balkans and Cyprus.⁷ What is perhaps even more worrying: 99% of them find themselves in situations of protracted displacement having fled their homes some 15 to 25 years ago as a result of conflicts arising from rejected independence claims and territorial disputes. Only recently have governments started measures to better integrate these people in terms of housing and access to livelihoods in order to reduce the degree of their social and economic marginalization.

In the Middle East, IDMC reported a total of 3.8 million IDPs at the end of 2009 with the largest number (2.7 million) in Iraq, protracted displacement situations in Syria and Lebanon, and important new displacement in Yemen.⁸

Reports about developments in South- and South-East Asia were particularly troubling in 2009. According to IDMC:

An estimated 4.3 million people in South and South-East Asia were internally displaced by armed conflict, generalized violence or human rights violations at the end of 2009. This represented an increase of around 800,000 people, or 23 per cent, since the end of 2008. Close to four million people were newly displaced in the region during the year, mainly as a result of existing conflicts that escalated. The overwhelming majority did however manage to return before the end of the year. By far the largest displacement was in Pakistan, where three million people were forced to flee their homes owing to government forces’ operations against Pakistani Taliban militants in the north-western provinces bordering Afghanistan. In the Philippines, up to 400,000 people fled their homes in the south as the army stepped up its operations against elements of the Moro Islamic Liberation Front (MILF) before declaring a ceasefire in July. In Sri Lanka, the end of the long-running conflict between the government against the Liberation Tigers of Tamil Eelam (LTTE) came at a high price for civilians in the north, 280,000 of who were displaced between October 2008 and June 2009. Tens of thousands of people were also estimated to be newly displaced in Afghanistan, in Myanmar and in India’s Orissa State and states in the north-east, where conflicts showed no signs of ending.”⁹

⁶ Id., p. 48. The number of IDPs in Colombia is between 3.3 million (according to the government) and 4.9 million (according to NGOs). A country with a protracted displacement situation is Peru.

⁷ Id., p. 53.

⁸ Id., p. 64ff.

⁹ Id., p. 72.

2. Who is an IDP?

(a) *The notion*

The UN Guiding Principles on Internal Displacement¹⁰ describe internally displaced persons as

“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.”

Thus, two elements are constitutive for the notion of IDP: (1) the coercive or otherwise involuntary character of movement; and (2) the fact that such movement takes place within national borders.

The *requirement of coercion* distinguishes IDPs from migrants who move voluntarily, e.g. to find better economic opportunities. True, the distinction between forced and voluntary movement of persons is often difficult, and the lines between the two categories are blurred. “Voluntary” - contrary to what the term suggests - does not mean to be able to decide in complete freedom. Rather, voluntariness requires certain room with realistic options to decide upon. “Forced” on the other hand characterizes movements that are not based on a free decision between realistic options, i.e. refers to situations where the elements of coercion outweigh those of free choice.

The second requirement of *not having crossed an international border* is to be understood in a broad sense. It refers to the place where the displaced persons finds refuge and is also met if displaced persons, e.g., have to transit through the territory of a neighboring state in order to gain access to a safe part of their own country or come back from abroad after a failed attempt to get asylum abroad but cannot go back to their place of former habitual residence for any of the relevant causes of displacement. The element of cross-border movement distinguishes IDPs from refugees. This is an important distinction. While the factual situation of two groups of persons who fled the same danger with one finding refuge on the other side of their country’s border and the other remaining inside that country may be very similar, from a legal perspective, the difference between the two categories is essential: The point of departure is the fact that refugees are aliens in a foreign land who find in a very weak legal position despite their obvious protection needs. To address this challenge, international refugee law is rooted in the notion of substitute international protection, i.e. the idea that persons persecuted by their State can by definition no longer turn to its authorities to get protection and thus depend on protection provided by the country of asylum in

¹⁰ UN Doc E/CN.4/1998/53/Add. 2. More on the Guiding Principles below, section II.

particular and the international community in general. In this context, the deeper meaning of persecution refers to the fact that the country of origin of the refugee is unwilling (or in the case of persecution by non-state actors) unable to fulfill its basic task of guaranteeing peace and security to its citizens thus destroying the “bond of trust, loyalty, protection, and assistance between the citizen and the state [that] constitutes the normal basis of society” and is severed in the case of refugees. Such persecution can also target IDPs but unlike refugees they remain part of the regular population of the country whose citizens¹¹ they normally are and whose sovereignty has to be respected. This means, as the Guiding Principles clearly spell out in Principle 3 that “the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons” lies with the authorities of the country concerned; thus, the international community only has a subsidiary role to play.

The exact *cause of displacement* is irrelevant as long as it is coercive. The Guiding Principles list some examples of how internal displacement may be brought about – armed conflict, situations of generalized violence, violations of human rights, or natural or human-made disasters, but the words “in particular” indicate that the list is not exhaustive. A particularly important cause is development projects which are implemented without adequate relocation or compensation of affected people.

It is important to stress that the notion of who is an internally displaced person contained in paragraph 2 is not a legal definition. Becoming displaced within one’s own country of origin or country of habitual residence does not confer special legal status similar to refugee status under the 1951 Convention on the Status of Refugees. Rather, as human beings and citizens or habitual residents of a particular state who are in a situation of special vulnerability they are entitled to the enjoyment of all relevant guarantees of human rights and humanitarian law applicable to the population of the country concerned. This does not rule out the possibility of administrative measures such as registration on the domestic level to identify those who are displaced and need special assistance. However, lack of such registration would not deprive internally displaced persons of their entitlements under applicable international human rights or humanitarian law.

(b) Is a specific focus on internally displaced persons justified?

Does it make sense to look at IDPs as a special category of people needing and deserving special protection? ICRC President Kellenberger, e.g., stresses that “Many of those who stay behind, the elderly, the sick perhaps, or some overburdened host family which has taken in IDPs from elsewhere and is sharing its meager resources with them, may be extremely vulnerable and in need of our

¹¹ As the Guiding Principles do not refer to citizenship but to “homes or places of habitual residence”, IDPs can also be stateless persons and other habitual residents, i.e. immigrants of foreign nationality with long-term residence in the country concerned. Thus, citizenship is not requirement for qualifying as an IDP.

help,” indicating that that someone displaced is automatically more vulnerable than someone who is not,¹² and Hathaway is doubtful that some factual differences between IDPs and non-displaced victims of human rights violations provide “a sufficient basis to carve out a scholarly, legal, or operational niche for the internally displaced”.¹³

While it is true that non-displaced people may be as vulnerable as or even worse off than IDPs, a specific focus is justified by the fact that these people face specific problems usually not encountered by those who remain in their homes: Only IDPs may

- have to cope with camp life,
- abandon and leave behind most of their property when they have to flee, and face the challenge of having apartments, houses or land occupied by others restituted to them,
- experience discrimination by virtue of being displaced if host communities do not welcome them,
- be deprived of opportunities to participate in elections or have lost documents replaced because this is only possible at the place of habitual residence, or
- have to look for durable solutions to their being displaced such as return or settlement and sustainable integration in another part of the country.

Depending on the circumstances, IDPs may be especially vulnerable and run a higher risk than those remaining at home to

- have their children forcibly recruited;
- become victims of gender-based violence, particularly in camp situations;
- become separated from family members, particularly during flight;
- be excluded from education and access to health services;
- or remain without any access to livelihood opportunities.

¹² ICRC, *Internal Displacement in Armed Conflict - Facing up to the Challenges*, Geneva 2009, p. 20.

¹³ James C. Hathaway, *Forced Migration Studies: Could We Agree Just to ‘Date?’*, 20 *Journal of Refugee Studies* 2007, p. 362. See also Roberta Cohen, *Response to Hathaway*, 20 *Journal of Refugee Studies* 2007, pp. 370.

These specific protection needs and vulnerabilities are sufficient to justify a specific focus on internal displacement and people affected by it. As Mooney succinctly put it, “ensuring that IDPs can enjoy their human rights in full equality with others requires paying attention to and addressing the specific needs and risks to which the experience of internal displacement exposes them.”¹⁴

II. The Legal Framework for the Protection of Internally Displaced Persons: The UN Guiding Principles on Internal Displacement

1. Applicable law and its limitations

At the international level, there exists no specific convention for the protection of IDPs or on the legal status of such persons. Even worse: Someone consulting the rich body of international human rights law would be unable to find any specific norms on the protection of IDPs. International humanitarian law applicable in times of armed conflict as well as international criminal law contains a few scattered provisions on the treatment of displaced persons but they do not create a comprehensive legal regime for the protection of IDPs. Finally, international refugee law has a lot to say about persons on flight but it only applies to those who, unlike internally displaced persons, have left their country of origin and crossed an international frontier. Thus, at first glance, one might think that internally displaced persons are without any legal protection.

On second thought, however, one quickly realizes that these persons are entitled as any other human being to a treatment in accordance with international human rights and – in situations of armed conflict - humanitarian law. But this does not solve the problems of determining which of these many provisions are relevant for internally displaced persons and what the general guarantees mean in the specific context of displacement. It remains also unclear as to whether or not present international law really covers all the legitimate needs of the displaced or whether there are any major gaps in the law. There is also the practical problem of how authorities or humanitarian actors without a very detailed knowledge of international human rights and humanitarian law should be able to determine which of the literally hundreds of applicable norms are relevant in a given situation and what exactly they mean.

These were the challenges the Representative of the Secretary-General on Internally Displaced Persons, Dr. Francis Deng, faced when he was asked in the early 1990s, by the then UN Commission on Human Rights, to develop an “appropriate normative framework” to enhance the protection of internally displaced persons.

¹⁴ Erin Mooney, The Concept of Internal Displacement and the Case for Internally Displaced Persons as a category of Concern, *Refugee Survey Quarterly*, Vol. 24, Issue 3, 2005, p. 23.

The Representative first undertook the task of preparing a Compilation and Analysis of Legal Norms pertaining to internally displaced persons which he submitted to the Commission on Human Rights in 1996.¹⁵ This 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 certain gray areas where clarification is necessary. On the basis of this very comprehensive study, the present Guiding Principles on Internal Displacement were prepared and submitted to the UN Commission on Human Rights in 1998. They aim of this document is to respond to the human rights needs of internally displaced persons by clearly outlining their guarantees.

2. Structure and Content

The Guiding Principles cover all three phases relevant to the problems of internal displacement, i.e. the pre-displacement phase, the situation during displacement and the concluding phase of return and reintegration. They address the full range of human rights and humanitarian law guarantees. They do not only cover civil and political rights but take economic and social rights very seriously, too (see, e.g., Principles 4, 8, 18, 19, 21 and 23). Many of the specific Principles are derived from the four Geneva Conventions on humanitarian law which are ratified by virtually all States and from other widely accepted humanitarian law instruments (see, e.g., Principles 6, 10, paragraph 2; 11, paragraph 3, letter c; 21, paragraph 2). In doing so, the Guiding Principles provide guidance for all those confronted and dealing with situations of displacement. This is achieved by synthesizing the many applicable norms of international human rights and humanitarian law into clear principles and by highlighting those more concrete aspects of human rights and humanitarian law guarantees that are of special significance for the displaced.¹⁶

a) Introduction and General Principles

The Guiding Principles start with an “Introduction” on their scope and purpose. Here, they combine a needs- and a rights-based approach by stating that the Principles “address the specific needs” of IDPs and identify the rights and guarantees relevant for protecting and assisting them, i.e. addressing these needs (paragraph 1). The introduction also explains who an IDP is (paragraph 2)¹⁷ and stress, that the “reflect and are consistent with international human rights law and international human rights law” (paragraph 3).

¹⁵ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57, Compilation and Analysis of Legal Norms, UN Doc. E/CN.4/1996/52/Add.2, of 5 December 1995

¹⁶ On the legal basis of the Guiding Principles, see Walter Kälin, Guiding Principles on Internal Displacement: Annotations, revised Edition, Washington D.C., 2008

¹⁷ See above, Section I.2.

INTERNALLY DISPLACED PERSONS IN INTERNATIONAL LAW

The document states, in Section I on “*General Principles*”, that the Guiding Principles “shall be observed by all authorities, groups and persons irrespective of their legal status” (Principle 2). What does this mean? With only few exceptions, human rights provisions impose direct obligations only on States and State actors. Humanitarian law applicable in situations of non-international conflicts¹⁸, in contrast, does bind not only state actors but all parties to the conflict. Individuals are indirectly bound by human rights and humanitarian law insofar as they can be prosecuted for violations of these obligations, particularly¹⁹ if they amount to war crimes, genocide or crimes against humanity. Principle 2 reflects this present state of international law but, at the same time, provides guidelines for anyone dealing with internally displaced persons, including international agencies and non-governmental organizations.

This part also highlights the primary duty and responsibility of national authorities to provide protection and humanitarian assistance to IDPs within their jurisdiction (Principle 3) and contains a general provision on non-discrimination (Principle 4).

b) Protection from Displacement

Section II contains “*Principles Relating to Protection From Displacement*”. Of particular importance is Principle 6 explicitly recognizing a right not to be arbitrarily displaced. This right is deduced from a variety of human rights guarantees including the freedom of movement and choice of residence (Article 12 Covenant on Civil and Political Rights) and several provisions contained in humanitarian law instruments addressing the issue of forced displacement of civilians in times of armed conflict.

Paragraph 2 of Principle 6 lists some important categories of prohibited displacement, including in the context of ethnic cleansing or when used as a collective punishment. Displacement is often occurring as a consequence of armed conflict. Here, by stating that displacement of civilians would be arbitrary in situations of armed conflicts “unless the security of the civilians involved or imperative military reasons so demand”, paragraph 2, subparagraph (b) reflects several articles of Geneva Convention IV on the protection of the civilian populations and the Protocols Additional to the Geneva Conventions. With regard to these two exceptional circumstances in which forced displacement might be permissible, the ICRC Commentary to Article 17 Protocol II explains that “[i]t is self-evident that a displacement designed to prevent the population from being exposed to grave danger can-not be expressly prohibited. (...) Military necessity as a ground for derogation from a rule always requires the most meticulous

¹⁸ Common Article 3 of the 1949 Geneva Conventions and the 1977 Protocol II Additional to the 1949 Geneva Conventions.

¹⁹ See also the 1984 Convention against torture and other human rights conventions imposing the duty upon States to prosecute individuals for certain human rights violations on the basis of their domestic law.

assessment of the circumstances. (...) The situation should be scrutinized most carefully as the adjective ‘imperative’ reduces to a minimum case in which displacement may be ordered. Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group”.²⁰

Obliging to move people are also arbitrary in situations of natural disasters, “unless the safety and health of those requires their evacuation” (paragraph 2, subparagraph d). The issue of exceptions to the prohibition of displacement arises, in particular, in the context of evacuations before and during disasters and relocations because return to the original place of residence is not possible or deemed to be too dangerous in the aftermath of a disaster. Such situations create obvious human rights dilemmas.²¹ On the one hand, taking measures to reduce the effects of natural hazards on people is part of States’ obligations under international human rights law. While States cannot be held responsible for disasters that occur, the right to life and other relevant human rights create positive obligations on States to take appropriate steps to safeguard the life, limb and property of those within their jurisdiction against the threats of disasters. If a disaster is foreseeable and the State is able to prevent ensuing threats to the life and property of persons, it has to take appropriate action in conformity with its human rights obligations under the right to life²². Failure of the State to protect the lives of its citizens would amount to a human rights violation if competent authorities knew or should have known about the danger and had the capacity to take life-saving measures. The duty to take life-saving measures to protect the right to life of its people may include the need to temporarily evacuate people or to relocate them from danger zones and prohibit them from returning to their homes as long as their safety and life would be at risk.

On the other hand, persons displaced or at risk of displacement by the effects of climate change enjoy freedom of movement, including the right to opt freely to return to their homes, to settle elsewhere in the country or to locally integrate at the place of displacement. The general rule is that States have a duty to respect such decisions. Persons should be provided with true and accurate information enabling them to make a free and voluntary decision.

²⁰ Jean Pictet (ed.), *Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC Geneva 1958 and Yves Sandoz (ed.), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949*, ICRC Geneva 1987, p. 1472/3).

²¹ The following is taken from UN General Assembly, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, A/64/214, 3 August 2009, pars. 25 – 28.

²² European Court of Human Rights, *Budayeva and others v. Russia*, judgement of 20 March 2008.

INTERNALLY DISPLACED PERSONS IN INTERNATIONAL LAW

Where a person agrees to be evacuated or relocated, the two human rights obligations go hand in hand. Tensions arise when people oppose such measures, even though authorities consider them necessary to protect their lives. Under international law, forced evacuations and relocations are not absolutely prohibited. Rather, the right to freedom of movement can be limited under certain strict conditions by the State in order to take life-saving measures. In doing so, the following generic requirements must be adhered to:

- Ensuring that a legal basis exists for the limitation of the freedom of movement through evacuation, relocation or prohibition of return. Such law has to be accessible, in particular, in areas of implementation and needs to be understandable for the people concerned. This enhances transparency and foreseeability and allows persons to prepare themselves for such events;
- Ensuring that the actual evacuation, relocation or prohibition of return serves exclusively the goal of protecting the safety of the persons concerned; and
- Ensuring that the evacuation, relocation or prohibition of return is necessary and proportional to this end and only resorted to if there are no other less intrusive measures.

Thus, whenever possible, the free consent of persons concerned must be sought before ordering such measures. Evacuations must not last any longer than absolutely necessary. In cases of permanent relocations, return can only be prohibited in very exceptional cases in which the area of return is indeed one with high and persistent risks for life or security, the remaining resources are inadequate for survival of returnees, the enjoyment of basic human rights cannot be guaranteed, all other available adaptation measures are exhausted, and the situation in the area of return can no longer be alleviated by protective measures. Furthermore, any evacuations, prohibition of return and permanent relocations need to be carried out without discrimination and the only permissible distinctions are those made in order to take into account special protection needs.

c) Protection during Displacement

The main body of the Principles (Section III, Principles 10 - 23) relates to “*Protection during Displacement*”. These Principles – as well as those in sections IV and V – apply regardless of whether

Most of these Principles first restate the applicable guarantee in general and then try to specify the relevance of these general guarantees for IDPs by specifically setting out what these guarantees mean in the context of displacement. Some of these specifications have been derived from humanitarian law and thus apply to situations of conflict induced displacement only. However, many other guarantees, e.g. Principle 12(3) on protection of internally displaced persons from discriminatory arrest and detention as a result of their displacement, Principle 18 on the right to an adequate standard of living, Principle 21 on the

protection of property, Principle 23 on the right of education and others also apply to persons who have been displaced by disasters or by development projects.

d) *Humanitarian Assistance*

The next Section of the Guiding Principles deals with “*Principles relating to Humanitarian Assistance*”. They recall the humanitarian principles of humanity, impartiality and non-discrimination (Principle 25), highlight the respective roles of national authorities and humanitarian organizations (Principle 25) and prohibition to attack humanitarian actors, their transport and supplies (Principle 26). Thus, these Principles are of special relevance to organizations offering assistance to internally displaced persons.

One could raise the question as to whether the Guiding Principles disregard the fundamental principle of State sovereignty by emphasizing access by international humanitarian organizations. The answer has to be negative: Principle 25 stresses that the primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities, and thus underlines the principle of State sovereignty. Assistance by international organizations and agencies can only be delivered with the consent of the State concerned. However, as principle 25, paragraph 2 highlights in accordance with relevant practice by the UN General Assembly and Security Council, such consent, cannot be denied for arbitrary reasons, i.e. reasons that are not based on objective and serious considerations. Particularly if the government concerned is unable to provide the required assistance, it hardly can keep all organizations providing such assistance out for prolonged periods of time without falling into arbitrariness.²³

This limitation of State sovereignty can be derived from human rights law: Today, it is recognized that human rights place a duty on States to take positive measures to fulfill these rights.²⁴ Economic and social rights and, in particular, the right to an adequate standard of living, which includes adequate food, clothing, housing and the right to health and education, entail minimum core obligations that States must ensure. In this regard, the Committee on Economic and Social Rights has taken the view “that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of

²³ For a more detailed discussion of humanitarian access see UN General Assembly, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, A/65/282, 11 August 2011.

²⁴ Human Rights Committee General Comment No. 31: The nature of the general legal obligation imposed on States parties to the Covenant, paras. 6 to 8. For a specific example, see Human Rights Committee General Comment No. 6: The right to life, para. 5 (obligation to adopt such positive measures as eliminating malnutrition and epidemics).

education is, prima facie, failing to discharge its obligations under the [International] Covenant [on Economic, Social and Cultural Rights]”²⁵. In other words, the core minimum requirements extend to the very goods and services that are the subject of humanitarian assistance. In order to fulfill these obligations, the State must take the necessary measures “individually and through international assistance and cooperation [...] to the maximum of its available resources”²⁶. A State is deemed to have violated the right to an adequate standard of living, to health and to education, if authorities knew or should have known about the humanitarian needs but failed to take measures to satisfy, at the very least, the most basic standards imposed by these rights. State obligations thus include the responsibility to follow up on these situations of concern and assess relevant needs in good faith, and ensure that humanitarian needs are being met, by the State itself or through available assistance by national or international humanitarian agencies and organizations, to the fullest extent possible under the circumstances and with the least possible delay. Thus, unless the country can ensure the necessary assistance through its own resources, arguably a prima facie case exists that in situations of large scale internal displacement humanitarian access for international organizations and agencies has to be granted.

e) Durable Solutions

The document concludes with the post-displacement phase, i.e. “Principles Relating to return, Resettlement and Reintegration.” addressing return, resettlement and reintegration (Section V, Principles 28 - 30). Here, Principle 28 is important in spelling out the primary duty and responsibility of competent authorities to establish conditions and to provide the means which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence or to resettle voluntarily in another part of the country. While this does not amount to an individual right to return to one’s home, Principle 28 clearly outlines the appropriate solutions to problems of displacement and establishes the right to free choice between the different types of durable solutions where they are available. Principle 29(2) sets out the right to restitution of property left behind by IDPs and compensation or another form of just reparation where restitution is not possible.

Principle 28 is particularly important for IDPs as it provides the legal framework for the challenge of finding durable solutions for IDPs, allowing them to end displacement. The point of departure is the liberty of movement and the freedom to choose one’s place of residence as guaranteed in Article 12 of the Covenant on Civil and Political Rights. While this guarantee is not absolute, it includes the right of IDPs to opt freely (i) to return to their homes, (ii) to locally integrate at the place of displacement, or (iii) to settle elsewhere in the country.

²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties’ obligations, para. 10.

²⁶ Article 2, para. 1, of the International Covenant on Economic, Social and Cultural Rights.

W. KAELIN

The general rule is that States have to provide IDPs with accurate information enabling them to make a free and voluntary decision whether or not to return, and to respect their decisions.

Based on this Principle, the Inter-Agency Standing Committee of the United Nations (IASC) has adopted a “Framework” on durable solutions for IDPs,²⁷ providing guidance for relevant actors. It sees the achievement of durable solutions and thus the end of displacement as a process through which the need for specialized assistance and protection gradually diminishes until an internally displaced person no longer has specific needs that are directly linked to his or her having been displaced.

In most cases, durable solutions are not achieved automatically. Both in post-conflict and post-disaster situations specific measures are needed to make solutions sustainable. Some general principles that facilitate the establishment of conditions which allow for durable solutions for internally displaced persons can be summarized as follows:

- *Information on the process, consultation with and participation of the affected communities:* These measures help internally displaced persons to make a free and voluntary decision on whether to return, integrate locally where they had been displaced or evacuated to, or to relocate and integrate elsewhere in the country. In the case where return is not an option (e.g. when, in the aftermath of a natural disaster) former places of residence have become inhabitable or too dangerous for human habitation), forced relocations, which have a tendency not to be sustainable, should be avoided; rather, affected populations should be empowered with a sense of ownership of the process of finding a solution to their situation. Information has to be true and accurate, consultation processes truly representative and participation inclusive and possible from the very beginning.

- *Long-term safety:* Return areas as well as relocation sites should be safe, e.g. from the dangers of landmines or militias in the case of armed conflict, or effects of secondary or recurrent hazards in the case of natural disasters. Reestablishments of the rule of law or reconciliation are other aspects of restoring safety.

- *Physical needs and livelihoods.* Provision of adequate housing and services, such as health care or education, is essential and continued access to livelihoods is critical. If access to former livelihoods is not possible, the creation of new livelihood opportunities is vital. The creation of such conditions often requires robust development interventions.

²⁷ IASC, Framework on Durable Solutions for Internally Displaced Persons, April 2010, A/HRC/13/21/Add.4. The Framework is available from www.humanitarianinfo.org/iasc and www.brookings.edu/reports/2010/04_durable_solutions.aspx.

- *Recovery of land and property upon return, including through restitution of property occupied by others and settlement of property and land disputes.* All IDPs should have access to mechanisms for property restitution or compensation, whether or not they opt for return or another durable solution. Where return is not possible or prohibited (e.g., in the case of zones declared unfit for human habitation in the aftermath of a natural disaster), affected persons must be provided with alternative housing and land or sufficient means to acquire such land and housing and with compensation for lost and damaged property in the case of arbitrary displacement. In this context, the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the so called Pinheiro Principles)²⁸ are providing important guidance.

3. Conceptual Ideas

In order to understand the Guiding Principles it is important to realize that they are based on three important conceptual ideas:

(1) Although IDPs have departed from their homes, unlike refugees they have not left the country whose citizens they normally are. As such, they remain entitled to enjoy the full range of human rights as well as those guarantees of international humanitarian law which are applicable in a given situation. This is why, in general, they must not be treated like refugees whose treatment is very often assimilated to the lower standards applicable to aliens legally present in the country of refuge.

(2) IDPs experience a very special factual situation and therefore, have specific needs: Like other vulnerable groups such as children, or the wounded and the sick, internally displaced persons do not constitute a distinct legal category. However, they have many special needs because of the fact of their displacement. The point of departure for the Guiding Principles was, therefore, the identification of these specific needs. On the basis of that analysis the norms of international human rights and humanitarian law which address the wants of the displaced were identified and restated in the Guiding Principles.

(3) It is necessary to restate in more detail those legal provisions which respond to the specific needs of internally displaced persons and to spell them out in order to facilitate their application in situations of internal displacement: As mentioned above, the Representative 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 certain gray areas where clarification is necessary.

The need for more specific and detailed guidance stemmed from several problems. First, the protection of internally displaced persons is complicated by

²⁸ Adopted by Resolution 2005/21 of the (former) UN Sub-Commission on Protection and Promotion of Human Rights.

the fact that they are found in three different situations, namely (i) situations of tensions and disturbances which fall short of internal armed conflict or disaster; here, human rights law applies; (ii) situations of non-international armed conflict governed by some of the most important principles of humanitarian law and by many human rights guarantees; and (iii) situations of interstate armed conflict where the detailed provisions of international humanitarian law become primarily operative although most human rights guarantees remain applicable. It is often difficult, in practice, to determine which norms apply to each of these situations. The Guiding Principles facilitate the invocation and application of relevant legal norms. They identify those guarantees which have to be observed in all situations; at the same time, they differentiate between these situations where necessary. Thus, e.g., Principle 7 on the modalities of displacement carefully distinguishes between the emergency stages of armed conflicts and disasters where, realistically, only very minimal guarantees can be observed by authorities, and other situations where procedural safeguards are possible. Another example is Principle 10 setting out in paragraph 1, the right to life in general, and specifying in paragraph 2 the guarantees which are relevant in situations of armed conflict only.

Second, there are other areas in present international law where a general norm exists but a corollary, more specific right has not yet been articulated and formally recognized that would ensure implementation of the general norm in areas of particular need to internally displaced persons. Most of the Guiding Principles try to specify in a more detailed manner the meaning of general norms for the special situation of displacement. Principle 17, e.g., states the general right to respect of family and then highlights particular aspects of this rights which are of special importance to internally displaced persons, e.g. the right of internally displaced families to remain together when relocated or interned in camps.

Finally, the Guiding Principles try to progressively develop certain general principles of human rights law where the existing treaties and conventions are unclear or may contain some gaps. One example 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 the freedom of movement but also the right to choose one's own residence, and thus, a right to remain²⁹. A right not to be displaced is also found in instruments on the rights of indigenous peoples³⁰. 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. Such a prohibition can be deduced from the prohibition of

²⁹ 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.

³⁰ Article 16 of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

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.³¹ 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 reflects its underlining principles. These and other examples show that the drafters of these guidelines have been very careful to not 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”.

4. Legal character³²

The Guiding Principles on Internal Displacement are neither a declaration on the rights of internally displaced persons nor do they constitute, as such, a binding instrument. However, as mentioned above, the Guiding Principles restate in more detail many of those existing legal provisions which respond to the specific needs of internally displaced persons and spell them out in order to facilitate their application in situations of internal displacement. They also clarify aspects of the protection of internally displaced persons where present international law contains certain gray areas or even gaps. For these reasons the introductory part of the Guiding Principles stresses that they “reflect and are consistent with international human rights and international humanitarian law” (introductory paragraph 3). Thus, they are based on existing international law and this is an important reason

³¹ See, e.g., UN Human Rights Committee Human Rights Committee, General comment No. 20[44], para. 9 and the Charles Chitat Ng v. Canada case, Communication 469/1991, Views adopted on 5 November 1993, para. 16.1. ; See also Article 3 UN Convention against Torture and the rich case-law of the Committee against Torture on Article 3 Convention against Torture and of the European Court of Human Rights on Article 3 European Convention on Human Rights (e.g., European Court of Human Rights, Cruz Varas Case, Judgment of 20 March 1991, Series A, No. 201, para. 69. See also European Court of Human Rights, Saadi v. Italy Case, Judgment of 28 February 2008 (Grand Chamber), paras. 124 – 133).

³² On this issue see, e.g., Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*; 10 *Global Governance* 2004, pp. 459–480, Walter Kälin, *The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool*, *Refugee Survey Quarterly*, Vol. 24, Issue 3, 2005, pp. 27 – 36. On the reasons for developing a soft law instrument rather than a convention see Walter Kälin, *How hard is soft law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*, in: *Recent Commentaries about the Nature and Application of the Guiding Principles in Internal Displacement*, *The Brookings-CUNY Project on Internal Displacement*, April 2002, at 4 – 7.

W. KAELIN

why they have gained, in a relatively short period of time, considerable recognition and standing.

A particularly important step in this regard was taken when in September 2005 the Heads of State and Government assembled in New York for the World Summit unanimously recognized the Guiding Principles as an “important international framework for the protection of internally displaced persons,” a recognition subsequently echoed by the Human Rights Council and the General Assembly.³³ In 2009, the General Assembly recognized that “the protection of internally displaced persons has been strengthened by identifying, reaffirming and consolidating specific standards for their protection, in particular through the Guiding Principles on Internal Displacement.”³⁴ Many regional organizations including the OAS have invoked them and many States incorporated them into domestic law.³⁵ There are even some indications that at least certain States feel that the Guiding Principles are emerging as customary law, providing a binding interpretation of the international legal norms upon which they are based.³⁶

III. Implementation

Implementation of the rights of IDPs as codified in the Guiding Principles on Internal Displacement first and foremost happens at the *operational level* when national or local authorities and other relevant actors undertake protection activities, i.e. “activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law” (i.e. international human rights and humanitarian law).³⁷ Such activities may be very diverse, including (i) direct protection delivery for affected persons, such as transportation of persons who want to evacuate from disaster-affected areas; lighting of water points and sanitation areas in camps and collective centers to prevent or reduce instances of gender-based violence; provision of legal aid to victims of human rights violations; (ii) monitoring of situations and identification of relevant protection issues on the basis of needs; (iii) advocacy with relevant stakeholders (confidentially or publicly); or (iv) capacity building of relevant

³³ 2005 World Summit Outcome, General Assembly resolution 60/1, para. 132; Human Rights Council Resolution 6/32, para. 5; General Assembly resolution 62/153 (2008), para. 10; 64/162, para. 11.

³⁴ General Assembly resolution, 64/162, tenth preambular paragraph.

³⁵ For more details see below, Section III.2.

³⁶ The National Policy on Displacement of Iraq declares that the Guiding Principles have become “part of international law.” Iraq National Policy on Displacement (July 2008), section 5, para. 3. The Government of Germany has taken the position that the Guiding Principles “can by now be considered to be international customary law”; see Achter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen, p. 150.

³⁷ IASC IDP Protection Policy 1999. The definition was originally adopted by a 1999 Workshop of the International Committee of the Red Cross (ICRC) on Protection.

stakeholders as well as affected persons and communities.³⁸ Much of this work is undertaken by UN humanitarian agencies and their non-governmental partners. The Human Rights Council's Special Rapporteur on the Human Rights of Internally Displaced Persons is mandated with visiting countries, report on his findings and engage with governments and other relevant stakeholders on how to improve the protection of IDPs.³⁹

For this publication, the *legal notion of protection*, i.e. the existence of individual rights and mechanisms for monitoring their implementation is more relevant and the following will focus on this aspect. Legal protection may exist at the level of regional organizations as well as at the domestic level of countries affected by internal displacement.

1. The regional level: Conventions and Resolutions

Internal displacement, while a global problem, is to a large extent shaped by regional dynamics and specificities.⁴⁰ This is why regional organizations, where they exist, can play a particularly important role in addressing internal displacement.

Africa is the most advanced region in this regard. In 2006, eleven countries in Eastern Africa that were involved in the armed conflicts in the Democratic Republic of Congo in the past two decades adopted, within the Framework of the International Conference on the Great Lakes Region, two important Protocols that are binding international treaties and have entered into force in 2008.⁴¹ The 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons is binding on 10 States⁴². Its key obligation is the incorporation of the UN Guiding Principles on Internal Displacement into domestic law, including the designation of authorities responsible for providing assistance and protection to IDPs. The Protocol covers all causes of displacement and is unique insofar as it recognizes explicitly those displaced by large scale development projects as IDPs; in this regard, States are obliged to consult with affected populations, explore alternatives to displacement, and provide adequate and habitable relocation sites in cases where displacement is justified. The Great Lakes Protocol on the Property Rights of Returning Persons addresses one of the key obstacles to successful return and reintegration of forcibly displaced people. It sets out the

³⁸ For the operational meaning of protection see IASC Operational Guidelines on the protection of persons in situations of Natural Disasters, A/HRC/16/43/Add.5, 11 January 2011, paras. 14 – 22.

³⁹ Human Rights Council resolution 14/6 of 17 June 2010, paras. 11-12. This mandate replaces that of the Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons.

⁴⁰ See above, Section I.1.b.

⁴¹ Angola and Sudan have not yet ratified the Protocols.

⁴² Sudan has not ratified the Protocols.

W. KAELIN

legal principles which govern the recovery of property by displaced people and the resolution of property related conflicts.

The African Union built on this experience when, in 2009 it adopted the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). The Kampala Convention which has not yet entered into force,⁴³ applies to displacement caused by a wide range of causes – from conflict and human rights violations to natural or man-made disaster and development projects. It sets out standards for the protection of people from arbitrary displacement, the protection of IDPs while they are displaced and durable solutions to their displacement. While the Convention is based on the human rights of IDPs (in particular the UN Guiding Principles on Internal Displacement), it is formulated in terms not of rights but of obligations of State actors. The Convention does not limit itself to the role of the States parties but also covers the duties of non-state actors and the roles and responsibilities of the African Union as well as international humanitarian agencies and other organizations. The Convention contains a strong obligation to incorporate it into domestic law and create the necessary institutional arrangements.

These instruments do not provide individuals with the possibility of legal remedies to a regional human rights mechanism. However, this is possible under the African Charter on Human and Peoples' Rights. This general human rights convention has become relevant for the issue of internal displacement since the African Commission of Human and Peoples' Rights, in the Endorois case, decided that the forcible removal of the Endorois people from their ancestral lands, undertaken in the context of the creation of a game reserve, without proper prior consultations and adequate and effective compensation violated their human rights.⁴⁴

Other regional organizations have adopted recommendations. In the Council of Europe, Recommendation Rec (2006)6 of the Committee of Ministers to member states on internally displaced persons is particularly important. According to this soft law instrument, member States shall take measures to, inter alia, to safeguard the civilian nature of IDP camps; facilitate the reunification of families which are separated by internal displacement; provide IDPs with necessary personal documents necessary for the effective exercise of their rights as soon as possible; ensure that IDPs have the right to repossess property left behind or receive adequate compensation; and ensure that IDPs can effectively exercise their right to vote.

⁴³ On 1 February 2011, 31 members of the AU had signed and 4 ratified the Kampala Convention.

⁴⁴ African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4b8275a12>.

INTERNALLY DISPLACED PERSONS IN INTERNATIONAL LAW

The European Court on Human Rights has decided several cases submitted by IDPs. In the 2004 *Doğan v. Turkey* case, e.g., the Court stressed that "the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country"⁴⁵. This and many other Turkish cases deal with the issue of compensation for loss of property caused by forced evacuation from villages.⁴⁶

In the Americas, the OAS General Assembly regularly adopts a resolution on IDPs. The resolution adopted in 2010⁴⁷, e.g., acknowledges and stresses the importance of the Guiding Principles; urges States to comply with their obligations under international law; emphasizes the primary responsibility of States toward IDPs; urges States to take preventive measures, to include in their national plans, policies and programs the needs of IDPs, and to recognize the special needs of vulnerable groups (indigenous peoples, afro-descendants, women, children, etc). It also encourages States to address the causes of displacement and mentions internal displacement in situations of natural disasters as a particular challenge.

The Inter-American Court of Human Rights has been particularly important for IDPs. In the 2005 case of *Masacre de Mapiripán v. Colombia*, the Court granted compensation not only for the massacre but also for displacement (para. 273). In *Moiwana v. Suriname* (2005) the Court stated: "The State shall adopt such legislative, administrative, and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled (...). The State shall guarantee the safety of those community members who decide to return to Moiwana Village." The Court regularly issues provisional measures in accordance with Article 63(2) of the American Human Rights Convention to protect communities against being displaced.⁴⁸ The Inter-American Commission on Human Rights has also actively addressed IDP issues. The 1983 Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, recommending payment of just compensation to returning internally displaced persons for the loss of their property, including homes, crops, livestock and other belongings is a particularly interesting example.

⁴⁵ *Doğan v. Turkey*, Judgement of 29 June 2004, para. 154.

⁴⁶ On the issue of evacuations see the *Budayeva* case, above at footnote 22.

⁴⁷ AG/RES. 2578 (XL-O/10).

⁴⁸ See, e.g., Order of the Inter-American Court of Human Rights of November 17, 2009 Provisional Measures regarding Colombia Matter of the Communities of Jiguamiandó and Curbaradó.

2. The domestic level: Strategies, policies and laws Displacement

As mentioned above, the primary responsibility for protecting and assisting IDPs lies with the national governments, not the international community (Guiding Principle 3). This principle recognized state sovereignty but at the same time insists that the right of States to be sovereign and to have this sovereignty brings certain obligations with it. As Francis Deng and Roberta Cohen in their seminal book *Masses in Flight* stressed, “the concept of sovereignty cannot be dissociated from responsibility: a state should not be able to claim the prerogatives of sovereignty unless it carries out its internationally recognized responsibilities to its citizens, which consist of providing them with protection and life-supporting assistance”⁴⁹. This concept of sovereignty as responsibility underlines not only the Guiding Principles but should also inform State action.

In this regard, the Brookings-Bern Project on Internal Displacement has developed a framework to assess national responsibility. In order to live up to their obligations, States have to undertake at least the following steps: (1) Prevent displacement and minimize its adverse effects; (2) Raise national awareness of the problem; (3) Collect data on the number and conditions of IDPs; (4) Support training on the rights of IDPs; (5) Create a legal framework and (6) a national policy upholding the rights of IDPs; (7) Designate an institutional focal point on IDPs; (8) Encourage national human rights institutions to address internal displacement; (9) Ensure the participation of IDPs in decision-making; (10) Support durable solutions; (11) Allocate adequate resources to the problem; (12) Cooperate with the international community when capacity is insufficient⁵⁰.

In recent years, much progress has been made at the level of IDP specific national laws, strategies policies with more than 15 countries possessing such instruments and several others being in the drafting stage. Colombia Law No 387 on internal displacement of 1997 is an early example. The Law addresses prevention of displacement by setting up an early warning mechanism, declares arbitrary displacement to be a punishable crime, provides for three months of humanitarian emergency assistance for registered IDPs, addresses measures to stabilize the socio-economic situation of IDPs, enshrines the right to access to basic services in the areas of health and education, and support for return. The Law also entrusts a State institution, Acción Social, with the task of coordinating interventions by relevant line ministries and other actors. While implementation

⁴⁹ Francis M. Deng, Roberta Cohen, *Masses in Flight: The Global Crisis of Internal Displacement*. Brookings Institution Press, Washington D.C., 1998, p. 7.

⁵⁰ Brookings-Bern Project on Internal Displacement, *Addressing Internal Displacement: A Framework for National Responsibility*, Washington D.C., April 2005.

of the law has been very problematic⁵¹, the law as such still provides an excellent example on how to address internal displacement at the legislative level.

Another example from the region is Peru with its Law No 28223 Concerning Internal Displacement. The Law's main objective is the incorporation of Guiding Principles but its scope of application is limited to displacement caused by conflict and violence. The law covers all phases of displacement and stresses the obligation and responsibility of national authorities to provide humanitarian protection and assistance to IDPs. The law goes even a step further by enshrining a right of IDPs to ask for and receive humanitarian protection and assistance and states that when the magnitude of the problem demands it, the State must invite international humanitarian agencies to support humanitarian action.

Even the best national laws remain symbolic if they are not implemented and cases of non-implementation or violation are not addressed by courts. In fact, courts can play an extremely important role in protecting the rights of IDPs as is evidenced by the Colombian Constitutional Court. In its decision T-025 of 2004 and whole series of follow-up decisions the Court decided “[t]o declare the existence of an unconstitutional state of affairs in the situation of the displaced population, due to the lack of coherence between the seriousness of the violation of the rights recognized in the Constitution and developed by the legislation, on the one hand, and the volume of resources effectively destined to secure effective enjoyment of said rights and the institutional capacity to implement the corresponding constitutional and legal mandates, on the other hand”, and ordered authorities to undertake very specific measures, including improving the registration process and allocating much higher budgetary resources. The Court also instituted a follow-up mechanism to measure the degree of implementation of its orders and the progress made in improving the situation of IDPs⁵².

IV. Achievements and Challenges

In conclusion, we can see that much has been achieved in the past decade to better assist and protect IDPs. At the same time, we are still far away from reducing the overall number of IDPs and significantly improve their lives. Thus, important challenges remain.

⁵¹ See paragraphs below on the role of the Colombian Constitutional Court. See also Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Addendum, Mission to Colombia, UN Doc A/HRC/4/38/Add.3, 24 January 2007.

⁵² On the activities of the Constitutional Court see Rodolfo Arango Rivadeneira (Ed.), *Judicial Protection of Internally Displaced Persons: The Colombian Experience*, published by the Brookings-Bern Project on Internal Displacement, Washington D.C., November 2009 and, in particular, the excellent contribution by Manuel José Cepeda Espinosa, *The Constitutional Protection of IDPs in Colombia*, pp. 1 – 47.

1. Achievements

As regards the achievements, there is increasing understanding that IDPs are a specific category of people with specific vulnerabilities that need to be addressed. There is also growing acceptance that internal displacement cannot be reduced to situations where people have to flee because of armed conflict and other forms of violence. In particular, internal displacement in the aftermath of natural disasters has received more attention in recent time, and this focus will become more and more important in the context of climate change.

Clear progress can be seen regarding the normative framework guaranteeing the rights of IDPs. In the years after the former Representative of the Secretary General on Internally Displaced Persons, Dr. Francis Deng, presented the Guiding Principles to the then UN Human Rights Commission, a group of States led by Egypt and Sudan contested the validity of the Guiding Principles on Internal Displacement because they had not been negotiated by States, claiming that they should not to be taken into account. While this was not an attitude shared by the majority of States, it affected their authority. However, a breakthrough came with the 2005 World Summit in New York, when Heads of State and Governments unanimously recognized the Guiding Principles as an important international framework for the protection of internally displaced persons, language which has since then been repeated in several UN General Assembly and Human Rights Council resolutions.⁵³

As mentioned above, the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons, adopted in 2006, obliges its ten member states to incorporate the Guiding Principles into their domestic law. 2009 saw the adoption of the AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa, the first legally binding regional instrument of its kind. Several countries have either adopted or are in the process of developing national legislative frameworks, programmes and policies which incorporate or refer to the Guiding Principles, and these are increasingly becoming more detailed and operational.

There have also been normative and conceptual advances with regard to specific aspects and types of internal displacement – for example, on protection of persons affected by natural disasters,⁵⁴ on the process for achieving durable

⁵³ See above, Section II.4

⁵⁴ IASC Operational Guidelines on the protection of persons in situations of Natural Disasters, A/HRC/16/43/Add.5, 11 January 2011.

solutions,⁵⁵ and on how to include the rights of internally displaced persons in peace processes and agreements⁵⁶.

These are achievements that cannot be underestimated. They have helped to improve our understanding of internal displacement, and to ground policies and programmes in a set of common standards which are based on a human rights framework. In many instances such improvements have meant a better life for real people.

One effect of these developments is a greater readiness of states to discuss their displacement situations. There are still countries like Myanmar or Pakistan which deny that people displaced by military operations are IDPs, but overall a growing willingness of governments can be felt not only to discuss IDP issues but also to accept their national responsibility and take at least some steps to assist and protect them better. Some countries, in particular Georgia and Azerbaijan and to some extent also Bosnia, Serbia and Colombia, have started to address their protracted displacement situations with measures to improve the living conditions of their IDPs while awaiting return or other durable solutions; however, problems remain, particularly in the area of livelihoods and for IDPs with special needs.

2. Challenges

Despite the progress made, much work remains to be done in an increasingly difficult environment. Eight major challenges can be identified:⁵⁷

1. *Moving beyond 'camps and conflicts': internal displacement in all its forms:* An IDP is typically perceived as somebody living in destitution in a camp after fleeing violence and armed conflict. The reality, however, is far more complex. The majority of IDPs live outside camps with host families or are dispersed in urban areas. We need to be more creative in our efforts to assist and protect them. Such efforts should reach all displacement-affected communities, i.e. not only the IDPs but also host communities or communities that have to re-integrate returnees. As regards the causes, every year more people are displaced by natural disasters than by conflicts. Climate change is contributing to this phenomenon as well. In addition, displacement resulting from forced evictions linked to development projects is also on the rise. Despite growing awareness about their relevance responses to such types of displacement remain inadequate.

⁵⁵ IASC, Framework on Durable Solutions for Internally Displaced Persons, April 2010, A/HRC/13/21/Add.4.

⁵⁶ Brookings-Bern Project on Internal Displacement, Integrating Internal Displacement in Peace Processes and Agreements, Washington D.C. 2020.

⁵⁷ For more details on these challenges see Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, UN Doc A/HRC/13/21, 5 January 2010, paragraphs 39 – 79.

2. *Addressing multiple layers of vulnerability and discrimination:* All IDPs are vulnerable in ways that non-displaced persons are not. However, certain groups of IDPs require particular attention. These include women (especially women heading households), children, the elderly, persons with disabilities or chronic illnesses, and those belonging to ethnic and religious minorities and indigenous peoples. While this is accepted in theory, the specific concerns and needs of these groups are still often overlooked in practice.

3. *Supporting states with limited capacity:* Sovereignty entails responsibility. Addressing internal displacement is therefore first and foremost a responsibility of governments. However, much internal displacement today occurs in States with limited capacity to prevent or respond to displacement or in “failed” States whose governments have no effective presence in large parts of the country. The challenge lies in supporting these States’ efforts to adopt and implement comprehensive policies and laws on internal displacement, while ensuring that donors and humanitarian and development agencies assist them with the necessary expertise and resources.

4. *Strengthening the international response:* The introduction of the cluster system has led to progress in the coordination of humanitarian action. Yet, humanitarian agencies can still do more to assume their joint responsibilities in respect to the protection of IDPs, especially in the area of disaster-related displacement. Humanitarian agencies can also improve their capacity to make the concept of protection more operational.

5. *Bridging the gap between emergency assistance and long-term reconstruction and development:* It is unacceptable and shameful that IDPs are often in a worse situation many years after a crisis than they were during the emergency phase. More flexible funding mechanisms as well as a readiness by humanitarian and development actors to work hand in hand early on in crises are a necessity.

6. *Defending humanitarian space:* IDPs and other crisis-affected populations will continue to suffer the consequences of diminished or compromised humanitarian access unless we develop new, innovative approaches such as assistance by ‘remote control’ or development interventions in the midst of a crisis that strengthen the resilience of communities at risk of displacement or the absorptive capacities of host communities.

7. *Ensuring accountability for arbitrary displacement:* Arbitrary displacement is a violation of the Guiding Principles and the binding international norms they reflect. In its most egregious forms, arbitrary displacement may amount to crimes against humanity or war crimes. If we are serious about preventing arbitrary displacement, we have to end the impunity prevailing in many displacement situations and bring perpetrators of such crimes to justice and ensure that victims receive appropriate reparations, including compensation.

INTERNALLY DISPLACED PERSONS IN INTERNATIONAL LAW

8. *Ending the politics of protracted displacement:* In many countries, people languish in situations of protracted displacement due to a lack of political will to find durable solutions for them. Durable solutions, based on voluntary and informed decisions of those concerned, are the best way to protect the human rights of internally displaced persons and to provide a measure of reparation for the violation of these rights.

