

Guiding Principles on Internal Displacement

A few comments on the contribution
of international humanitarian law

by **Jean-Philippe Lavoyer**

The very intense international debate that has taken place in recent years on the subject of internally displaced persons has recently undergone a major development — the drafting of the Guiding Principles on Internal Displacement (hereinafter referred to as the “Guiding Principles”). The distinguishing feature of these Guiding Principles is that they incorporate elements of three branches of public international law in a single document: international humanitarian law, human rights law, and refugee law. This combination calls for special comment.

The aim of this article is to place the Guiding Principles in a wider context and to highlight the importance of international humanitarian law and the role of the ICRC with regard to internally displaced persons. In so doing, the author examines both the advantages and the shortcomings of a document that covers a very broad range of contexts, whereas existing international law contains a number of rules which are precise but apply only to specific situations.

Internally displaced persons and international humanitarian law

Identifying the link between internal displacement and international humanitarian law is a simple matter, for persons internally displaced as a result of armed conflict are protected under the terms of this law. The

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link is in fact a very close one, since armed conflicts are one of the major causes of displacement.

While humanitarian law affords protection to the internally displaced, it is important to bear in mind that its scope extends a great deal further. Indeed, its aim is primarily to *prevent* displacement, and many forced population movements could be avoided if the rules of humanitarian law — and human rights law for that matter — were duly respected.

International humanitarian law seeks first and foremost to protect the civilian population from the harmful effects of war. The 1977 Protocols additional to the 1949 Geneva Conventions, which reaffirm and expand the provisions of the four Conventions for the protection of war victims, contain numerous rules setting standards of conduct for the warring parties in order to spare the civilian population as a whole. Some of these rules afford general protection, while others relate more specifically to displacement.

With 188 States Parties, the Geneva Conventions of 12 August 1949 are universal. A total of 150 States are bound by Additional Protocol I, which relates to international armed conflicts, and 142 States by Additional Protocol II, which concerns non-international armed conflicts.¹ These figures are very encouraging and bear witness to the importance that the international community attaches to the ideals upheld by humanitarian law.

Preventing displacement in general

As regards the conduct of hostilities, the rules of humanitarian law stipulate that, in the event of armed conflict, it is imperative at all times to distinguish between the civilian population and combatants, and between civilian objects and military objectives.² Consequently, only attacks against combatants and military objectives³ are lawful. It is expressly prohibited to attack civilians — insofar as they do not take an active part in the hostilities — or to launch indiscriminate attacks which strike military objectives and civilians without distinction.⁴

¹ As at 1 July 1998.

² Additional Protocol I, Art. 48.

³ The term “military objectives” is defined in Article 52 of Additional Protocol I.

⁴ Additional Protocol I, Art. 51, and Protocol II, Art. 13.

The Additional Protocols also provide for protection of objects indispensable to the survival of the civilian population (such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, and irrigation works), cultural objects and places of worship, works and installations containing dangerous forces (dams, dykes and nuclear power stations), and the natural environment.⁵

In order to strengthen such protection, humanitarian law requires belligerents to take numerous precautions when planning or executing an attack. They must always ensure that their objective is indeed a military one.⁶

Protection of the civilian population against the effects of hostilities is thus assured in the event of both international and non-international armed conflicts.

Furthermore, humanitarian law requires that persons who take no active part or have ceased to take an active part in the hostilities shall be treated humanely and without any adverse distinction. The purpose of this requirement is to protect civilians above all. Article 3 common to the four Geneva Conventions expressly prohibits acts of violence to life and person, the taking of hostages, outrages upon personal dignity and the passing of sentences without previous judgment pronounced by a regularly constituted court.⁷ It also provides that the wounded and sick shall be collected and cared for. Additional Protocol II of 1977 further consolidates these prohibitions.⁸

One of the advantages of humanitarian law over human rights law is that, in internal armed conflicts, its provisions — in this instance, common Article 3 and 1977 Additional Protocol II — are also binding on armed opposition groups. Moreover, there can be no derogation from the rules of international humanitarian law.

Displacement is expressly prohibited

Some rules of humanitarian law deal directly with the issue of displacement. For example, in situations of internal conflict it is expressly

⁵ Additional Protocol I, Arts 53-56, and Protocol II, Arts 14-16.

⁶ Additional Protocol I, Art. 57.

⁷ According to the International Court of Justice, Article 3 common to the Geneva Conventions contains rules that reflect elementary considerations of humanity and is applicable in *all* armed conflicts (*Nicaragua v. USA*, Judgment, 27 June 1986, para. 218).

⁸ Additional Protocol II, Arts 4-6.

forbidden to compel civilians to leave their place of residence unless the security of the persons involved or imperative military reasons so demand.⁹

Furthermore, the inhabitants of occupied territory may not be expelled from such territory by the Occupying Power.¹⁰ In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.¹¹

Protection of internally displaced persons

Internally displaced persons do not fall into a separate category under humanitarian law. They are included in the term “civilian population”, and thus benefit from all the provisions that afford protection to civilians (including those mentioned above).

All armed conflicts cause a degree of suffering among civilians, even when humanitarian law is fully respected. Strict compliance with the law would considerably reduce the number of victims and hence the number of forced population movements, meaning that there would be fewer internally displaced persons and refugees.

The ICRC and internally displaced persons

The States have entrusted the ICRC with the task of monitoring respect for international humanitarian law. As the promoter and custodian of this body of law, the organization endeavours to ensure compliance with its provisions in times of peace as well as war. In peacetime, the States’ primary responsibility in this respect is to provide instruction in humanitarian law for their armed forces — for whom it is principally intended — and to adopt measures for implementation of the law at the national level, particularly with a view to ensuring the prosecution of war criminals.¹²

⁹ Additional Protocol II, Art. 17.

¹⁰ Fourth Geneva Convention, Art. 49.

¹¹ Fourth Geneva Convention, Art. 45.

¹² The ICRC’s Advisory Service on International Humanitarian Law provides States with technical assistance and supports their efforts to implement humanitarian law at the national level.

When an armed conflict breaks out, the ICRC reminds the belligerents of their obligations, stemming mainly from the Geneva Conventions of 1949 and their Additional Protocols of 1977. It also seeks to establish a constructive dialogue with them, based on mutual trust. For this reason the ICRC prefers persuasion over denunciation as a working method. In the event of serious violations of humanitarian law, however, and if its policy of discretion fails to put a stop to such violations, the ICRC reserves the right to denounce them.

The ICRC also reminds States of their responsibility to *ensure respect* for humanitarian law, as stipulated in Article I common to the four Geneva Conventions and to Additional Protocol I.¹³

In the field, the ICRC performs a variety of tasks, which include providing protection and assistance for the civilian population, conducting health-related activities (such as war surgery, supplying drinking water, rehabilitation), visiting prisoners of war and security detainees, and restoring contact between family members separated by war.¹⁴

The ICRC's understanding of the term "civilian population" is the same as that defined in humanitarian law. It thus encompasses all civilians, without any distinction. Internally displaced persons are therefore obviously covered by the ICRC's mandate to afford protection and assistance to the civilian population, and the ICRC deploys large-scale activities to help the displaced all over the world. Almost every one of its operations — in Colombia, Uganda, Sierra Leone, the Horn of Africa, Sri Lanka, Afghanistan and the Caucasus, to name but a few — includes a component that deals with displaced persons.

While the ICRC strives to tend to the needs of all victims of armed conflict and internal disturbances, it is well aware of the extreme vulnerability of internally displaced persons, who, like refugees, have generally been forced to leave everything behind in their flight.

While concern for internally displaced persons is indeed crucial, there are obviously other categories of people whose needs may be just as pressing and just as acute — for example the wounded and the sick,

¹³ "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [this Protocol] in all circumstances."

¹⁴ The Geneva Conventions confer upon the ICRC the right to visit prisoners of war and civilian internees (Arts 126 and 143 of the Third and Fourth Conventions, respectively). Furthermore, the Conventions and the Statutes of the International Red Cross and Red Crescent Movement grant the ICRC a right of humanitarian initiative.

children separated from their families, persons deprived of their freedom, and all those who find themselves trapped in the fighting and who want to flee but are unable to do so. A global view of the different needs and an impartial response to them will prevent any unjustified distinction between the various categories of victims.

The ICRC has never attempted to define the term “internally displaced person”, simply because all displaced persons fall within the category “civilian population”. In terms of legal protection, it is immaterial whether an individual is displaced or not, for all civilians — whether they are living in their own homes, staying temporarily with friends or relatives, admitted to hospital, or forced to flee their homes — are equally entitled to protection.

The international debate on internally displaced persons

The debate on internally displaced persons intensified after the issue was submitted to the Commission on Human Rights, and following the appointment in 1992 of Francis M. Deng as the Representative of the UN Secretary-General on Internally Displaced Persons. Given the increasingly widespread incidence of the problem, such concern for the plight of the displaced was entirely justified.

From the outset, the ICRC made a point of taking an active part in the debate. It maintains a regular dialogue with the Secretary-General’s Representative; it has also exchanged views on the matter with other humanitarian players, particularly the Office of the United Nations High Commissioner for Refugees; and it has participated in numerous discussions in several fora, including the UN General Assembly and the Commission on Human Rights. The ICRC is also involved in the work of the Inter-Agency Standing Committee, which attaches great importance to internally displaced persons, and has placed one of its senior staff members at the disposal of the United Nations Office for the Coordination of Humanitarian Affairs to strengthen coordination in matters relating to the internally displaced.

As part of its contribution to the debate, in October 1995 the ICRC organized a three-day symposium in Geneva on internally displaced persons, at which experts discussed the operational and legal aspects of the problem.

The ICRC followed with great interest the work of the Secretary-General’s Representative and a team of international legal experts to

prepare a compilation and analysis of legal norms for the protection of internally displaced persons (hereinafter referred to as the “Compilation and Analysis”).¹⁵ This reference document, which was submitted to the Commission on Human Rights in 1996, gave a clearer picture of the rules of human rights law and international humanitarian law (and, by analogy, refugee law) pertaining to internally displaced persons. The conclusion was that existing law provides substantial coverage of the needs of the internally displaced; there were, however, shortcomings and a need for clarification in some areas. It was also considered advisable to make some of the general rules more explicit so as to respond more effectively to the specific needs of displaced persons.

The most serious shortcomings were to be found in contexts not covered by humanitarian law (such as internal disturbances), as a number of human rights may be waived in emergency situations. It should further be pointed out that international law fails to make sufficient provision for the return of internally displaced persons (i.e., the right to return home in safe and dignified conditions) or the right to seek refuge in a safe place. Furthermore, it does not provide for the restitution of property lost as a consequence of displacement or stipulate the right of the displaced to obtain official documents (which are often required to gain access to public services).

To give a more “operational” slant to the Compilation and Analysis, Francis Deng undertook to draw up the Guiding Principles on Internal Displacement, which were drafted between 1996 and 1998 with the assistance of a small group of experts. The ICRC was invited to contribute to the process and readily agreed to take part. Working sessions were held in Geneva in October 1996 and June 1997, and a consultation of experts took place in Vienna in January 1998, at the invitation of the Austrian government. The Guiding Principles were finalized thereafter.

The UN Secretary-General submitted the Representative’s report, along with the Guiding Principles, to the Commission on Human Rights for consideration at its April 1998 session.¹⁶ The Commission discussed the issue and took note of the report and the Guiding Principles. It decided to keep the subject on its agenda and to extend the Representative’s mandate.¹⁷

¹⁵ UN doc. E/CN.4/1996/52/Add.2 of 5 December 1995.

¹⁶ UN doc. E/CN.4/1998/53/Add.2 of 11 February 1998.

¹⁷ Resolution 1998/50 of 17 April 1998. See below, pp. 545-556.

Guiding Principles on Internal Displacement

The Guiding Principles are an important document, and some of its features deserve special comment.

General approach to the problem

As a general rule, protection of the individual can be viewed either in terms of situations or in terms of categories of persons. In the first instance, protection is afforded to persons caught up in certain types of situation. Thus humanitarian law, which applies in either international or internal armed conflicts, sets out an elaborate system of protection of the individual that is designed to meet specific needs arising from the situations covered. In such contexts, certain categories of persons may be entitled to special protection. Such would be the case, for example, of prisoners of war or the inhabitants of occupied territory.

In the second instance, provision may be made to protect specific categories of individuals in a variety of situations. This is the case, for example, of the Convention on the Rights of the Child. The advantage of this approach is that it focuses on protecting one category of persons, regardless of the situation in which they find themselves. The drawback is that it may fail to cover all their needs for protection, since it is impossible to take detailed account of all the rules governing the different situations that may arise.

The Guiding Principles provide for the second form of protection described above, and their strongest point is that they address a wide range of needs arising from diverse situations. However, it should be borne in mind that they do not necessarily provide the same level of protection as that afforded by the various bodies of international law.

Definition of internally displaced persons

The introduction to the Guiding Principles contains a very broad definition of the term “internally displaced person”. While the definition does not confer any legal status upon the persons covered, it serves to specify the document’s field of application. Laudable though this endeavour may be, it does, however, entail the risk of diminishing the scope of the protection to which the civilian population is entitled. Indeed, in an armed conflict internally displaced persons form part of the civilian population — whether the population in question is displaced or not. According to the definition, some people might not qualify as internally displaced persons if the reasons for their displacement are unclear. This

means that they might not be covered by the Guiding Principles, but they would be entitled to protection under international humanitarian law.

The Guiding Principles endeavour to counter this shortcoming by stipulating, in Principle 1, that internally displaced persons are on an equal footing with the rest of their country's population. Care must, however, be taken not to leap to conclusions when interpreting the definition of internally displaced persons.

The definition is somewhat arbitrary, and hence so are overall statistics regarding internally displaced persons. Caution must be exercised in regard to the figures quoted, as they do not always appear reliable. The ICRC for its part has consistently refrained from estimating the number of internally displaced persons worldwide.

Scope of the Guiding Principles

The document fully covers the problem of internal displacement. It deals with the various stages and issues involved, i.e., protection of and humanitarian assistance to the displaced, and their return, resettlement and reintegration.

The Guiding Principles also seek to prevent displacement by reaffirming the obligation to respect and ensure respect for human rights and international humanitarian law (Principle 5).

Legal nature of the Guiding Principles

The purpose of the document is neither to modify nor to replace existing law, as is clearly stated in Principle 2, paragraph 2:

“These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. (...)”

Although the Guiding Principles can thus be viewed as falling within the province of soft law, they contain numerous rules that form part of treaty law and that are therefore legally binding. It is crucial to bear this in mind and to invoke first and foremost the relevant binding rules, such as the detailed provisions of international humanitarian law in situations of armed conflict.

Those for whom the Guiding Principles are intended

As stated in their introductory section, the Guiding Principles are intended primarily for States, armed opposition groups, intergovernmental

and non-governmental organizations, and the Secretary-General's Representative in carrying out his mandate.

While the document may indeed be useful for governmental and non-governmental organizations and the Secretary-General's Representative, the Guiding Principles are intended first and foremost for governments and armed opposition groups, which are also bound by international humanitarian law. Indeed, both are responsible for ensuring respect for humanitarian law, which plays a primary role in matters relating to forced population movements. Principle 3 states, in a more general fashion, that national authorities have the primary duty to provide protection and assistance to internally displaced persons.

The ICRC, along with other organizations, has made it known that it intends to inform its delegates of the contents of the Guiding Principles and to promote them. When faced with a situation of internal displacement in an armed conflict, the ICRC invokes the principles and rules of humanitarian law. The Guiding Principles could nonetheless serve a useful purpose in contexts where humanitarian law does not make specific provision for certain needs (such as the return of displaced persons in safe and dignified conditions). The Guiding Principles could also play a very useful role in situations not covered by international humanitarian law, such as disturbances or sporadic violence.

The principle of non-discrimination

The Guiding Principles are based on the principle of non-discrimination (referred to in Principles 1, 2, 4, 18, 22 and 29 in particular). This principle is the cornerstone of both human rights and humanitarian law.

Protection of women and children

The Guiding Principles rightly place special emphasis on the protection of women and children, as they are particularly vulnerable. After setting out the general rule (Principle 4), the document deals with the recruitment of children in armed forces and their participation in hostilities (Principle 13), and the right of displaced children to receive education (Principle 23). The document stipulates that special attention shall be paid to women, particularly in terms of their health needs (Principle 19) and education (Principle 23).

Restoring family ties

Principles 16 and 17 deal with the issue of missing persons and the reunification of dispersed family members. They refer to the right of

internally displaced persons to be informed of the fate and whereabouts of relatives reported missing and to be reunited with them as quickly as possible. In both cases the Guiding Principles stipulate that the authorities concerned shall cooperate with the humanitarian organizations engaged in such tasks. Indeed, tracing missing persons, conveying messages between separated family members and arranging for family reunifications form part of the traditional activities conducted by the ICRC.

Assistance and protection

One entire section of the Guiding Principles (Principles 24-27) is based on the rules of humanitarian law providing for relief to be delivered to the civilian population in an impartial manner. The document further reaffirms that offers of services made by humanitarian organizations shall not be regarded as interference in a State's internal affairs nor arbitrarily refused.

The Guiding Principles also contain provisions aimed at affording better protection to internally displaced persons. Principle 27, for example, stipulates that:

“International humanitarian organizations (...) when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. (...)”

The decision to link assistance and protection is a judicious one indeed, for no operation strictly limited to the delivery of relief supplies can be fully effective. This confirms the ICRC's long-standing view that the concepts of assistance and protection are closely linked, if not virtually indissociable. In practice, assistance very often serves as a means of protecting the population concerned.

The Guiding Principles nonetheless stress the special role and responsibilities of organizations that have been entrusted with a specific mandate to afford protection:

“The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.”

This refers in particular to the mandate that the States have conferred upon the ICRC. Lastly, Principle 27 states that humanitarian organizations and other players should respect the relevant international standards and codes of conduct. This includes, for example, the Code of Conduct for

the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief,¹⁸ which has been endorsed by a large number of NGOs.

The right to leave one's own country

The Guiding Principles stipulate that all persons have the right to leave their country and, in particular, to seek asylum in another country (Principles 2 and 15). This is an important reminder, for one tends to forget that in some instances the option to flee to another country can save lives. This right is all the more crucial as attempts are sometimes made to prevent displacement so as to avoid creating refugee movements.

Return of internally displaced persons

An entire section of the Guiding Principles (Principles 28-30) is devoted to the return of internally displaced persons. This aspect of the problem deserves special attention, for in practice it has often been relegated to the background. The document takes up the principle of voluntary repatriation, as stipulated in refugee law. It also reaffirms the principle that internally displaced persons have the right to return in safety and with dignity, and that it is the duty of the competent authorities to assist them. Furthermore, the authorities must help the displaced to recover the property and possessions they left behind or, when such recovery is not possible, to obtain appropriate compensation or another form of just reparation.

Principle 15 reaffirms what is tantamount to the principle of *non-refoulement*: it specifically protects internally displaced persons against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Towards a development in the law?

What of the proposal to develop a legally binding instrument on the subject of internally displaced persons? Appealing though the idea may be at first glance, it undeniably has certain disadvantages. Quite aside from whether such a proposal would be politically acceptable to States, a new instrument of this kind might well fall short of, and thus weaken, existing law. Generally speaking, the main problem facing civilians today is blatant

¹⁸ Text reproduced in *IRRC*, No. 310, January-February 1996, pp. 119 ff.

lack of respect for the most fundamental rules. The question is therefore whether the introduction of new rules would serve any useful purpose. Such lack of respect can sometimes be attributed to ignorance, but it mostly stems from a deliberate lack of political will to apply humanitarian law.

This implementation problem is particularly acute in contexts where ethnic or religious concerns are the overriding issue and provoke a spate of violence aimed first and foremost at civilians. A prime example is the policy of “ethnic cleansing”, in which humanitarian law no longer holds any sway. Enormous difficulties also arise in situations where State structures have collapsed, where the chains of command — so vital to ensuring respect for humanitarian law — are lacking, and where the political vacuum has been filled by disorganized bands. In such cases, little heed is paid to the rules of law.

In the face of these considerable challenges, the development of new legal instruments would not appear *a priori* to be the answer to the problem; moreover, the proliferation of new rules might weaken existing law.

Rather than developing new instruments, the international community should, in our opinion, focus its efforts on promoting existing treaties and advancing respect for international humanitarian law among parties to conflicts. For example, States should be reminded of their responsibility to “ensure respect” for the Geneva Conventions and their Additional Protocols, as stipulated by Article 1 common to the four Geneva Conventions.

That being said, humanitarian law is part of a dynamic process, as evidenced by the recent bans on blinding laser weapons and anti-personnel landmines.

Conclusion

The international debate on the subject of internally displaced persons has undeniably advanced their cause. In particular, the work of the Secretary-General’s Representative has served as a catalyst and has brought about a deeper understanding of their plight and needs. The Compilation and Analysis and, more recently, the Guiding Principles have identified and clarified the rules for the protection of internally displaced persons.

The Guiding Principles are a working tool that serves to reaffirm and clarify existing law. It is to be hoped that they will help sensitize States (as well as warring parties, in the event of armed conflict) to the distressing problem of displacement, and guide them in their action.

The text has the merit of combining, in a single document, elements from different branches of international law, and makes it possible to address the numerous needs of internally displaced persons in a comprehensive fashion. However, it is necessary to remember that such an approach also entails a number of risks — particularly as regards the definition of the term “internally displaced person” — and to bear in mind the many rules of international humanitarian law that serve to protect the civilian population as a whole in the event of armed conflict.
