

# Rhetoric versus reality: the guiding principles on internal displacement 1998-2008

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**RHETORIC VERSUS REALITY:  
THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT  
1998-2008**

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Thesis submitted according to the requirements for  
a Masters Degree in Law (LL.M.)

April 2008

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Jessica Wyndham  
Washington DC

## ABBREVIATIONS

ASEAN	Association of South East Asian Nations
ASIL	American Society of International Law
AU	African Union
CAHAR	Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons
CAT	Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Punishment
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CODHES	Consultoría para los Derechos Humanos y el Desplazamiento
CRC	Committee on the Rights of the Child
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EU	European Union
FARC	Fuerzas Armadas Revolucionarias de Colombia
HRC	Human Rights Committee
IASC	Inter-Agency Standing Committee
ICGLR	International Conference of the Great Lakes Region
ICHRP	International Council on Human Rights Policy
ICRC	International Committee of the Red Cross
ICVA	International Council of Voluntary Agencies
IDP	Internally displaced person
IDMC	Internal Displacement Monitoring Centre
IGAD	Inter-Governmental Authority for Development
IHRLG	International Human Rights Law Group
IOM	International Organisation for Migration
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
SAARC	South Asian Association for Regional Cooperation
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Fund for Children
WFP	World Food Programme
WHO	World Health Organisation

## Introduction

On 11 February 1998, the Representative of the United Nations (UN) Secretary-General on internally displaced persons, Francis Deng, presented to the UN Commission on Human Rights the Guiding Principles on Internal Displacement.<sup>1</sup> Controversial among states, opposed by refugee advocates, and unwanted by some humanitarian organisations, at their inception the fate of the Guiding Principles was at best uncertain. Over the past 10 years, however, they have achieved a high level of rhetorical acceptance internationally and regionally. What remains to be determined is the extent to which in reality the Guiding Principles have strengthened the protection of internally displaced persons.

### I. THE STATE OF THE WORLD'S INTERNALLY DISPLACED PERSONS

The Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council monitors situations of internal displacement caused by armed conflict and collates official and unofficial estimates of the displaced in relevant countries. According to the IDMC *Global Overview of Trends and Developments*, as of December 2006, there were approximately 24.5 million internally displaced persons worldwide in 52 countries<sup>2</sup>, as compared to 9.9 million refugees.<sup>3</sup> According to IDMC, the number of internally displaced persons has remained largely unchanged for the past three years, only marginally higher than the 23.7 million estimated in 2005<sup>4</sup> and marginally lower than the 25 million of 2004.<sup>5</sup>

What these figures do not reflect, are the constantly changing dynamics of displacement in any given year. In July 2007, for example, the Office of the UN High Commissioner for Refugees (UNHCR) reported that 486 000 Ugandan internally

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<sup>1</sup> Francis M Deng, *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General*, UN Comm'n on Hum. Rts., 54th sess, UN Doc E/CN.4/1998/53/Add.2, (1998).

<sup>2</sup> IDMC, *Internal Displacement: Global Overview of Trends and Developments in 2006* (2007) 6. Unless otherwise indicated, all numbers given for conflict-induced displacement will refer to the figures as at December 2006.

<sup>3</sup> UNHCR, *UNHCR Statistical Yearbook 2006* (2007), 3.

<sup>4</sup> IDMC, *Internal Displacement: Global Overview of Trends and Developments in 2005* (2006) 6.

<sup>5</sup> IDMC, *Internal Displacement: Global Overview of Trends and Developments in 2004* (2005) 6.

displaced had returned to their villages as a result of peace talks.<sup>6</sup> At the same time, between February 2006 and July 2007, the Iraqi Ministry of Displaced and Migrants estimates that 852 666 people were internally displaced as a result of the on-going conflict and instability in that country.<sup>7</sup> In 2008 significant new displacements have occurred, including the displacement of 600 000 people in Kenya following post-election violence,<sup>8</sup> and further displacement in Sri Lanka where the government announced its withdrawal from a ceasefire agreement with the Liberation Tigers of Tamil Eelam.<sup>9</sup> Thus, while the number of displaced persons each year has remained largely constant, return movements and new displacements are occurring on a continual basis.

Internal displacement is primarily a national phenomenon but often with far-reaching regional consequences. In West Africa and the Great Lakes Region of Africa, in particular, intra-state conflicts have quickly assumed interstate dimensions, on account of the spread of weaponry, refugee flows, the straddle of national borders by ethnic groups and the intrusion of non-state armed actors from one state into another. The current conflict in the west Darfur region of Sudan, for example, has exacerbated already fragile situations in the neighbouring Central African Republic and Chad, causing the UN Security Council in 2007 to express its support for the deployment of European Union peacekeepers to these neighbouring countries.<sup>10</sup> The recent Kenyan crisis has had similar ripple effects in an already unstable region, causing shortages of food and other essential supplies in Southern Sudan, Uganda, Burundi, Rwanda and the eastern Democratic Republic of Congo (DRC).<sup>11</sup>

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<sup>6</sup> 'Uganda: Juba talks paying off as IDPs return home', Irinnews, (16 July 2007) <<http://www.irinnews.org/Report.aspx?ReportId=73248>> at 11 April 2008.

<sup>7</sup> Ministry of Displaced and Migrants (Iraq), 'Summary Results IDP Registration – February 2006 to July 2007', 4. This figure is now considered to be closer to 2.2 million, taking into account both those displaced since July 2007 and displacement prior to the United States-led invasion of Iraq in March 2003. See, eg, 'Iraq: Compounds for IDPs should not be a permanent solution, officials warn', Irinnews, (16 March 2008) <<http://www.irinnews.org/report.aspx?ReportId=77306>> at 11 April 2008; 'Iraq: IDPs in Baghdad suburb stage protest, demand protection', Irinnews, (24 September 2007) <<http://www.irinnews.org/Report.aspx?ReportId=74454>> at 11 April 2008.

<sup>8</sup> 'Kenya: Sexual violence continues in IDP camps', Irinnews, (4 March 2008) <<http://www.irinnews.org/Report.aspx?ReportId=77102>> at 11 April 2008.

<sup>9</sup> International Crisis Group, 'Sri Lanka's Return to War: Limiting the Damage', [i] (Asia Report No. 146, 2008).

<sup>10</sup> 'Chad: Foreign Minister pleads for international intervention', Irinnews, (5 February 2008) <<http://www.irinnews.org/Report.aspx?ReportId=76578>> at 11 April 2008.

<sup>11</sup> See, eg, 'Kenya: Crisis ripple effects across the region', Irinnews, (6 February 2008) <<http://www.irinnews.org/Report.aspx?ReportId=76598>> at 11 April 2008; 'Burundi-Kenya: "We are

It is partly on account of such regional dimensions of conflict that Africa remains the continent most affected by conflict-induced displacement. Twenty-one countries across the continent account for approximately 11.8 million internally displaced persons, almost half the global figure.<sup>12</sup> In the Americas, while only four countries are home to internally displaced persons, it is the second-most affected continent as a result of the very significant displaced population living in Colombia. With 3.8 million internally displaced persons, Colombia has the second-largest internally displaced population after Sudan.<sup>13</sup> Finally, Asia, Europe and the Middle East are each home to approximately three million internally displaced persons.<sup>14</sup>

In addition to the approximately 25 million persons internally displaced as a result of conflict, several million more are displaced each year as a result of natural disasters and development projects. The tsunami of December 2004, for example, stands as one of the most catastrophic natural disasters of our time, killing more than 300 000 people, injuring a further 500 000 and displacing more than one million.<sup>15</sup> The Pakistan earthquake of October 2005 left approximately three million people homeless.<sup>16</sup> In 2007, extensive flooding across Africa caused the displacement of hundreds of thousands of people, including in countries already affected by conflict-induced displacement, such as Uganda, where floods have displaced an estimated 500 000;<sup>17</sup> Chad, where heavy rains and flooding hampered the delivery of aid to

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all affected", Irinnews, (19 February 2008) <<http://www.irinnews.org/Report.aspx?ReportId=76828>> at 11 April 2008.

<sup>12</sup> Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2006* (2007) 11.

<sup>13</sup> Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2006* (2007) 6, 11.

<sup>14</sup> Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2006* (2007) 11.

<sup>15</sup> Walter Kälin, 'Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons – 27 February to 5 March 2005', Office of the High Commissioner for Human Rights, (2005) 7.

<sup>16</sup> 'Pakistan: with quake aid aimed at long term, UN experts warn of immediate needs', UN News Service, (21 November 2005) <<http://www.un.org/apps/news/story.asp?NewsID=16635&Cr=pakistan&Cr1=quake>> at 11 April 2008.

<sup>17</sup> Barbara Among, 'Museveni declares state of emergency over floods', New Vision (Kampala), 19 September 2007 <<http://allafrica.com/stories/200709191126.html>> at 11 April 2008.



internally displaced persons;<sup>18</sup> and Somalia where floods struck an area already home to 325 000 persons displaced by conflict.<sup>19</sup>

In many instances of natural disaster, displacement is unpreventable and often unforeseeable. In contrast, displacement as a result of development and related projects is often foreseeable and planned. Currently, development-induced displacement is the single-largest cause of internal displacement, affecting approximately 15 million people annually.<sup>20</sup> While the nature of development activities that lead to displacement may take various forms, including the creation of national parks,<sup>21</sup> the most significant cause of displacement is large-scale development projects. The Three Gorges Dam Project in China, for example, is one of the most notorious development projects leading to the displacement of at least 1.2 million people,<sup>22</sup> with a further three or four million expected to be displaced in the near future.<sup>23</sup> While the Three Gorges Dam Project is particularly notorious, other small scale development projects, urban renewal, re-zoning and large-scale construction projects also lead to displacement on a regular basis.<sup>24</sup> Operation Murambatsvina, a 'clean up' operation ordered by Zimbabwean President Mugabe, for example, led to the destruction of approximately 100 000 homes and the displacement of over 560 000 people.<sup>25</sup>

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<sup>18</sup> 'Chad: Flooding Hampers Aid Efforts', UN News Service, (20 September 2007) <<http://www.un.org/apps/news/story.asp?NewsID=23876&Cr=chad&Cr1=refugees>> at 11 April 2008.

<sup>19</sup> 'Africa: Flooding Affecting Millions', Africa News (22 August 2007) <<http://allafrica.com/stories/200708220836.html>> at 11 April 2008.

<sup>20</sup> Michael M Cernea, 'Development-induced and conflict-induced IDPs: bridging the research divide' (December 2006) *Forced Migration Review* 26, 26.

<sup>21</sup> Michael M Cernea and Kai Schmidt-Soltan, 'National Parks and Poverty Risks: Is Population Resettlement the Solution?' (Paper presented at the World Parks Congress, Durban, South Africa, 8-17 September 2003).

<sup>22</sup> Edward Cody, 'China's Symbol and Source of Power: Three Gorges Dam Nears Completion at High Human Cost', *Washington Post* (Washington D.C.) 18 May 2006.

<sup>23</sup> Howard W French, 'Dam project to displace millions more in China', *International Herald Tribune*, 11 October 2007.

<sup>24</sup> See, eg, 'Iraq: Authorities destroy Kerbala farms, displacing peasants', Irinnews, (13 January 2008) <<http://www.irinnews.org/report.aspx?ReportID=76208>> at 11 April 2008; 'Namibia: Dam will mean our destruction, warn Himba', Irinnews, (18 January 2008) <<http://www.irinnews.org/report.aspx?ReportID=76311>> at 11 April 2008; Maureen Fan, 'In Beijing, 15,000 Relocated to Make Room for Olympics', *Washington Post* (Washington D.C.) 19 February 2008.

<sup>25</sup> Anna Kajumulo Tibaijuka, 'Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe' (18 July 2005) 32.

Finally, displacement as a result of climate change is a concern creeping onto the international agenda,<sup>26</sup> amid dire predictions that a further one billion people will be displaced between now and 2050 largely as a result of climate change and the conflicts such movements of people will fuel.<sup>27</sup>

## II. INTERNAL DISPLACEMENT ON THE INTERNATIONAL AGENDA

Until the late 1980s, early 1990s, refugees were the only forcibly displaced persons of specific concern to the international community. The Convention on the Status of Refugees of 1951 defined a 'refugee' and regulated the system of asylum<sup>28</sup> and UNHCR was mandated to provide international protection to refugees so defined.<sup>29</sup> UNHCR's mandate only allowed for it to address the needs of internally displaced persons at the specific request of the Secretary-General or another UN authority and with the agreement of the country in question.

The first formal incidence of involvement by UNHCR with internally displaced persons occurred in 1972, when the Office provided the internally displaced in southern Sudan with assistance as part of its programme of assistance to returning refugees. By the end of the 1980s, UNHCR had undertaken assistance programmes for internally displaced persons in Guinea-Bissau (1974), Indochina (1975), Cyprus (1974), Ethiopia (1979), Uganda (1979), Chad (1981), Lebanon (1982), Nicaragua (1987), and Sri Lanka (1988).<sup>30</sup>

The consensus among academics in the field of forced migration is that with the end of the Cold War in the late 1980s the catalyst was provided for putting internal displacement on the international agenda.<sup>31</sup> The reason for this is threefold: first, as

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<sup>26</sup> Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, 58th sess, (1 October 2007).

<sup>27</sup> Christian Aid, 'Human tide: the real migration crisis' (May 2007) 2.

<sup>28</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 198 UNTS 137, art 1A(2) (entered into force 22 April 1954).

<sup>29</sup> *Statute of the Office of the United Nations High Commissioner*, GA Res 428(v), UN GAOR, 5th sess, 325th plen mtg, UN Doc A/RES/5/428(v) (1950).

<sup>30</sup> UNHCR, 'UNHCR's Operational Experience With Internally Displaced Persons' (1994).

<sup>31</sup> See, eg, Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) 3; Guy S Goodwin-Gill, 'International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform' (Paper presented at the Refugee Protection in International Law: Contemporary Challenges Workshop, Oxford, 24 April 2006) 4; Thomas G Weiss and David A Korn, *Internal Displacement: Conceptualization and its Consequences* (2006) 12; Luke T

the competition between superpowers subsided, possibilities emerged for crossing borders and reaching people in need;<sup>32</sup> secondly, as the political capital to be gained by accepting refugees of the opposite bloc lost relevance, so the containment of refugee flows became a new dynamic;<sup>33</sup> and finally, changing notions of sovereignty and developing concepts of a 'common public order' led to increased scrutiny of the internal matters of the state.<sup>34</sup> This confluence of independent but related factors, each called attention to the plight of the internally displaced and the need to address their concerns in a direct and comprehensive manner.

As attention turned to internal displacement, questions started to be raised about the most effective way of addressing the needs of the displaced. Following its first foray into the field of internal displacement in 1972, UNHCR increasingly assumed limited operational responsibility for the assistance and protection needs of certain groups of internally displaced persons, particularly in the context of a) promoting and implementing durable solutions for refugee populations, and b) undertaking 'special operations', on the basis of its humanitarian expertise and at the request of the UN Secretary-General or the General Assembly.<sup>35</sup> Until recently, however, UNHCR did not have a general mandate to provide protection and assistance to internally displaced persons.<sup>36</sup> To the extent that the Office undertook assistance programmes, these were exceptional, developed on a case-by-case basis.<sup>37</sup>

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Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis' (1996) 9(1) *Journal of Refugee Studies* 27, 33; Pasquale Lupoli, 'Why Focus on Displacement' (June 2006) *Migration* 3.

<sup>32</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 461.

<sup>33</sup> Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) 3; Thomas G Weiss, 'Whither International Efforts for Internally Displaced Persons?' (1999) 36(3) *Journal of Peace Research* 363, 364.

<sup>34</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 461; Guy S Goodwin-Gill, 'International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform' (Paper presented at the Refugee Protection in International Law: Contemporary Challenges Workshop, Oxford, 24 April 2006) 4.

<sup>35</sup> UNHCR, 'UNHCR's Operational Experience With Internally Displaced Persons' (1994) 2.

<sup>36</sup> According to the 'cluster approach' endorsed by the Inter-Agency Standing Committee in December 2005, UNHCR is responsible for leading the protection cluster in situations of conflict-induced displacement. For a general discussion of this new approach see: Tim Morris, 'UNHCR, IDPs and clusters' (May 2006) 25, *Forced Migration Review*, 54.

<sup>37</sup> Leonardo Franco, 'UNHCR's Operational Experience With Internally Displaced Persons' (1994), Foreword.

Another element adding to the growing awareness of internal displacement was the extensive media coverage in 1991 of the intervention on behalf of Kurds in Iraq.<sup>38</sup> The broad public visibility given to the plight of the internally displaced Kurds was echoed in other humanitarian crises of unprecedented scope that persisted during the first half of the 1990s and involved significant numbers of internally displaced persons, such as in the Sudan, the Great Lakes region of Africa and the former Yugoslavia.<sup>39</sup>

These factors, while they caused stir within the humanitarian community, required the motivation of a small but active group of non-governmental and policy actors in order to bring the plight of the internally displaced to the attention of the human rights community. Mobilised by the practical challenges involved in gaining access to large numbers of internally displaced persons, the Friends World Committee for Consultation, and the World Council of Churches, both based in Geneva, and the Refugee Policy Group based in Washington DC, saw an urgent need to raise the issue at the international level.<sup>40</sup> Others soon followed, including Caritas Internationalis and the International Council of Voluntary Agencies.<sup>41</sup> From early 1990, this network began their advocacy and mobilisation, meeting with diplomats and representatives of intergovernmental and non-governmental organisations (NGOs) to discuss internal displacement and the best way to place the issue on the international agenda.<sup>42</sup> Finally, together with the support of the Austrian delegate to the Commission on Human Rights, they successfully lobbied for resolution 1991/25 which called for the Secretary-General to "prepare an analytical report on internally displaced persons."<sup>43</sup> Thus, this global public policy network, as it has been branded,<sup>44</sup> became the driving

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<sup>38</sup> Catherine Phuong, 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18(2) *Netherlands Quarterly of Human Rights* 215, 217.

<sup>39</sup> Catherine Phuong, 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18(2) *Netherlands Quarterly of Human Rights* 215, 217 - 218.

<sup>40</sup> Thomas G Weiss and David A Korn, *Internal Displacement: Conceptualization and its Consequences* (2006) 20.

<sup>41</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999) 7; Thomas G Weiss and David A Korn, *Internal Displacement: Conceptualization and its Consequences* (2006) 21.

<sup>42</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999) 7.

<sup>43</sup> *Internally displaced persons*, CHR Res 91, UN Comm'n on Hum. Rts., 47th sess, UN Doc E/CN.4/1991/91 (1991)..

<sup>44</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999).

force behind the consideration by the UN of internal displacement and ultimately the development of the Guiding Principles.

### III. IMPETUS FOR THE DEVELOPMENT OF THE GUIDING PRINCIPLES

In 1992, Secretary-General Boutros Boutros-Ghali submitted his analytical report on internally displaced persons to the Commission on Human Rights pursuant to resolution 1991/25.<sup>45</sup> In that report, the Secretary-General noted that there was no clear statement of the human rights of internally displaced persons or those at risk of being displaced. Reflecting on the enormity of the crisis of internal displacement, he stated that this "crisis of major proportions has motivated calls for clear guidelines concerning the human rights of the affected population, guidelines which could be applied to all internally displaced persons."<sup>46</sup> Boutros-Ghali also noted the submission made by the Friends World Committee for Consultation for the creation of a working group or the appointment of a rapporteur on internally displaced persons.<sup>47</sup>

Following intensive lobbying, in March 1992 the Commission approved a resolution requesting the Secretary-General to appoint a representative on internally displaced persons<sup>48</sup> and in July 1992, Sudanese diplomat Francis M. Deng was appointed to the position. The mandate of the Representative required him to conduct "an examination of existing international human rights, humanitarian and refugee law and standards and their applicability to the protection of and relief assistance to internally displaced persons" and to submit to the Commission a comprehensive study "identifying existing laws and mechanisms for the protection of the internally displaced, possible additional measures to strengthen implementation of these laws and mechanisms and alternatives for addressing protection needs not adequately covered by existing

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<sup>45</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, UN Doc E/CN.4/1992/23 (1992).

<sup>46</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [103] UN Doc E/CN.4/1992/23 (1992).

<sup>47</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [108] UN Doc E/CN.4/1992/23 (1992).

<sup>48</sup> *Internally Displaced Persons*, CHR Res 73, UN Comm'n on Hum. Rts., 48<sup>th</sup> sess, [1] UN Doc E/CN.4/RES/1992/22 (1992).

instruments."<sup>49</sup> In the fulfilment of this task, the Representative was guided by one underlying conviction: that internally displaced persons *per se* were a distinct category of concern meriting particular attention.

#### *A. Internally Displaced Persons as a Category of Concern*

Since emerging on the international agenda, significantly divergent views have been expressed within academic and humanitarian circles about whether the internally displaced should be considered a category of specific concern. Some argue that the needs of the internally displaced should be addressed within the broader rubric of those affected by war,<sup>50</sup> that to single out this one group would lead to discrimination against others, including those who have been unable to flee and host communities which, it is suggested, often suffer a fate similar to that of the displaced.<sup>51</sup> This view is vehemently defended by the International Committee of the Red Cross (ICRC), among others. As Aeschlimann has argued:

The ICRC is bound by its mandate to ... act in favour of all the victims of armed conflict and violence, and cannot therefore *a priori* delegate or forgo some or all of its activities in favour of IDPs [internally displaced persons]. Being essentially a situation-driven organisation, the ICRC deploys its resources based on its judgment of a given situation and after a thorough evaluation of the resulting humanitarian consequences. We are careful not to create positive discrimination or to advantage certain categories of beneficiaries in a manner detrimental to other victims.<sup>52</sup>

Concerned as much about the practical ramifications as the conceptual assumptions that arise when giving focus to internal displacement, some refugee advocates have argued strongly against recognising internally displaced persons as a distinct category of concern. Mikhael Barutciski, for example, has questioned the underlying motives

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<sup>49</sup> *Internally Displaced Persons*, CHR Res 1992/73, UN Comm'n on Hum. Rts., 48<sup>th</sup> sess, [1] UN Doc E/CN.4/RES/1992/22 (1992).

<sup>50</sup> Françoise Bouchet-Saulniew, 'Using the Law of War to Protect the Displaced', *MSF Activity Report 2000-2001*, Médecins sans Frontières (2001).

<sup>51</sup> See, eg, the remarks of James Hathaway in American Society of Public International Law, *Proceedings of the 90<sup>th</sup> Annual Meeting of the American Society of Public International Law* (1996) 562; Marguerite Contat Hickel, 'Protection of internally displaced persons affected by armed conflict: concept and challenges' (2001) 83(843) *International Review of the Red Cross* 699, 707.

<sup>52</sup> Alain Aeschlimann, 'Protection of IDPs an ICRC View' (October 2005), Supplement, *Forced Migration Review* 25.

and the overall success of UNHCR in addressing internal displacement.<sup>53</sup> Basing his analysis primarily on UNHCR's significant in-country protection activities in Bosnia-Herzegovina during the early 1990s, Barutciski suggests a self-interest on the part of UNHCR in the face of increased state resistance to accepting refugees. As resistance to refugee flows increased, and the number of refugees decreased, Barutciski accuses UNHCR of shifting to in-country protection to "justify its continued existence."<sup>54</sup> Barutciski fears that this 'subversion' of UNHCR's mandate has negative implications for the refugee protection regime, essentially legitimising policies of containment.<sup>55</sup> Guy Goodwin-Gill similarly argues against UNHCR's expanded mandate for internally displaced persons on the basis *inter alia* of a conflict of interest.<sup>56</sup>

Like Barutciski, James Hathaway decries the apparent "refocus" and "redirection" of attention from refugees to internally displaced persons which, he says, has "displaced the refugee agenda as a matter of international concern."<sup>57</sup> And for what? According to Hathaway, "[t]he fact that neither new laws nor new institutions have evolved despite the massive investment in reorienting attention away from refugees ... should give us pause."<sup>58</sup>

Beyond a concern that the 'discovery' of internal displacement has led the international community to turn their backs on refugees, Hathaway questions the need to focus on internally displaced persons as distinct from other populations threatened by and victims of human rights violations. Just as the ICRC argues from an operational standpoint, so Hathaway asserts that "[u]nless it were shown – rather than simply asserted – that IDPs around the world face an across-the-board greater risk of exposure to the gravest forms of human rights abuse relative to non-displaced victims,

<sup>53</sup> See, eg, Michael Barutciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina' (1996) 8 *International Journal of Refugee Law* 49; Michael Barutciski, 'A Critical View on UNHCR's Mandate Dilemmas' (2002) 14(2/3) *International Journal of Refugee Law* 365.

<sup>54</sup> Michael Barutciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina' (1996) 8 *International Journal of Refugee Law* 49, 101, 109.

<sup>55</sup> Michael Barutciski, 'Tensions between the refugee concept and the IDP debate' (December 1998) 3 *Forced Migration Review* 11, 14.

<sup>56</sup> Guy S Goodwin-Gill, 'International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform' (Paper presented at the Refugee Studies Centre Workshop, 'Refugee Protection in International Law: Contemporary Challenges', Oxford, 24 April 2006) 7.

<sup>57</sup> James C Hathaway, 'Could We Agree Just to 'Date'?' (2007) *Journal of Refugee Studies* 349, 357.

<sup>58</sup> James C Hathaway, 'Could We Agree Just to 'Date'?' (2007) *Journal of Refugee Studies* 349, 359.

there is no good case for normative, institutional, or other privileging of their predicament."<sup>59</sup> To this community of scholars, what makes refugees distinct and therefore worthy of specific attention in accordance with the Refugee Convention, is the fact that they are outside their country of citizenship. As Barutciski states:

The whole Convention is based on the notion of having fled one's country. That is the condition or situation that is being addressed: not displacement or human rights violations *per se*, but rather the fact of being stranded outside one's country without the formal protection that comes from being the national of a particular state. Given that people in this situation do not benefit from the rights that normally follow from citizenship in the host state, they have to be provided with some sort of international protection.<sup>60</sup>

The lack of "specificity of the IDP predicament" suggested by Hathaway, and the need to cross an international border in order to benefit from international protection, remain two points of academic argument to which the proponents of the Guiding Principles have sought to respond on several occasions. In particular, the Representative of the Secretary-General, Francis Deng, and his successor, Walter Kälin; Roberta Cohen, formerly of the Refugee Policy Group and Brookings Institution Project on Internal Displacement; and their staff, have individually and collectively produced a significant volume of literature explaining, and defending, the validity of paying particular attention to the internally displaced.<sup>61</sup> The central tenet of their argument is that the internally displaced do have particular needs and face specific vulnerabilities arising from the fact of their displacement. Furthermore, as Cohen points out, while it may not currently be possible to categorically *prove* "across-the-board" greater risk, as demanded by Hathaway,<sup>62</sup> neither is this possible in the case of refugees, yet they too are clearly deserving of specific attention.<sup>63</sup>

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<sup>59</sup> James C Hathaway, 'Could We Agree Just to 'Date'?' (2007) *Journal of Refugee Studies* 349, 362.

<sup>60</sup> Michael Barutciski, 'Tensions between the refugee concept and the IDP debate' (December 1998) 3 *Forced Migration Review* 11, 12.

<sup>61</sup> See, eg, Francis M Deng, 'Protecting the Dispossessed: A Challenge for the International Community', (1993); Walter Kälin, *Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons*, Comm'n on Hum. Rts., 62<sup>nd</sup> sess, UN Doc E/CN.4/2006/71 (2006); Roberta Cohen, 'Response to Hathaway' (2007) *Journal of Refugee Studies* 370; Erin Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005) 24(3) *Refugee Survey Quarterly* 9; Simon Bagshaw, 'Responding to the Challenge of Internal Forced Migration: The Guiding Principles on Internal Displacement' in Ryszard Cholewinski, Richard Perruchoud and Evan MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (2007) 189; Maria Stavropolou, 'Displacement and Human Rights: Reflections on UN Practice' (1998) 20(3) *Human Rights Quarterly* 515.

<sup>62</sup> James C Hathaway, 'Could We Agree Just to 'Date'?' (2007) *Journal of Refugee Studies* 349, 362.

<sup>63</sup> Roberta Cohen, 'Response to Hathaway' (2007) *Journal of Refugee Studies* 370, 374 – 375.



Barriers faced by internally displaced children in receiving an education provide a useful illustration of the challenges faced by the internally displaced generally in exercising their rights.<sup>64</sup> In 2004, of the approximately 43 million children lacking access to education in conflict-induced humanitarian emergencies, overwhelming numbers were internally displaced.<sup>65</sup> The barriers faced by these children include: legal and administrative requirements, including residency restrictions in cases where school enrolment is dependant on proof of residence in the local district;<sup>66</sup> the need for personal documentation which may have been destroyed or lost during flight but which is required to prove age, attendance at a prior educational institution, and grades achieved; language differences particularly affecting ethnic and indigenous minorities displaced to areas in which they do not speak the local language of instruction;<sup>67</sup> discrimination on account of being displaced, or as a result of being part of an ethnic minority;<sup>68</sup> and mental and physical injuries that may result from displacement and that may impact upon a child's ability to learn.<sup>69</sup>

A study conducted for the United Kingdom Department for International Development in 2005 summarises the particular consequences suffered by internally displaced persons as follows: "massive loss not only of commodities such as the home, income, land or other forms of property, but also of less tangible symbolic goods, such as cultural heritage, friendship and a sense of belonging to a particular place." Its "pernicious effects on individuals, families and communities" are wide-ranging and include "impoverishment, social isolation, exclusion from health, welfare

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<sup>64</sup> This section is drawn from Erin Mooney and Jessica Wyndham, 'The Right to Education in Situations of Internal Displacement' (2008) *American Society for International Law* (forthcoming).

<sup>65</sup> Save the Children, *Rewrite the Future: Education for Children in Conflict-Affected Countries* (2004) 1; Women's Commission for Refugee Women and Children, *Global Survey on Education in Emergencies* (2004).

<sup>66</sup> See, eg, Order of the Moscow Committee on Education No. 567, 9 September 1999, Sub-item 1.1 cited in Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, *The Propiska System Applied to Migrants, Asylum Seekers and Refugees in Council of Europe Member States: Effects and Remedies*, Doc. 9262 (12 October 2001) [91].

<sup>67</sup> See, eg, Kofi Annan, *Report of the Secretary-General concerning the situation in Abkhazia, Georgia*, [17] UN Doc S/2000/697 (2000).

<sup>68</sup> See, eg, 'Conflict has had terrible impact on already failing education system (2001-2005)', Internal Displacement Monitoring Centre <[http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/460991DF3E39244C802570B8005A7377?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/460991DF3E39244C802570B8005A7377?OpenDocument)> at 13 April 2008.

<sup>69</sup> See, eg, Francis M Deng, *Report of the Representative of the Secretary-General on Internally Displaced Persons. Profiles in Displacement: Colombia*, [91] UN Doc E/CN.4/2000/83/Add.1.

and education provision, the breakdown of social relationships and support structures, and the undermining of authority structures and social roles."<sup>70</sup>

*B. Inadequacy of the existing legal protection framework*

In view of the particular challenges faced by the internally displaced in the exercise of their rights, and in accordance with his mandate, the Representative turned to the question of whether existing international law provided adequate protection for the internally displaced. The Representative looked to the refugee protection framework, international human rights and humanitarian law to determine the adequacy, or not, of legal protection for internally displaced persons.

The Refugee Convention defines a refugee as a person who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>71</sup>

The Refugee Convention therefore applies to those who have crossed an international border. This essential feature of the Convention definition reflects, as pointed out by Barutciski, the fact that refugees are no longer subject to the jurisdiction or protection of their own country and are seeking protection from another. Internally displaced persons, in contrast, remain within their country of origin and therefore remain subject to national laws and, in theory at least, subject to the protection of the state.

Notwithstanding this practical and legally fundamental difference between refugees and internally displaced persons, suggestions were made at the time the Representative was conducting his investigations that using border-crossing as the most important criterion for distinguishing between refugees and internally displaced persons, hence determining their eligibility to international protection, could be

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<sup>70</sup> Stephen Castles and Nicholas Van Hear, *Development DFID's Policy Approach to Refugees and Internally Displaced Persons, Volume 1: Consultancy Report and Policy Recommendations*, (2005) 29 cited in Erin Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005) 24(3) *Refugee Survey Quarterly* 9, 15.

<sup>71</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 198 UNTS 137, art 1A(2) (entered into force 22 April 1954).

faulted on historical, practical, juridical and human rights grounds and that, therefore, a legal synthesis should be created, incorporating internally displaced persons into the definition of a 'refugee' by removing the requirement of border crossing.<sup>72</sup> This proposal, one of several based on a reassessment of the Refugee Convention,<sup>73</sup> was decried by refugee advocates.<sup>74</sup> Barutciski, for example, points to the primary duty of states to protect those people within their borders, arguing that to provide the same international protection to internally displaced persons as to refugees would constitute a violation of national sovereignty.<sup>75</sup>

Another reason for not attempting to bring the internally displaced into the refugee protection regime, as pointed out by Kälin as well as Hathaway, is that many of the norms and guidelines relating to the status of refugees guarantee refugees equal treatment only as *aliens* in the country of refuge.<sup>76</sup> Consequently, an analogous application of these provisions to internally displaced persons would deprive them of the rights that they have as citizens of their own country and, thus, would be detrimental to their interests.<sup>77</sup>

Concluding that it was inappropriate, if not conceptually impossible, to subsume the internally displaced under the 'refugee' umbrella, the question remained whether the rights due to internally displaced persons as citizens of their own country constituted an adequate protection framework. The first step in this inquiry was to consider the human rights and humanitarian law that does apply to the internally displaced.

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<sup>72</sup> See, eg, Luke T Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis' (1996) 9(1) *Journal of Refugee Studies* 30.

<sup>73</sup> See, eg, Ved P Nanda, 'International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced People', (1991-1992) 28 *Willamette Law Review* 798. See also, Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985-1986) 26 *Virginia Journal of International Law* 857-8.

<sup>74</sup> Zachary A Lomo, 'The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work' (2000) 18 *Berkeley Journal of International Law* 284.

<sup>75</sup> Michael Barutciski, 'Tensions between the refugee concept and the IDP debate' (December 1998) 3 *Forced Migration Review* 11, 14.

<sup>76</sup> James C Hathaway, 'Could We Agree Just to "Date"?', (2007) *Journal of Refugee Studies* 349, 358.

<sup>77</sup> Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000) 4.

International humanitarian law, as set out in the four Geneva Conventions of 1949<sup>78</sup> and their two Additional Protocols of 1977<sup>79</sup>, regulates the conduct of hostilities in, and seeks to protect the victims of, armed conflicts. Like human rights law, humanitarian law does not refer specifically to internally displaced persons. Yet, international humanitarian law does establish clear rules for the prevention of displacement and, should displacement occur, for the protection of civilians during displacement.

International humanitarian law of particular relevance to internal displacement includes the following prohibitions:<sup>80</sup> making civilians the target of attacks;<sup>81</sup> conducting hostilities in an indiscriminate manner;<sup>82</sup> acts or threats of violence the primary purpose of which is to spread terror among the civilian population;<sup>83</sup> making civilian property the object of attack;<sup>84</sup> starvation of the civilian population as a method of warfare and the destruction of objects indispensable to its survival;<sup>85</sup> reprisals against the civilian population and its property;<sup>86</sup> and collective punishments which, in practice, have often taken the form of destruction of homes, leading to displacement.<sup>87</sup>

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<sup>78</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1951); *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1951); *Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1951); *Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1951).

<sup>79</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1979) ('Additional Protocol I'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('Additional Protocol II').

<sup>80</sup> For a comprehensive review of the provisions of international humanitarian law of relevance to internal displacement, see: Emanuela Chiara Gillard, 'The Role of International Humanitarian Law in the Protection of Internally Displaced Persons' (2005) 24(3) *Refugee Survey Quarterly* 37-48.

<sup>81</sup> Additional Protocol I, Article 51(2).

<sup>82</sup> Additional Protocol I, Article 51(4).

<sup>83</sup> Additional Protocol I, Article 57.

<sup>84</sup> Additional Protocol I, Article 52.

<sup>85</sup> Additional Protocol I, Article 54.

<sup>86</sup> Additional Protocol I, Article 51(6) and 52.

<sup>87</sup> Additional Protocol I, Article 75(2)(d).

These prohibitions only apply during times of international armed conflict and non-international armed conflict, as defined.<sup>88</sup> They do not apply during times of natural disaster, for example. Furthermore, except to the extent that certain principles of international humanitarian law are now considered customary in nature,<sup>89</sup> the rules set out above only apply to those states that have ratified the relevant convention. The fact that Additional Protocol II relating to non-international armed conflict has not been universally ratified has been identified by one commentator as cause for particular concern when seeking to protect the rights of internally displaced persons under humanitarian law.<sup>90</sup> Indeed, at the time of writing, while only four more states had ratified Additional Protocol I as compared to Protocol II, the list of non-ratifying states included several experiencing on-going conflict and displacement, namely Iraq, Nepal, Myanmar, Somalia, and Sri Lanka.<sup>91</sup>

Unlike international humanitarian law, international human rights law does not make any specific reference to the internally displaced. Nonetheless, international human rights law applies to the internally displaced just as it applies to all persons within the jurisdiction of their home country. Yet, as a detailed legal analysis overseen by the Representative bore out, international human rights law, together with international humanitarian law, do not sufficiently protect the rights of internally displaced persons in the specific circumstances in which they find themselves.

In 1995, the Representative submitted to the Commission on Human Rights a compilation and analysis of legal norms in which he identified areas of insufficient protection where a general norm existed, but a corollary, more specific right relevant to the protection of particular needs of the internally displaced had not been articulated.<sup>92</sup> For example, although there was a general norm addressing essential medical care, the special needs of internally displaced women in the areas of

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<sup>88</sup> See Additional Protocol II, Article 1.

<sup>89</sup> For a comprehensive review of customary international humanitarian law, see: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005).

<sup>90</sup> Rainer Hofmann, 'International Humanitarian Law and the Law of Refugees and Internally Displaced Persons', in *Law in humanitarian crises: Volume I - How can international humanitarian law be made effective in armed conflicts?* (1995) 285.

<sup>91</sup> 'Tables showing the States party to selected treaties', <<http://www.icrc.org/ihl>> at 1 December 2007.

<sup>92</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1996/52/Add.2 (1995).

reproductive and psychological health care needed to be elucidated.<sup>93</sup> Similarly, regarding forced recruitment, while guidelines existed regarding refugee children, similar provisions concerning forcible recruitment of internally displaced children did not exist. In all, 17 areas of insufficient protection were identified.<sup>94</sup>

Despite the identification of these gaps, some argued at the time that it would be more valuable to ensure *existing* standards be respected than to create new standards,<sup>95</sup> and others warned that the development of new standards would narrow the scope of existing laws and would have a retrogressive rather than a progressive effect.<sup>96</sup> The Representative, however, did not aim to create new standards so much as to clarify the application of existing law, fill any gaps in that law and thereby ensure that internally displaced persons were subject to a comprehensive protection regime. On that basis, the Guiding Principles on Internal Displacement were developed.

Whether the Guiding Principles have met, in whole or in part, their goal of affecting the implementation of human rights and humanitarian protections for internally displaced persons remains to be determined. Certainly, existing literature on the Guiding Principles suggests that the process is underway for the Principles to become new 'standards', even perhaps to some day acquire the status of customary international law.<sup>97</sup> Literature specifically addressing the Guiding Principles, however, is not abundant and generally emanates from the same small cohort of scholars and practitioners associated with the Representative of the Secretary-General and the Brookings Institution Project on Internal Displacement. The conclusions of these authors, therefore, must be approached with some circumspection given their 'ownership' of the Principles.

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<sup>93</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, [415(h)] UN Doc E/CN.4/1996/52/Add.2 (1995).

<sup>94</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, [415] UN Doc E/CN.4/1996/52/Add.2 (1995).

<sup>95</sup> David Petrasek, 'New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach' (1995) 14(1/2) *Refugee Survey Quarterly* 286.

<sup>96</sup> 'Summary record of the 38th meeting', UN GAOR, 3rd Comm, [52] UN Doc A/C.3/50/SR.38 (1995).

<sup>97</sup> See, eg, Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459; Makau Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 547; Patrick L Schmidt, 'The Process and Prospects for the UN Guiding Principles on Internal Displacement to become Customary International Law: A Preliminary Assessment' (Spring 2004) 35(3) *Georgetown Journal of International Law* 483.

The focus of their work is directed towards four main areas: the legal underpinnings and justifications for the Guiding Principles; identification of practical uses for the Guiding Principles, not only as a legal standard, but also an operational tool; a comparative analysis of the Guiding Principles and domestic law; and a preliminary view of the legal impact of the Guiding Principles.

Analysing the legal basis and implications of the Guiding Principles has largely been the work of Walter Kälin, the principal drafter of the Principles and successor to Deng as Representative. He has made a valuable contribution to the legal debate about the Guiding Principles by identifying in exhaustive detail the legal antecedents of each Principle in *Guiding Principles on Internal Displacement: Annotations*.<sup>98</sup> Referring to binding international and regional standards as well as soft law instruments, this scholarly research is particularly valuable in identifying the legal justifications for each of the 17 gaps that were filled by the Principles. Based on this analysis, Kälin, a law professor from Berne, Switzerland, has since ventured to consider the exact legal standing of the Principles, concluding that the Guiding Principles constitute 'soft-law.' "Their soft law character," he explains "stems not from the process of elaboration but from their content which is solidly grounded in existing international law. It is possible to cite a multitude of legal provisions for almost every principle."<sup>99</sup>

This conclusion is supported by the comprehensive review of customary international humanitarian law conducted under the auspices of the ICRC in 2005,<sup>100</sup> and also by a scholar from Georgetown University, who directly considered the extent to which the Principles constituted customary international law.<sup>101</sup>

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<sup>98</sup> Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000); Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Revised edition) (Studies in Transnational Legal Policy No. 38, American Society of International Law, 2008).

<sup>99</sup> Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool' (2005) 24(3) *Refugee Survey Quarterly* 27, 29. See, also, Walter Kälin, 'How Hard is Soft Law?', cited in Walter Kälin, Francis Deng and Roberta Cohen, *Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement* (April 2002) 1.

<sup>100</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005).

<sup>101</sup> Patrick L Schmidt, 'The Process and Prospects for the UN Guiding Principles on Internal Displacement to become Customary International Law: A Preliminary Assessment' (Spring 2004) 35(3) *Georgetown Journal of International Law* 483.

Complementing Kälin's focus on the legal aspects of the Guiding Principles, Roberta Cohen has adopted a policy angle in promoting the Principles as a tool for use by NGOs and as a means to encourage states to meet their national responsibility towards the internally displaced.<sup>102</sup> While Kälin has emphasised the legal antecedents to the Principles as the basis for their legitimacy, Cohen has mapped the rhetorical support expressed by international and regional organisations. Reflecting on this support, Cohen has argued that the Principles represent “an innovation in international standard setting”,<sup>103</sup> an argument supported by Makau Mutua who, when identifying the legal and political processes necessary to set international standards, has used the Guiding Principles as a case study, concluding that “it is clear, even to the sceptics, that the Guiding Principles have been a success.”<sup>104</sup>

Beyond this small circle of scholars and policy analysts, a cohort of refugee scholars constitute a counter movement, less engaged in the question of whether the Guiding Principles have set standards, as in raising concerns about the increased focus and attention paid to internally displaced persons in general. Hathaway, in particular, directly engages with and opposes the arguments made by Cohen and Kälin for focussing on the internally displaced.<sup>105</sup> Hathaway’s position resonates with those of other refugee scholars who similarly express caution, as well as scepticism, about the promotion of greater scholarly and institutional attention focussing on internal displacement.<sup>106</sup> Indeed, the main spark igniting the concern and engagement of refugee scholars is the question of institutional mandates and capacities, specifically the on-going debate about UNHCR’s role in the protection of internally displaced persons. A debate which, though integrally linked to the promotion of the internally

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<sup>102</sup> Roberta Cohen, ‘The Guiding Principles on Internal Displacement: A new instrument for international organisations and NGOs’ (August 1998) 2 *Forced Migration Review* 32.

<sup>103</sup> Roberta Cohen, ‘The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting’ (2004) 10 *Global Governance* 459.

<sup>104</sup> Makau Mutua, ‘Standard Setting in Human Rights: Critique and Prognosis’ (2007) 29 *Human Rights Quarterly* 547, 562.

<sup>105</sup> James C Hathaway, ‘Could We Agree Just to ‘Date’?’ (2007) *Journal of Refugee Studies* 349.

<sup>106</sup> See, eg, Mikhael Barutciski, ‘The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-94)’ (1996) 8 *International Journal of Refugee Law* 49; S Alex Cunliffe and Michael Pugh, ‘The Politicization of UNHCR in the Former Yugoslavia’ (1997) 10(2) *Journal of Refugee Studies* 134; Guy S Goodwin-Gill, ‘International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform’ (Paper presented at the Refugee Protection in International Law: Contemporary Challenges Workshop, Oxford, 24 April 2006).



displaced as a 'category of concern', is largely separate from activities aimed at clarifying the normative framework for the protection of the displaced.<sup>107</sup>

Finally, an increasing dialogue is developing in the field about the compliance of national policies and practices with the Guiding Principles. From Angola to the Caucasus, Colombia to Turkey, scholars and activists are framing their concerns and arguments in terms of the Guiding Principles.<sup>108</sup> While still a small movement, the literature being produced in the field does reveal the increased penetration and relevance of the Guiding Principles in national debates about the protection of internally displaced persons.

The question that remains unanswered, to any comprehensive degree, is the extent to which the Guiding Principles have contributed to the effective implementation of existing international law for the protection of internally displaced persons. This thesis considers this question from three angles. Chapter 1 addresses the 'standard-setting' character of the Guiding Principles, framing a consideration of the legal contributions of the Guiding Principles in terms of established and traditional forms of 'standard-setting.' The Chapter highlights the insistence of many states that internal displacement was a question of direct relevance to their sovereignty, yet the almost complete relegation of states to the sidelines in the drafting process leading to the completion and presentation of the Guiding Principles in 1998. Notwithstanding the limited direct role of states in developing the Guiding Principles, the Chapter reveals how the concerns of states did still impact the form and content of the Principles, first the decision not to adopt a binding instrument, and secondly, to base the Principles on existing law.

Although based on an existing corpus of human rights and humanitarian law, the Guiding Principles contribute legally and conceptually to existing legal protection mechanisms for internally displaced persons and, it may be found, to others suffering

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<sup>107</sup> See, eg, UNHCR, 'Policy Framework and Corporate Strategy: UNHCR's role in support of an enhanced inter-agency response to the protection of internally displaced persons', Informal Consultative Meeting (30 January 2007) 27.

<sup>108</sup> See, eg, Andrea Lari, 'Returning Home to a Normal Life? The Plight of Displaced Angolans', *Institute for Security Studies*, Paper 85 (February 2004); 'Proceso Nacional de Verificación de los Derechos de la Población Desplazada: Primer Informe a la Corte Constitucional', Comisión de Seguimiento a la Política Pública Sobre el Desplazamiento Forzado, Bogotá (31 January 2008).

massive human rights violations at the hands of their own state. As detailed in Chapter 1, the Guiding Principles not only clarify how general principles of law apply specifically to internal displacement, and fill in gaps and grey areas in existing law, they also make substantial conceptual contributions that bear on issues integral to the future role and responsibility of the international community, particularly with regard to states that fail to meet their sovereign obligations to their citizens. Finally, Chapter 1 considers the gaps remaining unanswered by the Principles but which have significant bearing on the protection of the internally displaced.

Chapter 2 addresses the extent to which international and regional organisations, humanitarian agencies and human rights mechanisms, have accepted and incorporated the Guiding Principles into their operations. The Guiding Principles, both a legal standard and operational guide, can serve a multiplicity of purposes: as an interpretative guide in applying human rights principles to the internally displaced; as a training manual; as a monitoring tool by which to measure state responses to internal displacement; as an operational tool upon which to base protection activities for the benefit of internally displaced persons; and as the basis for regional standards on internal displacement. Chapter 2 reveals how the Guiding Principles have been adopted and applied, and the extent to which some organisations and institutions are yet to fully incorporate the Guiding Principles into their operations.

Finally, Chapter 3 considers the domestic incorporation of the Guiding Principles, revealing the limited, if growing, trend toward incorporating the Principles into national law and policy. Highlighting some of the challenges associated with translating the sometimes abstract Guiding Principles into clear directives on the ground, this Chapter considers the experience of Colombia in incorporating the Guiding Principles into the legal protection mechanisms for internally displaced persons, the various ways in which the Guiding Principles have been used by the Constitutional Court, state authorities and NGOs, and the ongoing challenges for which the Guiding Principles provide only limited guidance.

In conclusion, this thesis will argue that the Guiding Principles have had a much broader impact on the protection of internally displaced persons than could have been expected when they were first developed. As an instrument created with minimal state involvement and inspiring dissent from a handful of vocal and persistent states,

the Guiding Principles did not follow a well-trodden path of 'standard-setting'. Yet, as a result of the persistence of a small group of proponents, comprised largely of the Representative of the Secretary-General, a small group of policy analysts and NGOs, the Principles enjoy widespread acceptance and increasing application. That said, the Guiding Principles are not a panacea. They are yet to fully realise their goals, due largely to the ambitious objectives set for them, and as a result of the many challenges that lie at the intersection of law and practice. Ten years after their presentation to the Commission on Human Rights, both the promise and the limitations of the Guiding Principles are still being discovered. The Guiding Principles are still in the process of being integrated into national, regional and international responses to internal displacement. Though their influence is significant and growing, only time will tell whether the Guiding Principles become a meaningful standard for the protection of internally displaced persons.

## 1: The Guiding Principles – A reconception of existing law

The Guiding Principles arose from a request of the UN Secretary-General<sup>1</sup> and the process of their development was formally overseen by the Commission on Human Rights. Yet, the development of the Guiding Principles did not follow a traditional process of standard-setting which is typically characterised by extensive state involvement and consultation. To the contrary, the drafting and consultative process undertaken to develop the Principles involved more input from non-governmental, regional and international organisations, than from states. As a consequence, the drafters enjoyed significant latitude in the form and content of the Principles.

This chapter explores the process by which the Guiding Principles were developed, institutionally, conceptually and legally. In doing so, it addresses how the Guiding Principles, though based in existing human rights and humanitarian law, reshaped the way existing legal protections were conceived and in some cases set new standards.

### I. THE PROCESS

The development of the Guiding Principles took half a decade and involved a cohort of international lawyers and experts, regional organisations, human rights and humanitarian agencies of the UN, other international organisations and NGOs. The intention was that all actors feel part of the process of developing the new normative framework on internal displacement, and therefore committed to promote it.<sup>2</sup> Key actors largely excluded from the substantive process of drafting the Guiding Principles were states. Due perhaps to the sensitive issue of sovereignty inherent in any discussion of internal displacement, and the legal finessing involved in finalising certain sections of the Guiding Principles in the absence of pre-existing clear legal provisions, states were only involved to the extent that each year in the General Assembly and Commission on Human Rights they were able to comment on the report of the Representative and negotiate a resolution addressing internal

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<sup>1</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [103] UN Doc E/CN.4/1992/23 (1992).

<sup>2</sup> Thomas Weiss, 'Internal exiles: what next for internally displaced persons?' (2003) 24(3) *Third World Quarterly* 433.

displacement. This relegation of states to the sidelines, though largely a tactical success, caused consternation among some states and threatened the ultimate acceptance and effectiveness of the Guiding Principles, but for the softly-softly approach taken in developing non-binding principles, and the significant efforts to engage states in dialogue undertaken by the Representative of the UN Secretary-General and interested organisations in the years following their completion.

#### *A. UN process*

When in 1991, the Secretary-General presented his report to the Commission calling for guidelines on the human rights of internally displaced persons<sup>3</sup> he was reflecting the position expressed to him by a cohort of NGOs. The Refugee Policy Group, for example, called for the establishment of a basic core of human rights and humanitarian norms to which internally displaced persons are entitled and from which government could not derogate. Human Rights Watch, focusing more specifically on humanitarian law, called for the development of specific minimum standards as to the conditions provided for internally displaced persons. Finally, the Friends World Committee for Consultation suggested the preparation of draft principles for the protection of internally displaced persons.<sup>4</sup>

Once in the domain of the General Assembly and the Commission on Human Rights, neither indicated a need or intention for the Representative to develop a legal framework. Rather, it was the Representative who championed "a legal instrument specifically addressing the problem of internal displacement."<sup>5</sup> As the Representative reported to the Commission:

Combining the argument that there are gaps in the existing law with the chronic problem of insufficient implementation would tend to favour the development of a legal instrument specifically addressing the problem of

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<sup>3</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [103] UN Doc E/CN.4/1992/23 (1992).

<sup>4</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [79 - 83] UN Doc E/CN.4/1992/23 (1992).

<sup>5</sup> Francis M Deng, *Comprehensive study prepared by Mr. Francis M Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons*, [282] UN Doc E/CN.4/1993/35 (1993).

internal displacement. Such an instrument could also serve as a means of focusing international attention on the crisis.<sup>6</sup>

The Representative presented this conclusion to the Commission in 1993. The Commission's subsequent resolution, however, did not directly engage with the question of whether the Representative should pursue the development of a legal instrument. Rather, it simply requested the Representative to "continue his work...with a view to identifying, where required, ways and means of improving protection for and assistance to internally displaced persons."<sup>7</sup> Over the ensuing three years, the Representative engaged a team of legal and other experts to assist him in the task of reviewing existing law for the protection of internally displaced persons and identifying gaps in their legal protection, each year continuing to report to the Commission and the General Assembly on his progress.<sup>8</sup> This review became known as the *Compilation and Analysis of Legal Norms*.<sup>9</sup>

Each year, both the Commission and the General Assembly encouraged the Representative to continue his review, although in neither forum was there a clear indication as to the ultimate purpose to be served by it.<sup>10</sup> Only once the *Compilation* was near completion did the General Assembly call upon the Commission "to consider the question of establishing a framework [on internal displacement]."<sup>11</sup> The call was heeded by the Commission which, following the presentation of the

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<sup>6</sup> Francis M Deng, *Comprehensive study prepared by Mr. Francis M Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons*, [282] UN Doc E/CN.4/1993/35 (1993).

<sup>7</sup> *Internally displaced persons*, Comm'n on Hum. Rts., 49th sess, [4] UN Doc E/CN.4/RES/1993/95 (1993).

<sup>8</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, [410] UN Doc E/CN.4/1996/52/Add.2 (1995).

<sup>9</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1996/52/Add.2 (1995).

<sup>10</sup> *Internally Displaced Persons*, GA Res 135, UN GAOR, 48th sess, 85th plen mtg, [2] UN Doc A/RES/48/135 (1994); *Protection of and assistance to internally displaced persons*, GA Res 195, UN GAOR, 50th sess, 99th plen mtg, [7] UN Doc A/RES/50/195 (1996); *Internally displaced persons*, CHR Res 68, UN Comm'n on Hum. Rts., 50th sess, [4] UN Doc E/CN.4/RES/1994/68, (1994); *Internally displaced persons*, Comm'n on Hum. Rts., 51st sess, [4] UN Doc E/CN.4/RES/1995/57 (1995).

<sup>11</sup> *Protection of and assistance to internally displaced persons*, GA Res 195, UN GAOR, 50th sess, 99th plen mtg, [8] UN Doc A/RES/50/195 (1996).

Compilation to it in 1995,<sup>12</sup> called upon the Representative to develop an “appropriate framework” for the protection of internally displaced persons.<sup>13</sup>

The question of what form the framework would take was determined by the Representative. When he presented his report to the Third Committee of the General Assembly in 1995, he stated his clear preference for the “development of an instrument, whether it be a statement of principles, a code of conduct, a declaration or a fully-fledged convention.”<sup>14</sup> The idea of ‘guiding principles’ emerged following a meeting of the Representative's legal team in June 1996,<sup>15</sup> and the language carried through subsequent Commission and General Assembly resolutions.<sup>16</sup>

Beyond reference to the preparation of guiding principles in these resolutions, and therefore implied acceptance of the idea of developing an instrument of some sort, no particular guidance was provided by either body on the form or content of this instrument. Furthermore, in his reports to the Commission and General Assembly, the Representative provided only limited insight into the details of the process he was steering in the development of the principles.<sup>17</sup> The Commission on Human Rights, and its members, therefore, were largely unaware of the contents of the Guiding Principles until these were presented to them in April 1998.<sup>18</sup>

### *B. Engaging states*

A recent study of the International Council on Human Rights Policy (ICHRP) entitled *Human Rights Standards: Learning from Experience* emphasises the importance in standard-setting processes of a 'bottom-up' approach and the value of building

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<sup>12</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1996/52/Add.2 (1995).

<sup>13</sup> *Internally displaced persons*, Comm'n on Hum. Rts., 52nd sess, [9] UN Doc E/CN.4/RES/1996/52 (1996).

<sup>14</sup> UN GAOR, 3<sup>rd</sup> Comm, 38th mtg, [53] UN Doc A/C.3/50/SR.38 (1995).

<sup>15</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [8] UN Doc E/CN.4/1997/43 (1997).

<sup>16</sup> *Internally displaced persons*, Comm'n on Hum. Rts., 53rd sess, [6] UN Doc E/CN.4/RES/1997/39 (1997); *Protection of and assistance to internally displaced persons*, GA Res 130, UN GAOR, 52nd sess, 70th plen mtg, [6] UN Doc A/RES/52/130 (1997).

<sup>17</sup> See, eg, Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [8-9] UN Doc E/CN.4/1997/43 (1997).

<sup>18</sup> Francis M Deng, *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General*, UN Commission on Human Rights, UN Comm'n on Hum. Rts., 54th sess, UN Doc E/CN.4/1998/53/Add.2, (1998).

alliances, including among states.<sup>19</sup> This reflects the traditional process by which human rights and other standards have been developed, through intergovernmental negotiations. While other actors, such as the UN specialised agencies and regional organisations may have a right or be invited to participate, the participation of states is unrestricted.<sup>20</sup> This is the case with regard to treaty negotiations. The creation of non-binding standards, however, can take place in a multiplicity of fora with a great diversity of actors, although, as the ICHRP report and other commentators emphasise, building alliances, including among states, remains vital.<sup>21</sup> With specific reference to the Guiding Principles, the report identifies the opportunity created by the Representative for states to voice their opinions through a questionnaire, as an example of state engagement.<sup>22</sup>

The team of policy advisers assisting the Representative in the development of and advocacy for the Guiding Principles maintains that states were engaged throughout the development process. State support was mobilised, they assert, through the Commission and the General Assembly, specifically the passage of resolutions that reaffirmed the development of a normative framework and supported the conclusions and recommendations contained in the reports of the Representative.<sup>23</sup> Certainly the fact that these resolutions were passed without a vote, and were sponsored by a growing number of states, was a positive achievement. Starting from the first resolution of the Commission following the appointment of the Representative, the number of states sponsoring the annual resolution on internal displacement increased

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<sup>19</sup> ICHRP, 'Human Rights Standards: Learning from Experience' (2006) 63-71.

<sup>20</sup> ICHRP, 'Human Rights Standards: Learning from Experience' (2006) 22.

<sup>21</sup> ICHRP, 'Human Rights Standards: Learning from Experience' (2006) 66; Makau Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 584.

<sup>22</sup> ICHRP, 'Human Rights Standards: Learning from Experience' (2006) 18.

<sup>23</sup> See, eg, Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999). For relevant resolutions of the Commission on Human Rights see: *Internally displaced persons*, CHR Res 95, UN Comm'n on Hum. Rts., 49th sess, UN Doc E/CN.4/RES/1993/95 (1993); *Internally displaced persons*, CHR Res 68, UN Comm'n on Hum. Rts., 50th sess, UN Doc E/CN.4/RES/1994/68, (1994); *Internally displaced persons*, CHR Res 57, UN Comm'n on Hum. Rts., 51st sess, UN Doc E/CN.4/RES/1995/57 (1995); *Internally displaced persons*, CHR Res 52, UN Comm'n on Hum. Rts., 52nd sess, UN Doc E/CN.4/RES/1996/52 (1996); *Internally displaced persons*, CHR Res 39, UN Comm'n on Hum. Rts., 53rd sess, UN Doc E/CN.4/RES/1997/39 (1997). For relevant resolutions of the General Assembly see: *Internally Displaced Persons*, GA Res 135, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/RES/48/135 (1994); *Protection of and assistance to internally displaced persons*, GA Res 195, UN GAOR, 50th sess, 99th plen mtg, UN Doc A/RES/50/195 (1996); *Protection of and assistance to internally displaced persons*, GA Res 130, UN GAOR, 52nd sess, 70th plen mtg, UN Doc A/RES/52/130 (1997).



steadily from 31 in 1993<sup>24</sup> to 61 in 1998, the year the Guiding Principles were presented to the Commission.<sup>25</sup> What is more, the states sponsoring the draft resolutions represented a diversity of regions, and economic and political traditions, from the Congo and Uganda, to Bosnia and Herzegovina, Georgia, Austria and Argentina.<sup>26</sup>

Furthermore, the debates and negotiations around the annual Commission resolutions, and to a lesser extent the biennial resolutions of the General Assembly, provided an opportunity for states to express their support or concerns with relation to the development of the Guiding Principles, and internal displacement more generally. In 1993, for example, following the presentation by the Representative of his first report to the Commission, containing a comprehensive study on internal displacement,<sup>27</sup> Russia hailed the study as “commendable” containing “very pertinent recommendations.”<sup>28</sup> Norway recommended the continuation of the mandate of the Representative,<sup>29</sup> and Austria was “strongly of the opinion that the Representative’s mandate should be extended, to enable him to continue the work he had so competently begun.”<sup>30</sup>

Others, however, were more cautious. Underlining the tension between international protection for the internally displaced and state sovereignty, Sudan stated that human rights protection was only part of the problem of the internally displaced. Such cases as Bosnia and Herzegovina and Somalia, the representative of Sudan contended, should not be confused with other situations where national governments were

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<sup>24</sup> Comm'n on Hum. Rts., 49th sess, 68th mtg, UN Doc E/CN.4/1993/SR.68 (1993); *Internally displaced persons: Draft Resolution*, Comm'n on Hum. Rts., 49th sess, UN Doc E/CN.4/1993/L.105/Rev.1 (1993).

<sup>25</sup> Comm'n on Hum. Rts., 54th sess, 52nd mtg, UN Doc E/CN.4/1998/SR.52 (1998); *Internally displaced persons: Draft Resolution*, Comm'n on Hum. Rts., 54th sess, UN Doc E/CN.4/1998/L.68 (1998).

<sup>26</sup> See, eg, *Internally displaced persons: Draft Resolution*, Comm'n on Hum. Rts., 54th sess, UN Doc E/CN.4/1998/L.68 (1998).

<sup>27</sup> Francis M Deng, *Comprehensive study prepared by Mr. Francis M Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons*, [280] UN Doc E/CN.4/1993/35 (1993).

<sup>28</sup> *Summary record of the 38th meeting*. [73] UN Doc E/CN.4/1993/SR.38 (1993).

<sup>29</sup> Francis M Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993) 142.

<sup>30</sup> *Summary record of the 40th meeting*. [82-83] UN Doc E/CN.4/1993/SR.40 (1993).

providing protection and simply required material assistance from the international community – which, according to the representative, was the case in Sudan.<sup>31</sup>

Sri Lanka and India stated that internal displacement has dimensions that transcend the specific issues of human rights and therefore recommended caution.<sup>32</sup> Both delegations stressed that the causes of displacement had also to be considered in the context of environmental and socio-economic factors. They also indicated that emphasis only on human rights was limiting, because it did not usually highlight 'terrorist activities' by non-state actors.<sup>33</sup>

The issue of sovereignty was one that member states had raised with the Secretary-General when he first addressed internal displacement in the early 1990s, particularly the concern that increased international attention on the internally displaced would lead to encroachment on state sovereignty. The submission of the Government of Sri Lanka to the Secretary-General, for example, stated that "any international initiative on internally displaced persons must be taken subject to the paramount principle of State sovereignty, and the related principles of non-interference and non-intervention in the internal affairs of states established under the Charter of the United Nations."<sup>34</sup> The submission of the Government of Mexico also mentioned the importance of strict respect for the principle of non-intervention in the internal affairs of states.<sup>35</sup>

The voices of these states, however, were not at all present in the substantive discussions about the content of the Guiding Principles or their conceptual underpinnings. The resolutions of the Commission and General Assembly did not address substantive issues, except to the extent that they recognised internal displacement as having both a human rights and a humanitarian dimension.<sup>36</sup>

Questions of definition and scope, and the implications for state sovereignty of the

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<sup>31</sup> *Summary record of the 40th meeting*. [57] UN Doc E/CN.4/1993/SR.40 (1993).

<sup>32</sup> Francis M Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993) 144 - 5.

<sup>33</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999).

<sup>34</sup> Kofi Annan, *Analytical report of the Secretary-General on internally displaced persons*, [95] UN Doc E/CN.4/1992/23 (1992).

<sup>35</sup> Kofi Annan, *Analytical report of the Secretary-General on internally displaced persons*, [95] UN Doc E/CN.4/1992/23 (1992).

<sup>36</sup> See, eg, *Internally Displaced Persons*, GA Res 135, UN GAOR, 48th sess, 85th plen mtg, [Preamble] UN Doc A/RES/48/135 (1994).

increased focus on internal displacement were not addressed. Issues of substance were only addressed during the consultative meetings convened by the Representative outside the formal structures of the UN. These meetings involved legal experts from the various geographic regions, as well as representatives of UN agencies, regional organisations and NGOs.<sup>37</sup> States were not involved at any stage during this drafting or review period, with the exception of Austria, the host of the meetings, and sponsor of the resolutions on internal displacement in the Commission, and Norway, which exercised the same function but in the General Assembly.

The sidelining of states in the development of the Guiding Principles was a tactical decision closely linked to the question of whether the Principles should take the form of a legally binding Convention or some form of non-binding standards. The form the document took could have significant ramifications, both for states, in terms of their legal obligations, and for operational agencies, which sought more practical or specific measures which they considered necessary to give effect to a particular right, rather than principles of a primarily legal nature.<sup>38</sup>

When, in 1992, the Secretary-General first consulted member states to find out their views about internal displacement, most states did not express a particular view as to whether or not new standards should be developed. Burkina Faso indicated that it favoured the adoption of an instrument specifically concerning internally displaced persons and no state expressed an opposition to this suggestion.<sup>39</sup> The guidance provided by member states in the Commission on Human Rights and General Assembly was equivocal. The General Assembly resolution on internal displacement of 1996 noted "the progress made thus far by the representative of the Secretary-General in developing a *legal* framework."<sup>40</sup> The 1998 resolution of the Commission on Human Rights also referred to a *legal* framework.<sup>41</sup> Yet, during this period, all

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<sup>37</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [9] UN Doc E/CN.4/1997/43 (1997).

<sup>38</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999) 22-23.

<sup>39</sup> Kofi Annan, *Analytical report of the Secretary-General on internally displaced persons*, [75] UN Doc E/CN.4/1992/23 (1992).

<sup>40</sup> *Protection of and assistance to internally displaced persons*, GA Res 195, UN GAOR, 50th sess, 99th plen mtg, [Preamble] UN Doc A/RES/50/195 (1996) (emphasis added).

<sup>41</sup> *Internally displaced persons*, CHR Res 50, UN Comm'n on Hum. Rts., 54th sess, [Preamble] UN Doc E/CN.4/RES/1998/50 (1998).

other resolutions of both the General Assembly and the Commission on Human Rights referred either to a "comprehensive" or "appropriate" framework.<sup>42</sup>

Some commentators, in particular those intimately involved in the process of developing and promoting the Guiding Principles, have made much of the language used in these resolutions as a clear rejection by the majority of states of the development of a binding instrument.<sup>43</sup> Simon Bagshaw, who worked for three years in the office of the Representative of the Secretary-General, has written about the debate surrounding the Commission resolution on internal displacement in 1996.<sup>44</sup> During that debate, Austria, Cyprus and Hungary strongly favoured the development of a binding legal framework. Sweden, however, speaking on behalf of the Nordic countries, recommended that a restatement of general principles for internally displaced persons be framed through the development of guidelines such as the UNHCR Guidelines for the Protection of Refugee Women<sup>45</sup> and that the gaps in existing law identified in the compilation and analysis be addressed by the draft declaration of minimum humanitarian standards.<sup>46</sup>

The final resolution adopted by member states in 1996 only referred to an "appropriate" framework,<sup>47</sup> and enabled the Representative to proceed with the development of the normative framework. The original Austrian draft was stronger. It called for the consolidation in one document of the rights for the protection of the internally displaced, and explicitly called upon the Representative to develop a "legal framework" for their protection.<sup>48</sup>

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<sup>42</sup> See, eg, *Protection of and assistance to internally displaced persons*, GA Res 130, UN GAOR, 52nd sess, 70th plen mtg, [Preamble] UN Doc A/RES/52/130 (1997); *Internally displaced persons*, CHR Res 52, UN Comm'n on Hum. Rts., 52nd sess, UN Doc E/CN.4/RES/1996/52 (1996); *Internally displaced persons*, CHR Res 39, UN Comm'n on Hum. Rts., 53rd sess, UN Doc E/CN.4/RES/1997/39 (1997).

<sup>43</sup> See, eg, Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 464; Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999) 31.

<sup>44</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999).

<sup>45</sup> UNHCR, *Guidelines for the Protection of Refugee Women* (July 1991).

<sup>46</sup> *Declaration of Minimum Humanitarian Standards*, reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Comm'n on Hum. Rts., 51st sess., [4], U.N. Doc. E/CN.4/1995/116 (1995).

<sup>47</sup> *Internally displaced persons*, CHR Res 52, UN Comm'n on Hum. Rts., 52nd sess, UN Doc E/CN.4/RES/1996/52 (1996).

<sup>48</sup> Cited in Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999) 31.

The prevailing attitude of most states at the time was characterised by Bagshaw as "a profound reluctance as regards their preparedness to assume further legal obligations by means of ratifying or acceding to international treaties in the field of human rights and humanitarian law in general and with regard to displaced persons in particular".<sup>49</sup> Thus, the term *legal* to modify the word *framework* was avoided by the Commission on Human Rights in its resolutions on internal displacement.

In addition to the equivocal stance adopted by member states, there were other factors conspiring against the development of a legally binding Convention. First, time was a factor. Treaty-making through the UN system can be a slow process, both in the drafting and ratification process. Some instruments, including 'soft-law' declarations and principles, have taken more than a decade to negotiate.<sup>50</sup> Furthermore, even after a text is adopted, there is no guarantee that the treaty will come into force in a reasonable time, and without being significantly modified by state reservations and declarations.<sup>51</sup> Given the urgent need for a document to address the immediate needs of the internally displaced, those advocating for the development of international standards insisted that the instrument be finalised in as short a period as possible.<sup>52</sup>

Secondly, adequate international law applicable to internally displaced persons already existed. Indeed, some advocated for more fervent efforts to monitor and

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<sup>49</sup> Rainer Hofmann, 'International Humanitarian Law and the Law of Refugees and Internally Displaced Persons' in *Law in Humanitarian Crises (Vol. I): How can international humanitarian law be made effective in armed conflicts?* (1995).

<sup>50</sup> See, eg, *Declaration on Human Rights Defenders*, GA Res 53/44, UN GAOR, 53rd sess, UN Doc A/RES/53/144; the *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res 47/133, UN GAOR, 47th sess, UN Doc A/RES/47/133; the *Declaration on the Rights of Persons Belonging to National Or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UNGAOR, 47th sess, UN Doc A/RES/47/135, the *Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human rights Law and Serious Violations of International Humanitarian Law*, CHR Res 2005/35, UN Comm'n on Hum. Rts., 61st sess, UN Doc E/CN.4/RES/2005/35; the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, CHR Res 2005/81, UN Comm'n on Hum. Rts., 61st sess, UN Doc E/CN.4/RES/2005/81.

<sup>51</sup> Walter Kälin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', (Lecture presented to the City University of New York Graduate Center, New York, 19 December 2001).

<sup>52</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 464. See also, Brookings Institution Project on Internal Displacement, 'Report of the International Colloquy on the Guiding Principles on Internal Displacement', Vienna, 21-23 September 2000, 4.

implement this law, rather than the development of another instrument.<sup>53</sup> Thirdly, the drafting of a binding Convention that combined both human rights and humanitarian law, while presenting a unique opportunity, was also a considerable challenge, and was considered premature.<sup>54</sup> Finally, the development of a binding Convention presupposed that the primary audience of the instrument was member states. Had this been the case, state involvement in the process of developing the standards as a means of ensuring their 'buy-in' would have been vital. However, this was not the primary concern of those advocating the drafting of international standards, who were equally concerned to provide a clear and concise document to guide the work of humanitarian organisations in the field.<sup>55</sup>

Thus the Representative recommended a restatement of existing law and clarification of its provisions in a single document. Doing so, he argued, would serve several purposes. It would consolidate the relevant existing norms that were too disperse and diffused to be effective. It would draw attention to the need for a better implementation of existing norms. The document would also serve to increase international awareness of the plight of internally displaced persons and of the need for further measures to effectively address it. Moreover, it would prove valuable to the work of governments, as well as international organisations and NGOs, in promoting and protecting the rights of internally displaced persons.<sup>56</sup>

It was only because the Guiding Principles were based in existing law that their proponents were able to largely bypass member states from the process of their development. Frustration at their lack of involvement, however, eventually surfaced among some states when they were ultimately presented with the Guiding Principles and asked to 'welcome' them. Mr. Gomez-Robledo Verduzco of Mexico, in the

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<sup>53</sup> Francis M Deng, *Comprehensive study prepared by Mr. Francis M Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons*, [280] UN Doc E/CN.4/1993/35 (1993).

<sup>54</sup> Walter Kälin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', (Lecture presented to the City University of New York Graduate Center, New York, 19 December 2001).

<sup>55</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 464. See also, Brookings Institution Project on Internal Displacement, 'Report of the International Colloquy on the Guiding Principles on Internal Displacement', Vienna, 21-23 September 2000, 4.

<sup>56</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [6] UN Doc E/CN.4/1997/43 (1997).

deliberations over the annual resolution on internally displaced persons in 1998, asked to have his country's reservations put on record with regard to paragraph 1 of the resolution, which referred to the Representative's report to which were annexed the Guiding Principles. He said:

Given the importance of the subject, it was regrettable that the report of the representative of the Secretary-General on internally displaced persons (E/CN.4/1998/53), which included a study of the legal aspects of protection against arbitrary displacement and Guiding Principles relating to internal displacement of persons, had been distributed only on 6 April although it was dated 11 February 1998. As a result, his delegation was not in a position to comment on the report, and still less on the Guiding Principles.<sup>57</sup>

Mr. Verduzco went on to reference guidelines established by the UN regarding the development of international instruments in the field of human rights which specify that such instruments should, among other things, attract broad international support.<sup>58</sup>

The original Commission resolution of 1998 "took note with appreciation" of the report of the Representative and the Guiding Principles.<sup>59</sup> In the process of negotiation among states, this was amended. The final version, in lukewarm UN-speak, simply "took note" of the report and the Principles.<sup>60</sup>

## II. THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: AN OVERVIEW

The Guiding Principles set out the rights of internally displaced persons and explain the obligations of national authorities and non-state actors towards them.<sup>61</sup> They refer to civil and political as well as economic, social and cultural rights, and address all phases of internal displacement from pre-displacement, to during displacement, to return or resettlement and reintegration.

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<sup>57</sup> UN Comm'n on Hum. Rts., 54th sess, 52nd mtg, [46] UN Doc E/CN.4/1998/SR.52 (1998).

<sup>58</sup> UN Comm'n on Hum. Rts., 54th sess, 52nd mtg, [46] UN Doc E/CN.4/1998/SR.52 (1998).

<sup>59</sup> *Internally displaced persons: Draft Resolution*, [1] UN Comm'n on Hum. Rts., 54th sess, UN Doc E/CN.4/1998/L.68 (1998).

<sup>60</sup> *Internally displaced persons*, CHR Res 50, UN Comm'n on Hum. Rts., 54th sess, [1] UN Doc E/CN.4/RES/1998/50 (1998).

<sup>61</sup> This section is based on Jessica Wyndham, 'Background paper', Appendix C to the Brookings-Project on Internal Displacement, *Report of the First Regional Conference on Internal Displacement in West Africa*, 2006) 59.

Section I of the Guiding Principles sets out general principles relating to the rights of internally displaced persons and the responsibilities of national authorities. Principle 1(1) stipulates that internally displaced persons are entitled to enjoy in full equality the same rights and freedoms as other persons in their country, and shall not be discriminated against because of their displacement. At the same time, the Guiding Principles acknowledge that certain groups – especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons - may require specific attention.<sup>62</sup>

Although a non-binding document *per se*, Principle 2 states that the Guiding Principles are to be observed by all authorities, groups and persons. This provision is intended to encapsulate non-state actors, as well as governments, although the Representative acknowledged at the time of drafting that promoting adherence to the Principles by non-state actors would present particular challenges.<sup>63</sup> Principle 2(2) states that the Principles are without prejudice to the right to seek and enjoy asylum in other countries. This right, also recognised in Principle 15(c), reflects the fears of refugee advocates and the genuine concern of the Representative not to undermine the right to seek asylum, while strengthening the standards for protection of internally displaced persons.<sup>64</sup> Finally, Principle 3(1) explains that national authorities have the primary duty and responsibility to provide protection and assistance to the internally displaced within their jurisdiction.

Section II addresses the issue of protection from displacement. Principle 6 articulates a right not to be arbitrarily displaced, providing examples of arbitrary displacement including when based on policies of apartheid or ‘ethnic cleansing’; in cases of large-scale development projects not justified by compelling and overriding public interests; and in cases of disasters, unless the safety and health of those affected requires their evacuation. When displacement is unavoidable, Principle 7 specifies minimum guarantees to be observed, for example, the provision of full information to those people to be displaced; the requirement of informed consent; the involvement of the

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<sup>62</sup> Guiding Principles on Internal Displacement, Principle 4(2).

<sup>63</sup> Francis M Deng, *Report on internally displaced persons, prepared by the representative of the Secretary-General*, [8] UN Doc A/52/506 (1997).

<sup>64</sup> Francis M Deng, 'Dealing with the Displaced: A Challenge to the International Community' (1995) 1 *Global Governance* 45, 53.



affected population in the planning and management of their relocation; and the right to an effective remedy. Principle 9 recognises the particular obligation of states to protect against the displacement of indigenous peoples and "other groups with a special dependency on and attachment to their lands."

The third and most extensive section of the Guiding Principles identifies the full range of civil, political, economic, social and cultural rights that all internally displaced persons should enjoy. These include, for instance, the rights to be protected against acts of violence, torture and cruel, inhumane or degrading treatment or punishment, as well as the right to be protected against the use of antipersonnel landmines.<sup>65</sup>

Principle 18 relates to the right to an adequate standard of living, including ensuring safe access to essential food, potable water, basic shelter and housing, as well as appropriate clothing and essential medical services and sanitation. Principle 22(d) specifically identifies the right of internally displaced persons to vote and to participate in governmental and public affairs, whether or not they are living in camps. The third section also states that special attention should be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced populations.<sup>66</sup>

The fourth section addresses the issue of humanitarian assistance and specifies that when governmental authorities are unable or unwilling to provide assistance to the displaced, international organisations have the right to offer their services, and that consent for them to do so shall not be arbitrarily withheld.<sup>67</sup>

The final section emphasises the importance of providing the internally displaced with options for long-term solutions, namely voluntary return in safety and dignity or resettlement in another part of the country.<sup>68</sup> In practice, political motivations have led some states to exclude the internally displaced from society in a deliberate attempt to foreclose their options and press them to return to their places of origin.<sup>69</sup> The

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<sup>65</sup> Guiding Principles on Internal Displacement, Principles 10, 11.

<sup>66</sup> Guiding Principles on Internal Displacement, Principle 19(3).

<sup>67</sup> Guiding Principles on Internal Displacement, Principle 25(2).

<sup>68</sup> Guiding Principles on Internal Displacement, Principles 28 – 30.

<sup>69</sup> G Tarkhan-Mouravi, 'National Policy On IDP Issues in Georgia and the Problem of Urban "collective" Centres' (Paper presented at 'Internal Displacement in Turkey and Abroad: International Principles, Examples and Policy Proposals', Istanbul, 4-5 December 2006) 2-3.

Guiding Principles, however, emphasise the importance of ensuring durable solutions, including the need to provide the internally displaced with reintegration assistance, whether they return or resettle, and to ensure they have equal access to public services.<sup>70</sup> In addition, this section explains the duty of national authorities to assist the internally displaced to recover property and possessions lost upon displacement or, when this is not possible, to assist them in obtaining compensation or some other form of just reparation.<sup>71</sup>

Throughout the Guiding Principles special attention is paid to the protection, assistance and reintegration needs of women and children. They call for the participation of women in the planning and distribution of relief supplies, and require special attention be paid to the health needs of women, including access to female health care providers and services.<sup>72</sup> They require that special efforts be made to ensure the full and equal participation of women and girls in educational programs.<sup>73</sup> They also prohibit sexual violence, stress the need for family reunification, and highlight the right of women to equal access to personal identity and other documentation and to have such documentation issued in their own names.<sup>74</sup> In relation to children, Principle 13(2) adds that under no circumstance are children to be recruited, required or permitted to take part in hostilities.

### III. CONCEPTUAL CONTRIBUTIONS

Although principally a restatement of existing law, as applied to internally displaced persons, the Guiding Principles make several important conceptual contributions relevant specifically to the field of internal displacement and more broadly to questions of humanitarian concern.

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<sup>70</sup> Guiding Principles on Internal Displacement, Principles 28(1), 29(1).

<sup>71</sup> Guiding Principles on Internal Displacement, Principle 29(2).

<sup>72</sup> Guiding Principles on Internal Displacement, Principles 18(3), 19(2).

<sup>73</sup> Guiding Principles on Internal Displacement, Principle 23(3).

<sup>74</sup> Guiding Principles on Internal Displacement, Principles 11(2)(a), 17(2)(3), 20(3).

### *A. Meaning of 'internally displaced person'*

The introduction to the Guiding Principles explains their scope and purpose. In the introduction, internally displaced persons are described as:

[p]ersons 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 recognised border.<sup>75</sup>

The description of an 'internally displaced person' in the introductory section of the Guiding Principles was intended to be just that, a description and not a legal definition. This description identifies the category of persons whose needs are the concern of the Guiding Principles. Unlike the term 'refugee' in the 1951 Refugee Convention, the term 'internally displaced person' in the Guiding Principles does not confer any legal status. In international law, refugees are granted a special legal status because they have lost the protection of their own country and, therefore, are in need of international protection. Internally displaced persons do not need such substitute protection. This is because the rights and guarantees to which internally displaced persons are entitled stem from the fact that they remain within their country of citizenship.<sup>76</sup>

Thus the Guiding Principles reflect the distinction between a formal legal definition and an operational one. Each serves different purposes and may have different consequences. A legal definition seeks to establish a legal regime of protection for internally displaced persons, whereas an operational definition is aimed at facilitating material assistance and protection measures on the ground. The differences which exist between refugees and internally displaced persons demonstrate the need for different approaches and the same strategy cannot be adopted with regard to both. It follows that a legal definition for internally displaced persons cannot create rights and obligations similar to those contained in the Refugee Convention.

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<sup>75</sup> Guiding Principles on Internal Displacement, Introduction.

<sup>76</sup> Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000), 2-3.

Certain aspects of the problem of internal displacement can be addressed without a precise definition, particularly in the case of programming by operational agencies. In some instances, however, a legal definition may be necessary. This will often be the case when national states develop laws to bestow benefits upon the internally displaced or modify legal procedures to accommodate the fact of displacement, for example, the creation of an absentee voting system aimed at allowing the displaced to vote, or the provision of special health care benefits for the displaced population. The quest for a definition in these circumstances demands a degree of flexibility, so as not to exclude any internally displaced persons in need, while preventing abuse by the non-displaced. In this regard the Representative considered inseparable the questions of "who are the internally displaced?" and "who are those in need of protection?"<sup>77</sup> As an intended operational tool, however, the Guiding Principles do not provide clear guidance on how to address these questions in practice. Indeed, the broad, all-encompassing description of an internally displaced person makes the challenge of transforming it into a legal definition, when needed, all the more difficult.

That said, in some respects the description of an internally displaced person contained in the Guiding Principles is suggestive of a legal definition, addressing several important nuances. In recognition that people could become internally displaced directly as a result of, for example, threats of violence, but also in anticipation of such events, reference was made to people having to flee "as a result of or in order to avoid the effects of" the causes listed in the definition. As people do not necessarily have a home, reference was also made to "habitual places of residence." The reference to those "who have not crossed an internationally recognised State border," rather than merely to those who are within their own country, reflects the possibility of sudden border changes, as had occurred, for instance, with the break-up of the former Yugoslavia and the dissolution of the Soviet Union.<sup>78</sup> Finally, the notion of 'displacement' as described in this introductory section, and as used in the Guiding Principles generally, is intended to be neutral, in the sense of covering both situations where persons are forced to leave in violation of their rights, and instances of

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<sup>77</sup> Deng, Francis M, 'Dealing with the Displaced: A Challenge to the International Community' (1995) 1 *Global Governance* 45, 49-50. See also, International Law Association, *Report and Draft Declaration for Consideration at the 2000 Conference*, Committee on Internally Displaced Persons, London Conference (2000), 5-6.

evacuations and relocations/resettlements that, while involuntary, are perfectly legal, for example, in the case of development projects or preventive evacuations in anticipation of a flood, cyclone or volcanic eruption.

Before the drafters of the Guiding Principles settled upon a description of an 'internally displaced person', the Representative recognised that there was 'no firm agreement ... on what should be included in the definition [of internally displaced persons]'.<sup>79</sup> The question of how to define these groups of persons, however, was important in at least two respects. First, the description to be included in the Guiding Principles could prove influential in framing the agenda for the UN generally, and the Representative specifically. In addition, determining who came within this category of persons was a key operational concern. As an ICRC legal expert noted:

the use of a simplistic catch-all term ("IDPs") – not to mention its dehumanising nature – is bound to give rise to unreliable estimates and exaggerated figures, and to a humanitarian response that is inappropriate, poorly coordinated, or even dangerous as far as protection is concerned. Semantic confusion engenders operational confusion.<sup>80</sup>

When developing the Guiding Principles, the Representative had various options and models from which to choose or seek guidance. The Cartagena Declaration on Refugees of 1984,<sup>81</sup> for example, recognised a broader category of 'refugee' than that contained in the Refugee Convention of 1951, defining displaced persons as "those who have been forced to leave their homes – because their lives, security or freedom is endangered by general violence, massive human rights violations, on-going conflicts or other circumstances which seriously disrupt the public order."<sup>82</sup>

UNHCR supported a similar approach to that taken in the Cartagena Declaration, though even narrower, arguing that internally displaced persons should be defined as

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<sup>79</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [118] UN Doc E/CN.4/1995/50 (1995).

<sup>80</sup> Marguerite Contat Hickel, 'Protection of internally displaced persons affected by armed conflict: concept and challenges' (2001) 83(843) *International Review of the Red Cross* 699, 708.

<sup>81</sup> *Cartagena Declaration on Refugees*, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

<sup>82</sup> *Cartagena Declaration on Refugees*, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, [3] OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

would-be refugees who do not leave their country of origin.<sup>83</sup> The Secretary-General, in contrast, used the term 'internally displaced person' in a more expansive way to mean: "persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country."<sup>84</sup> Others advocated for an even more expansive description, suggesting that persons who migrate for economic reasons be considered internally displaced persons.<sup>85</sup> Finally, some questioned whether there should be a definition at all, on the grounds that entitlement to assistance and protection should be based not on fulfilment of formal criteria, but on need.<sup>86</sup>

Ultimately, the question of how to describe an internally displaced person focused on three potential causes of displacement: natural disaster; development-induced displacement; and economic migration. Displacement as a result of conflict was assumed to be integral to any description.

Some commentators do not consider people displaced by natural disasters, such as drought, floods or earthquakes, as internally displaced persons deserving of protection in the manner envisaged by the Guiding Principles.<sup>87</sup> They consider that persons displaced by natural or man-made disasters face only some of the challenges encountered by persons displaced as a result of armed conflicts or systematic human rights violations. According to the proponents of this view, in the case of natural disasters, governmental authorities do not usually hinder the indiscriminate delivery of national or international aid. Rather, governments routinely appeal for international assistance for the victims of natural disasters.<sup>88</sup> These commentators emphasise the element of coercion which characterises forced displacement,

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<sup>83</sup> Francis M Deng, *Comprehensive study prepared by Mr. Francis M Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons*, [50] UN Doc E/CN.4/1993/35 (1993).

<sup>84</sup> Kofi Annan, *Analytical report of the Secretary-General on internally displaced persons*, [17] UN Doc E/CN.4/1992/23 (1992).

<sup>85</sup> Kofi Annan, *Analytical report of the Secretary-General on internally displaced persons*, [16] UN Doc E/CN.4/1992/23 (1992).

<sup>86</sup> Francis M Deng, *Report on internally displaced persons prepared by the representative of the Secretary-General*, [59] UN Doc A/50/558 (1995).

<sup>87</sup> See, eg, International Law Association, *Report and Draft Declaration for Consideration at the 2000 Conference*, Committee on Internally Displaced Persons, London Conference (2000) 5-6.

<sup>88</sup> Nils Geissler, 'The International Protection of Internally Displaced Persons' (1999) 11 *International Journal of Refugee Law* 451, 455 – 456.

interpreting coercion as requiring action either by government or by an insurgent group.<sup>89</sup> As others have pointed out, however, the dividing line between natural and man-made disasters is not always entirely clear.<sup>90</sup> That said, in terms of operational responsibility the distinction between people displaced by conflict and those displaced by natural disaster has significant practical consequences; the organisations that traditionally have responded to conflict-induced displacement, for example UNHCR and the ICRC, are not the same as those that respond to disasters, such as the International Federation of the Red Cross and the International Organisation for Migration (IOM).<sup>91</sup>

The question for the Representative in determining how to describe an internally displaced person, related to the comparability of protection challenges in conflict and disaster situations. In the analysis of the Representative, natural disasters present particular challenges for the fulfilment of national responsibility as regards protection from displacement. Earthquakes, floods, tornadoes, tsunamis and other natural disasters are beyond the capacity of any state to prevent. Yet, states have the responsibility both to mitigate the human toll of such disasters, including by ensuring effective early warning systems, and to respond to disasters in a way consistent with human rights and in accordance with the needs of the populations affected.<sup>92</sup> Thus, the argument for including reference to disasters in the definition was based on cases where governments respond to such disasters by discriminating against or neglecting certain groups on political, ethnic, racial or religious grounds, or by violating the human rights of the affected population in other ways, thereby creating special protection needs.<sup>93</sup>

By including reference to natural disasters in the description of an internally displaced person, the Guiding Principles were intended to provide guidance to states in identifying the protection needs of affected populations, including for example, equal

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<sup>89</sup> See, eg, James Hathaway in American Society of Public International Law, *Proceedings of the 90<sup>th</sup> Annual Meeting of the American Society of Public International Law* (1996) 559.

<sup>90</sup> Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) 30.

<sup>91</sup> Inter-Agency Standing Committee, *Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response*, (2006) 3.

<sup>92</sup> Francis M Deng, *Report on internally displaced persons, prepared by the representative of the Secretary-General*, UN Doc A/60/338 (2005).

<sup>93</sup> Francis M, *Report on internally displaced persons, prepared by the representative of the Secretary-General*, [12] UN Doc A/54/409 (1999).

access to assistance, non-discrimination in aid provision, voluntary relocation, prevention of sexual and gender-based violence, documentation, safe and voluntary return or resettlement, and property restitution, needs shared by those displaced by conflict. The massive displacement crisis resulting from the December 2004 tsunami in Southeast Asia helped to focus attention on the needs of those displaced by natural disasters and, in the view of the Representative, Walter Kälin, it also has confirmed the relevance of bringing together under one description the different scenarios in which internal displacement can arise.<sup>94</sup> Whether *all* scenarios contemplated by the term 'internally displaced person' will prove as useful and justified, however, is yet to be determined, particularly in the case of development-induced displacement.

The lack of explicit mention of development in the description of an 'internally displaced person' has sometimes led to confusion, including erroneous assertions that those displaced as a result of development projects are excluded from the Guiding Principles. That the Guiding Principles were meant also to apply in situations of development, however, is apparent from the content of the Principles themselves, which directly address displacement by development projects in Principle 6, and also draw upon resettlement standards from the development field.<sup>95</sup>

Commonly, persons uprooted by development projects are often not considered to be internally displaced persons. They are not counted by those collecting statistics, and they are not given assistance by the organisations involved with the internally displaced. There is in fact little consensus over which international agencies, if any, should become involved with these populations. The World Bank and regional development banks have developed guidelines on involuntary resettlement applicable to those displaced by development projects, but the banks only monitor these situations when they themselves are involved in lending programmes.<sup>96</sup>

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<sup>94</sup> Walter Kälin, *Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons*, 27 February to 5 March 2005 (2005), 9.

<sup>95</sup> See, eg, Organisation for Economic Cooperation and Development, *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects* (1992); World Bank, *Involuntary Resettlement*, OP 4.12 (updated March 2007).

<sup>96</sup> See, eg, World Bank, *Involuntary Resettlement*, OP 4.12 (updated March 2007); Asian Development Bank, *Operations Manual on Involuntary Resettlement*, OM Section F2/BP (October 2003).



Again, the central questions here should be whether governments actually offer assistance to populations displaced by development projects, whether there is discrimination in the decisions to relocate minority groups and, more fundamentally, whether such displacement can be described as 'forced' or voluntary.<sup>97</sup>

Finally, with regard to the proposal to expand the Guiding Principles' description further to encompass economic migrants,<sup>98</sup> the Representative decided not to include such populations for three main reasons: first, the element of coercion and involuntary movement is not so clear when it comes to economic migrants; secondly, broadening the concept would make dealing with the internally displaced operationally unmanageable; and thirdly, it would upset a political consensus that has developed around the internally displaced as persons with distinct protection needs.<sup>99</sup> As Robert Goldman, one of the members of the legal team that drafted the Guiding Principles, has explained, the reason for framing a definition of an 'internally displaced person' was to address the plight of a particular group of persons who had distinct protection and assistance needs resulting from forced displacement; and to enlarge the definition would risk losing this focus.<sup>100</sup>

#### *B. A needs-based approach vs a rights-based approach*

The Guiding Principles as presented ended up being far more than a restatement of existing law. The final document reflected an analysis of the needs of internally displaced persons and an attempt to address those needs through a human rights and humanitarian legal framework.

The development of the Guiding Principles in terms of the needs of the internally displaced was neither a request of the Commission nor an initiative of the Representative. When the Representative solicited the views of his two principal

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<sup>97</sup> Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) 31.

<sup>98</sup> See Roberta Cohen, 'Key Policy Debates in the Internal Displacement Field' (Paper presented at 'Internal Displacement in Turkey and Abroad: International Principles, Examples and Policy Proposals', Istanbul, 4-5 December 2006) 5.

<sup>99</sup> Roberta Cohen, 'Key Policy Debates in the Internal Displacement Field' (Paper presented at 'Internal Displacement in Turkey and Abroad: International Principles, Examples and Policy Proposals', Istanbul, 4-5 December 2006) 5.

<sup>100</sup> Quoted in Erin Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern (2005) 24(3) *Refugee Survey Quarterly* 13.

legal teams for the purposes of the Compilation and Analysis of Legal Norms, their approaches were conceptually quite distinct. The approach of the Boltzmann Institute was strictly rights-based, starting with existing human rights law and demonstrating how those rights could be applied to the internally displaced. The approach of the American Society for International Law (ASIL) and International Human Rights Law Group (IHRLG), by contrast, was based on an analysis of the needs of the internally displaced and then an examination of the extent to which the law adequately addressed those needs.

The needs identified by the ASIL/IHRLG group were derived from field reports, other relevant studies and discussions with experts.<sup>101</sup> They included: subsistence needs such as the needs for food, water, housing and shelter; movement-related needs including the right to seek asylum, and the right to return; the need for personal identification, documentation and registration; property-related needs; and the need to build self-reliance, for example, through employment, education, and participation in community and governmental affairs.

In his Compilation, the Representative choose to adopt the needs-based approach of the ASIL/IHRLG group. The advantage of approaching the Compilation from this perspective was that it not only helped to identify existing legal standards applicable to internally displaced persons, but also the gaps and weaknesses of these standards in addressing their needs.<sup>102</sup>

When it came to drafting the Principles, Walter Kälin, drafter of the Guiding Principles and successor to Deng as Representative of the Secretary-General, adopted the needs-based framework to structure the Principles and then incorporated existing law to give substance to the document.<sup>103</sup> Consequently, the Principles identify the rights and guarantees which, when fully observed and respected, can prevent arbitrary displacement and address the needs of internally displaced persons in terms of protection, assistance and durable solutions. Furthermore, in keeping with their focus

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<sup>101</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, [6] UN Doc E/CN.4/1996/52/Add.2 (1995).

<sup>102</sup> Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (December 1999) 19.

<sup>103</sup> Thomas G Weiss and David A Korn, *Internal Displacement: Conceptualization and its Consequences* (2006), 59.

on needs, the Principles are structured around the phases of internal displacement: protection from displacement; protection during displacement; and protection during return or resettlement and reintegration.<sup>104</sup>

A distinct benefit of the needs-based structure of the Guiding Principles is that they are more accessible and applicable for operational purposes than a strictly legal document, which essentially catalogues rights. Based on this approach, the Guiding Principles bring to the fore many of the practical challenges and barriers experienced by the displaced. For example, Principle 20 not only recognises the right of everyone to recognition as a person before the law, but aims to give effect to that right by specifically calling for states to provide all necessary documentation to the displaced. Similarly, Principle 23 not only recognises the right to education, but clearly stipulates that this right applies, regardless of whether the person is living inside or outside a camp.

### *C. Sovereignty as Responsibility*

Principle 3(1) of the Guiding Principles states that:

National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.

The Annotations to the Guiding Principles,<sup>105</sup> drafted by Walter Kälin in 2000 to identify and clarify the legal basis of each principle, explain that Principle 3(1) is based on the San Remo Principles which govern the conduct of hostilities in non-international armed conflicts.<sup>106</sup> Furthermore, it reflects the fundamental principle of sovereignty contained in Article 2(7) of the UN Charter which prohibits intervention in matters that are essentially within the domestic jurisdiction of the state, while also recognising a principle reaffirmed by the UN General Assembly that affected states

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<sup>104</sup> Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000) 2.

<sup>105</sup> Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000) 2.

<sup>106</sup> *Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts*, 7 April 1990, reprinted in (1990) 278 *International Review of the Red Cross* 404 (7 April 1990).

have the "primary role in the initiation, organisation, co-ordination and implementation of humanitarian assistance within their respective territories."<sup>107</sup>

The relationship between state sovereignty, the principle of non-intervention and the protection of internally displaced persons is fraught, and as revealed in the deliberations leading to the completion of the Guiding Principles, can be used as a shield to prevent attention being paid and assistance being given to populations in need. As Sadako Ogata, the former UN High Commissioner for Refugees responded when asked in 1997 why the UN had not been able to do more for the internally displaced, "The problem is sovereignty."<sup>108</sup>

What, then, is the problem with sovereignty? As a concept underpinning the international legal regime, sovereignty implies the exercise by a state of exclusive power with respect to its territory and citizens, the corollary obligation being not to interfere in the sovereign powers of other states, as reflected in the non-intervention principle articulated in Article 2(7) of the UN Charter. With deep historical roots dating back to the 1648 Westphalian Peace Accord, the concept has undergone significant reformulation in the past century, particularly since the advent of the international human rights system following the end of World War II.<sup>109</sup>

Until 1945, sovereign states were neither restricted in, nor admonished for their treatment of their inhabitants. This was not considered a valid subject of international concern. The atrocities committed in the lead-up to and during the war, however, served to change this absolute notion of sovereignty, heralding a new legal order based on a shared commitment to peace among nations and to protecting human rights, as embodied in the Universal Declaration of Human Rights.<sup>110</sup> Thus, over time, states became signatories to international and regional human rights treaties, and

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<sup>107</sup> *Humanitarian assistance to victims of natural disasters and similar emergency situations*, GA Res 100, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/100 (1990); *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, GA Res 182, UN GAOR, 46th sess, 78 plen mtg, UN Doc A/RES/46/182 (1991).

<sup>108</sup> Roberta Cohen, 'Key Policy Debates in the Internal Displacement Field' (Paper presented at 'Internal Displacement in Turkey and Abroad: International Principles, Examples and Policy Proposals', Istanbul, 4-5 December 2006) 1.

<sup>109</sup> See, eg, Janina W Dacyl, 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 136.

<sup>110</sup> *Universal Declaration of Human Rights*, GA Res 217(a), UN GAOR, UN Doc A/810 (1948).

thus subject to the reporting, monitoring and adjudicatory system these treaties embody. While in practice the force of human rights to effectively penetrate the cloak of sovereignty is often limited, the agreement by states, however rhetorical, to become bound by such a system, has significantly impacted on the continued evolution and reformulation of the traditional concept of sovereignty, particularly in the field of internal displacement.

National sovereignty poses more problems in the context of internal displacement than in relation to refugees. In many cases, internally displaced persons find themselves caught in the crossfire during an ongoing internal armed conflict. It is often difficult for international organisations to reach these populations. A country with serious internal political problems might consider that to allow the UN or other states to assist internally displaced persons is to open the door to interference in that political problem. Refugees may have a difficult relationship with the state from which they have fled, however, by definition, they are out of the government which may have caused their displacement, whereas internally displaced persons are within its reach: risks of abuse are therefore higher, and means of protection not available.<sup>111</sup>

Many states' representatives at the UN have invoked sovereignty as a basis for constraining international humanitarian assistance in the context of internal displacement. In general, developing states have continued to insist that consent is a prerequisite to humanitarian presence. For example, when asked for its view on how to proceed with regard to internal displacement, Sri Lanka responded that "any international initiative must be taken subject to the paramount principle of State sovereignty and the related principles of non-interference and non-intervention in the internal affairs of states under the Charter."<sup>112</sup> In the same context, Mexico stressed the importance of strict respect for non-interference.<sup>113</sup> Cuba responded by denouncing what it saw as a dangerous trend toward providing humanitarian

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<sup>111</sup> Catherine Phuong, 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18(2) *Netherlands Quarterly of Human Rights* 215, 219-220.

<sup>112</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [95] UN Doc E/CN.4/1992/23 (1992).

<sup>113</sup> Boutros Boutros-Ghali, *Analytical report of the Secretary-General on internally displaced persons*, [95] UN Doc E/CN.4/1992/23 (1992).

assistance without State consent and using it as a pretext to interfere in the “internal affairs of the State.”<sup>114</sup>

When at the outset of his mandate the Representative sought the views of states on questions of internal displacement, he received similar responses. Sudan and India emphasised the importance of collaborating closely with the government in question, an emphasis maintained by both states throughout discussions of the Guiding Principles and internal displacement. China was the strongest critic of international rights to access, claiming that biased discussions of human rights norms as defined by “a few countries” had violated the principles of the UN Charter and as a result “the sovereignty and dignity of many developing countries had come under attack.”<sup>115</sup>

It was in this contentious climate that the Representative developed the concept of 'sovereignty as responsibility'. Representative Deng recognised that traditional notions of sovereignty were eroding, but considered that there was no adequate replacement for the state, at least for the time being.<sup>116</sup> “Until a replacement is found,” he wrote in *Sovereignty as Responsibility: Conflict Management in Africa*, “the notion of sovereignty must be put to work and reaffirmed to meet the challenges of the times in accordance with accepted standards of human dignity.”<sup>117</sup> Thus, according to Deng, the locus of responsibility for promoting citizens' welfare and liberty, for organising cooperation and managing conflict, when not exercised by society itself, remains with the state. States are responsible for ensuring that the basic needs and demands of their people are provided for, and that the conflicts arising

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<sup>114</sup> Quoted in Elizabeth E Ruddick, 'The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced' (1997) 77 *Boston University Law Review* 429, 456-457.

<sup>115</sup> Summary Record, UN GA, 3rd Comm, UN GAOR, 50th mtg, 45th sess, Friday, 23 November 1990, [40] UN Doc A/C.3/45/SR.50.

<sup>116</sup> Francis M Deng, 'Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced' (1995) 8(2) *Leiden Journal of International Law* 249, 249-250

<sup>117</sup> Francis M Deng *et al*, *Sovereignty as Responsibility: Conflict Management in Africa* (1996) xi. See, also Francis M Deng, 'Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced' (1995) 8(2) *Leiden Journal of International Law* 249, 249-250.

among them are managed.<sup>118</sup> They are also obliged to mitigate against the effects of disasters.<sup>119</sup>

The emphasis on the primary responsibility of states to provide protection and assistance to internally displaced persons within their jurisdiction has become a mainstay of General Assembly and Commission on Human Rights resolutions of the past several years.<sup>120</sup> Yet, the paradox, as recognised and emphasised by some commentators, is that sovereignty puts the internally displaced at the mercy of their own state, the same state that may have displaced them.<sup>121</sup>

#### *D. Responsibility to Protect*

This apparent inherent contradiction between the notion of protection for internally displaced persons,<sup>122</sup> and the emphasis on the responsibility of states for the protection of the human rights of their citizens as part of the essence of statehood is only the first of two essential parts of Deng's conception of 'sovereignty as responsibility'. The other relates to the question of: to whom is the government accountable when it fails to discharge its responsibility toward its citizens? Deng's response is that "[t]o argue that it is the people of the country would be to give an obvious but only partial answer. The mere fact that a government that has failed dismally remains in power indicates the limits of national accountability. The alternative leverage can only be external."<sup>123</sup> Consequently, when states are unwilling or unable to provide for the security and well-being of their citizens, there is an international responsibility to

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<sup>118</sup> Francis M Deng *et al*, *Sovereignty as Responsibility: Conflict Management in Africa* (1996) xx.

<sup>119</sup> Deng, Francis M, *Internally displaced persons. Report of the Representative of the Secretary-General*, [8] UN Doc E/CN.4/1998/53/Add.1 (1998).

<sup>120</sup> See, eg, *Protection of and assistance to internally displaced persons*, GA Res 164, UN GAOR, 56th sess, 88th plen mtg, [Preamble] UN Doc A/RES/56/164 (2002); 'Protection of and assistance to internally displaced persons', *Protection of and assistance to internally displaced persons*, GA Res 168, UN GAOR, 58th sess, 77th plen mtg, [Preamble] UN Doc A/RES/58/177 (2004); *Protection of and assistance to internally displaced persons*, GA Res 168, UN GAOR, 60th sess, 64th plen mtg, [Preamble] UN Doc A/RES/60/168 (2006).

<sup>121</sup> Bilgin Ayata, 'From Denial to Dialogue? An Analysis of the National and International Policies on Internal Displacement in Turkey' (Paper presented at 'Internal Displacement in Turkey and Abroad: International Principles, Examples and Policy Proposals', Istanbul, 4-5 December 2006) 5. See, also Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [14] UN Doc E/CN.4/1995/50 (1995); Michael M Cernea, 'Development-induced and conflict-induced IDPs: bridging the research divide' (December 2006) 25 *Forced Migration Review*.

<sup>122</sup> Catherine Phuong, 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18(2) *Netherlands Quarterly of Human Rights* 220.

<sup>123</sup> Francis M Deng *et al*, *Sovereignty as Responsibility: Conflict Management in Africa* (1996) xx-xxi.

protect vulnerable individuals. Thus, paired with the notion of 'sovereignty as responsibility' is the notion of 'the responsibility to protect'.

As Deng wrote in his seminal book, *Sovereignty as Responsibility*:

The premise is that internal conflicts are the principal source of human suffering, gross violations of human rights, and massive destruction of civilian lives and productive capacity... Those who suffer the humanitarian consequences of conflict fall into a moral vacuum left by the state's failure, deliberate or imposed, to fulfill its normal responsibilities ... Although accountability for such responsibility rests with the people of the country, when people are oppressed, their power to hold their governments accountable becomes very limited. To the extent that the international community is the ultimate guarantor of the universal standards that safeguard the rights of all human beings, it has a corresponding responsibility to provide innocent victims of internal conflicts and gross violations of human rights with essential protection and assistance.<sup>124</sup>

The notion of a 'responsibility to protect' has achieved significant traction within the international community. In his report on UN reform, Secretary-General Kofi Annan affirmed that "the responsibility to protect" must shift to the international community when national authorities fail to provide for the welfare and security of their citizens.<sup>125</sup> Sovereignty, he wrote, cannot be allowed to serve as a barrier when the lives of millions of men, women, and children are at risk. In 2005, the international community also adopted the concept of necessary UN protection, though only on a case-by-case basis.<sup>126</sup>

The debate between those who use sovereignty as a shield, and those who stress the responsibilities of the state and the international community is far from over. The final sessions of the now-disbanded Commission on Human Rights were, at times, bitter. Some states were driven to adopt a defensive stance, and to argue that protection of 'national sovereignty' should take precedence over the promotion and protection of human rights and fundamental freedoms.<sup>127</sup> Thus, some commentators argue that current assumptions of the 'end' of the post-Westphalian concept of

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<sup>124</sup> Francis M Deng *et al*, *Sovereignty as Responsibility: Conflict Management in Africa* (1996) xii.

<sup>125</sup> Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, [210] UN Doc A/59/2005 (2005).

<sup>126</sup> *World Summit Outcome Document*, GA Res 60/L.1, UN GAOR [138] UN Doc A/60/L.1 (2001).

<sup>127</sup> Peter F Wille, 'Placing IDPs on the international agenda: lessons learned' (December 2006) 25 *Forced Migration Review* 7.



sovereignty are premature and grounded on biased empirical evidence.<sup>128</sup> These commentators, such as Janina Dacyl, point to the post-Cold War responses of states to 'externally displaced persons' (i.e. refugees) arguing that these represent a substantial deterioration in respect to the protection seekers' human rights and a simultaneous sharpening of the sovereign prerogatives of the host state vis-à-vis this special category of persons.<sup>129</sup>

#### IV. LEGAL CONTRIBUTIONS

##### A. *Protection*

The greatest practical legal contribution made by the Guiding Principles was to identify and create a protection framework addressing the rights and needs of internally displaced persons. Until the development of the Guiding Principles, international efforts to address the needs of internally displaced persons focused more often on relief than on protection.<sup>130</sup> 'Protection' being a term employed most frequently in the context of 'refugee protection', meaning actions to "remedy the situation created by the fact that [refugees] lack the protection which is usually afforded to nationals abroad by the State of nationality."<sup>131</sup> Protection, to the extent that it was referred to in the context of internal displacement, connoted physical protection. The link between the refugee concept of protection, and the responsibility to provide equivalent protection for internally displaced persons has recently been concretised, with UNHCR the designated agency responsible for 'protection' not only of refugees but also of internally displaced persons arising from situations of conflict.<sup>132</sup>

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<sup>128</sup> Janina W Dacyl, 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 158.

<sup>129</sup> Janina W Dacyl, 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 159.

<sup>130</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [17] UN Doc E/CN.4/1995/50 (1995).

<sup>131</sup> Paul Weis, 'The International Protection of Refugees' (1954) 24 *American Journal of International Law* 218.

<sup>132</sup> Inter-Agency Standing Committee, *Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response*, (2006) 3.

According to the ICRC, protection "encompasses all 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. human rights law, international humanitarian law, refugee law)."<sup>133</sup> UNHCR takes a similarly broad view. Erika Feller, former Director of the UNHCR Department of International Protection, described protection in the following terms:

Protection is not a theoretical or legal construct, even though its practice is framed by an important set of internationally agreed legal principles and guidelines ... The protection function is dynamic and action oriented ... it has overarching goals and ... it is performed through a wide range of specific activities ranging from intervention and programme implementation, through advice, promotion and training, to capacity building.<sup>134</sup>

It is this dynamic meaning of 'protection' for which the Guiding Principles now form the basis in the context of internal displacement, by providing a fully-fledged framework for identifying protection needs and for planning, implementing and monitoring protection activities.<sup>135</sup>

### *B. Filling legal gaps and grey areas*

The Guiding Principles were developed to improve the effective implementation of existing human rights and humanitarian law with regard to internally displaced persons. In the process of analysing existing law in terms of the needs of the displaced, the Representative and his team of legal experts identified certain grey areas and gaps in the existing law. In addressing these gaps and areas of insufficient protection, the Guiding Principles make a significant legal contribution.<sup>136</sup>

Seventeen areas of insufficient protection were identified by the Representative. In each case, a general norm existed, but a corollary, more specific right relevant for the

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<sup>133</sup> Inter-Agency Standing Committee, 'Protection of Internally Displaced Persons', IASC policy paper (December 1999) 4.

<sup>134</sup> Erika Feller, 'Statement by the Director, UNHCR Department of International Protection, to the 18th Meeting of the UNHCR Standing Committee, 5 July 2000' (2000) 12 *International Journal of Refugee Law* 401, 402.

<sup>135</sup> Walter Kälin, 'The role of the Guiding Principles on Internal Displacement' (October 2005) *Forced Migration Review* 8.

<sup>136</sup> Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool' (2005) 24(3) *Refugee Survey Quarterly* 27, 29.

protection of the particular needs of the internally displaced had not been articulated. For example, although there is a general norm addressing essential medical care, the special needs of internally displaced women in the area of reproductive and psychological health care needed to be elucidated. The 17 areas of insufficient protection concerned: discrimination; protection of life; gender-specific violence; detention; use of the internally displaced as human shields; forcible recruitment; subsistence needs; medical care; freedom of movement; family-related needs; use of one's own language; religion; work; education; freedom of association; political participation; and the need for access to international assistance.<sup>137</sup> In each case, the legal team considered that it was possible to infer specific legal rights from existing general norms, but in order to strengthen the protection of internally displaced persons it would be valuable to spell out the specific guarantees as they related to the internally displaced.<sup>138</sup>

For example, in the cases of women's specific health care needs, the Principle 19(2) states that:

Special attention should be paid to the health needs of women (to include access to female health care providers and services), such as reproductive health care, and appropriate counselling for victims of sexual abuse and other abuses."<sup>139</sup>

In the absence of specific recognition of such an obligation, the legal drafters relied on two sources. First, the Beijing Platform of Action which states:

[h]ealth policies and programmes often perpetuate gender stereotypes and fail to consider socio-economic disparities and other differences among women and may not fully take account of the lack of autonomy of women regarding their health. Women's health is also affected by gender bias in the health system and by the provision of inadequate and inappropriate medical services to women.

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<sup>137</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1996/52/Add.2 (1995) 415.

<sup>138</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1996/52/Add.2 (1995) 411.

<sup>139</sup> Guiding Principles on Internal Displacement, Principle 19(2).

Secondly, Principle 19(2) derives from Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women<sup>140</sup> which calls upon states to take appropriate measures to eliminate discrimination against women in the field of access to health care and stipulates that "States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."<sup>141</sup>

Further grey areas filled by the Guiding Principles include: a prohibition of discrimination against the internally displaced on the basis of displacement;<sup>142</sup> protection of the right to life, including a prohibition on the use of internally displaced persons to shield military objectives from attack and a prohibition on attacks against internally displaced persons living in camps and settlements;<sup>143</sup> and, in relation to the right to family, the Guiding Principles state that families that are separated by displacement should be reunited as quickly as possible.<sup>144</sup>

In addition to those areas of insufficient protection, the Representative and his team identified seven clear gaps in existing laws. For example, there exists no explicit norm on the restitution of property lost as a consequence of displacement during conflict, or on the need of the internally displaced for personal identification and documentation. Other areas in which existing human rights and humanitarian law are silent concern: disappearances; the use of land-mines and similar devices; detention; property-related needs; and the protection of relief workers and organisations. In the case of these gaps, the legal team determined that rights would have to be inferred from other provisions of law.<sup>145</sup> In such cases, it was only possible to articulate rights by analogising from existing provisions of law that apply only in limited situations or only to certain categories of persons, such as children, refugees or minorities.

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<sup>140</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res. 34/180, UN GAOR, UN Doc A/34/46 (entered into force 3 September 1981).

<sup>141</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Article 12(2).

<sup>142</sup> Guiding Principles on Internal Displacement, Principle 1(1).

<sup>143</sup> Guiding Principles on Internal Displacement, Principle 10(2)(c).

<sup>144</sup> Guiding Principles on Internal Displacement, Principle 17(3)

<sup>145</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1996/52/Add.2 (1995) 416.

An illustrative example of this technique is Principle 6 on "the right to be protected against being arbitrarily displaced." No existing instrument mentions such a right explicitly. However, humanitarian law prohibits displacement in some specific and limited situations, and human rights law, in a more general sense, guarantees not only freedom of movement but also the right to choose one's own residence, and thus a right to remain. A right not to be displaced can also be found in instruments on the rights of indigenous peoples. From this it can be inferred that a right not to be arbitrarily displaced is already implicit in international law.<sup>146</sup>

Another example relates to Principle 29 on the duty to provide compensation or other reparation for the loss of property. Property restitution is not a right currently recognised in existing law. Certainly in relation to compensation for human rights violations, generally, there is an increasing trend, particularly among regional human rights tribunals, to order compensation for victims. In relation to property restitution specifically, a growing body of rules and jurisprudence from the Dayton Peace Agreement, to the ad hoc tribunal for the former Yugoslavia and the Inter-American Commission on Human Rights, recognise a right to compensation specifically for returning internally displaced persons. Based on these precedents, the Guiding Principles recognise the right to property restitution.<sup>147</sup>

## V. UNANSWERED QUESTIONS

Notwithstanding the significant contribution made by the Guiding Principles in identifying relevant human rights and humanitarian law as applicable to the internally displaced, and filling gaps in the law, the Principles left several difficult questions unanswered. One operational question was: when should a non-citizen be considered an internally displaced person? Stateless persons, citizens of neighbouring countries who crossed the border for work, persons who were born to non-citizens in their country of displacement, and non-citizen spouses and parents of displaced persons: do the Guiding Principles apply to them and, if so, in what circumstances?

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<sup>146</sup> Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool' (2005) 24(3) *Refugee Survey Quarterly* 27, 29

<sup>147</sup> Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations', (Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000), 71-74.

The Guiding Principles deliberately do not limit the description of an internally displaced person to citizens. Yet, no clear line exists to distinguish between those whose entire lives, families and livelihoods are tied to a particular location, and who therefore would suffer greatly if displaced, and those whose ties within the country are less well established and more transient, but who may still be forced to flee their homes. One perspective would suggest that in cases where people's lives are so integrated into one location, albeit, not in their country of citizenship, that those people should still be assisted and protected based on need. Certainly in the case of a spouse or parent seeking shelter in a camp for the displaced, the right to family unification should override any suggestion of removing the person or their family from the shelter of the camp. The question, however, is more likely to arise outside a camp situation where the national authorities are asked to provide benefits to a non-citizen displaced person. The Guiding Principles would not provide clear assistance in determining an appropriate response.

Another question unanswered by the Guiding Principles is the meaning of 'natural disaster' and whether the normative framework that has been established can be applied equally to persons displaced by volcanic eruptions, floods and earthquakes, as to those displaced by drought and rising sea levels. It was the Pacific tsunami of December 2004 that brought into sharp relief the needs of the internally displaced following a natural disaster and raised the question of the adequacy of the Guiding Principles as a tool in responding to those needs. Following a visit to two of the affected countries, Sri Lanka and Thailand, the Representative of the Secretary-General issued a report setting out the main protection issues that can arise after natural disasters.<sup>148</sup> The emphasis in his report was on catastrophic, sudden onset disasters.

The tsunamis of 2004 were followed in 2005 by several other catastrophic natural disasters including the earthquakes in Pakistan, and Hurricanes Katrina and Rita in the United States. These disasters, all in quick succession, and receiving substantial

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<sup>148</sup> Walter Kälin, 'Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons – 27 February to 5 March 2005', Office of the High Commissioner for Human Rights (2005)

attention by the media and humanitarian community alike, led the Representative to develop Operational Guidelines on Human Rights and Natural Disasters.<sup>149</sup> The Guidelines do not define 'natural disaster' but do refer to "sudden natural hazards" and seek to distinguish between 'natural disasters' and 'other kinds of disasters' which are described as including disasters of slow onset, including drought.<sup>150</sup>

The question therefore remains: what standards are to be applied to those who are forced to leave their homes as a result of these other disasters? It is an increasingly pressing question as near-apocalyptic predictions are made of mass displacements as a result of climate change.<sup>151</sup> Are these displaced people 'internally displaced persons' and should their rights and needs be considered within the framework of the Guiding Principles, or should they be considered separately? Certainly the need to leave home may not be as urgent as for those who are escaping floods or a hurricane. However, as in the case of those displaced by development projects, consideration still needs to be given to whether the state offers effective and comprehensive assistance to the populations displaced by climate change, whether there is discrimination in the decision not to mitigate the effects of the disaster, and, more fundamentally, whether such displacement can be described as 'forced' or voluntary.

For the time being, it is premature to advocate for one position or another. The Guiding Principles have generally been relied on only in cases of conflict-induced displacement. Consequently, their value in protecting those displaced other than by conflict is yet to be determined. What is more, no comprehensive analysis has been done of the protection needs that arise from slow-onset disasters. Such an analysis would be valuable before seeking to subsume these displaced under the rubric of the Guiding Principles.

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<sup>149</sup> Brookings Institution Project on Internal Displacement, 'Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters', Brookings-Bern Project on Internal Displacement (June 2006).

<sup>150</sup> Inter-Agency Standing Committee, 'Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters' Brookings Institution – University of Bern Project on Internal Displacement, (June 2006) 9 n4.

<sup>151</sup> See, eg, Christian Aid, 'Human tide: the real migration crisis' (May 2007).

### A. *When displacement ends*

The final, and perhaps most important question, left unanswered by the Guiding Principles relates to 'when displacement ends.' When can a person, previously displaced and now either returned to their original place of residence or resettled elsewhere, cease to be considered displaced? When can national authorities and humanitarian organisations with targeted programmes aimed at the internally displaced cease to monitor the situation or provide specific services and benefits for the displaced? This is an operational question with tangible consequences.

As early as 1995, the Representative of the UN Secretary-General reflected on the question of whether persons who were displaced, but later able to resume their activities in another place, could continue to be called 'displaced.' His answer at the time was that the issue is not so much one of duration of time as one of solution – that is, whether the fundamental problems connected with being uprooted have ceased to exist or at least have been significantly alleviated.<sup>152</sup>

In 1998 the Representative, in his book *Masses in Flight*, considered the question of when displacement ends. There he emphasised that return home should not necessarily be considered the all-important criterion by which to determine when displacement has ended, noting that in some cases, the displaced may have integrated economically and socially into another area and may not choose to return home.<sup>153</sup> He mentions the case of displaced Mozambicans who refused to return home on account of the landmines that had been planted during the conflict, as well as the land tenure laws that threatened to complicate the resettlement of both returning refugees and internally displaced families. Should these populations, the Representative asked, still be considered internally displaced because they have not returned? Or should they not be classified as such since their displacement is no longer due to conflict and

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<sup>152</sup> Deng, Francis M, 'Dealing with the Displaced: A Challenge to the International Community', (1995) 1 *Global Governance* 51.

<sup>153</sup> Roberta Cohen and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, (1998) 36.



persecution, but rather to socioeconomic factors, and since they enjoy the protection of their government?<sup>154</sup>

The Representative's musings, for he did not reach any conclusion on the question, reflect the importance of determining when displacement ends, both as an academic exercise, but more importantly, as an operational necessity. Determining when displacement ends is an important factor in compiling reliable and agreed statistics and, therefore, in formulating budgets, framing policies and planning programmes to address the needs of the displaced.<sup>155</sup> It is also critical to determining when the displaced cease to come under the mandate and be the concern and responsibility of particular institutional mechanisms and operational agencies. Finally, and as a corollary to this last point, it can have important implications for the entitlement of the internally displaced to benefits under state and other programmes.<sup>156</sup>

The Refugee Convention contains cessation clauses, establishing clear circumstances in which a person ceases to be considered a refugee. These circumstances include: acquiring new nationality and enjoying the protection of that country; voluntary reestablishment in the country from which the refugee was displaced or in the country of refuge; or because the circumstances in connection with which the person was recognised as a refugee have ceased to exist.<sup>157</sup> The Guiding Principles, in contrast, do not contain such a cessation clause. The Guiding Principles, primarily because they do not seek to create any legal status for the internally displaced, state only that "displacement shall last no longer than required by the circumstances."<sup>158</sup>

Given the operational imperative in determining 'when displacement ends,' the Office for the Coordination of Humanitarian Affairs (OCHA) asked the Representative of the

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<sup>154</sup> Roberta Cohen and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, (1998) 37.

<sup>155</sup> Erin Mooney, 'An IDP No More? Exploring the Issue of When Internal Displacement Ends', paper presented at a meeting on When Displacement Ends, Washington DC, April 2002 and cited in Brookings Institution – University of Bern Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions' (June 2007) 21-22.

<sup>156</sup> Erin Mooney, 'An IDP No More? Exploring the Issue of When Internal Displacement Ends', paper presented at a meeting on When Displacement Ends, April 2002 and cited in Brookings Institution – University of Bern Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions' (June 2007) 22.

<sup>157</sup> Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 198 UNTS 137, (entered into force April, 22 1954) Art 1C.

<sup>158</sup> Principle 6(3), Guiding Principles on Internal Displacement.

UN Secretary-General to explore this question. Specifically, OCHA, as well as governments, donors, regional organisations and civil society, wanted to know when protection and assistance activities for the internally displaced would no longer be considered necessary, as the displaced could be said to enjoy access to protection and assistance on a par with the rest of the population.<sup>159</sup>

The request by OCHA for guidance from the Representative prompted the editors of the *Forced Migration Review* to dedicate an entire issue to the question of "When does internal displacement end?"<sup>160</sup> One point of consensus arising from the commentaries was that applying a cessation clause, like that contained in the Refugee Convention, is not appropriate in the case of internally displaced persons whose description as such is based on a situation of fact, rather than a legal status determination process.<sup>161</sup> The breadth of practical experiences reflected in articles concerning, for example, Burundi, Colombia, Sierra Leone and Sri Lanka, revealed how in practice the question of ending displacement has been dealt with in a plethora of different ways among humanitarian agencies, governments and the internally displaced themselves.<sup>162</sup> One consensus reached in light of these and other case studies, was that the end of displacement is intimately linked with comprehensive and durable solutions to the plight of the internally displaced.<sup>163</sup>

Following an extended consultative and drafting process, it became clear that the ending of displacement is a complex process which usually does not end at a specific

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<sup>159</sup> Brookings Institution – University of Bern Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions', June 2007, Foreword.

<sup>160</sup> "When does internal displacement end?" (May 2003) 7 *Forced Migration Review*.

<sup>161</sup> See, eg, Erin Mooney, 'Bringing the end into sight for internally displaced persons' (May 2003) 7 *Forced Migration Review* 4 – 7; Raphael Bonoan, 'Cessation of refugee status: guide for determining when internal displacement ends?' (May 2003) 7 *Forced Migration Review* 8 – 9; Guillermo Bettocchi with Raquel Freitas, 'A UNHCR perspective' (May 2003) 7 *Forced Migration Review* 13 – 14; Walter Kälin, 'The legal dimension' (May 2003) 7 *Forced Migration Review* 15 – 16. For an argument in favour of applying a cessation clause to internally displaced persons, see: Nils Geissler, 'The International Protection of Internally Displaced Persons' (1999) 11 *International Journal of Refugee Law* 456.

<sup>162</sup> Susan Martin, 'Burundi: out of sight, out of mind?' (May 2003) 7 *Forced Migration Review* 27 – 28; Amelia Fernandez and Roberto Vidal Lopez, 'Colombia: the end of displacement or the end of attention?' (May 2003) 7 *Forced Migration Review* 28 – 29; Claudia McGoldrick, 'Sierra Leone: resettlement doesn't always end displacement' (May 2003) 7 *Forced Migration Review* 31 – 32; Rupasingha A Ariyaratne, 'Sri Lanka: on the edge of ending internal displacement?' (May 2003) 7 *Forced Migration Review* 33 – 34.

<sup>163</sup> See, eg, Patricia Weiss Fagen, 'Looking beyond emergency response' (May 2003) 7 *Forced Migration Review* 19 – 21; Roberta Cohen, 'The role of protection in ending displacement' (May 2003) 7 *Forced Migration Review* 21 – 23.

point in time in the same way that refugee status does. Rather, ending displacement is a process through which the need for particular assistance and protection diminishes.<sup>164</sup> Thus, in 2007, the Brookings Institution Project on Internal Displacement, co-Directed by the Representative, together with Georgetown University, published *When Displacement Ends: A Framework for Durable Solutions*.<sup>165</sup> These two institutions, in close cooperation with the Representative, had spearheaded the process by which an answer to the question of when displacement ends could be determined. The conclusion they reached was that "there is no clear or magic formula for deciding that displacement or the need for assistance or protection has ended."<sup>166</sup> Thus, in contrast to the Refugee Convention cessation clause, simple but inappropriate in the context of internal displacement, the Framework for Durable Solutions reflects the complex nature of the involuntary displacement-return/resettlement continuum.

According to the Framework, in order to determine whether and to what extent a durable solution has been achieved, it is necessary to examine both the process through which solutions are found, and the actual conditions of the returnees and those persons who have integrated locally or settled elsewhere in the country.<sup>167</sup> When considering the conditions of the returnees or resettled persons, it is not as simple as determining whether their needs are fulfilled, as some have suggested.<sup>168</sup> Rather, it requires a comparative analysis based on whether formerly displaced persons are able to assert their rights on the same basis as other nationals, bearing in mind that other nationals may not have all their needs fulfilled.

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The Guiding Principles did leave some questions unanswered. As a document intended primarily to restate existing law, however, the Guiding Principles achieved

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<sup>164</sup> Walter Kälin, *Report of the Representative of the Secretary-General on human rights of internally displaced persons*, Human Rights Council, 4th sess, [37] UN Doc A/HRC/4/38 (2007).

<sup>165</sup> Brookings Institution – University of Bern Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions' (June 2007).

<sup>166</sup> Brookings Institution – University of Bern Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions' (June 2007) 11-12.

<sup>167</sup> Brookings Institution – University of Bern Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions' (June 2007) 11.

<sup>168</sup> Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) 37.

far more than that. They demonstrate how existing principles apply specifically in situations of internal displacement, they fill gaps in existing law, and provide a conceptual foundation for future activities aimed at encouraging states to meet their responsibilities, while preparing the international community to intervene should a state fail to do so.

It is debatable whether, with greater state involvement in the drafting of the Principles, they could have achieved as much as they did. Indeed, that is the very nature of traditional standard-setting processes, that they involve negotiation and often a high degree of compromise. What is yet to be determined is whether the exclusion of states from the development of the Guiding Principles has had ramifications for the ultimate acceptance and application of the Principles in practice.

## 2: The Guiding Principles – Going global

Many an international declaration, standard, principle, even treaty, has been developed and adopted by the UN without ever achieving the level of acceptance and implementation necessary to truly have an impact. The Guiding Principles had the potential of being another such document. They were not drafted with any substantive state input and, therefore, lacked state 'buy-in', they address an issue that has proven controversial both among states and within the humanitarian community, they are non-binding, and they were developed partly as a result of state failure to implement existing law, the same law upon which the Guiding Principles are based.

This chapter and the following will consider the extent to which these factors have helped or hindered in the promotion and application of the Guiding Principles. In so doing, they will explore the degree of acceptance enjoyed by the Guiding Principles and the extent of their use in practice, at the international and regional levels, and at the domestic level, respectively.

### I. INTERNATIONAL

In February 1998 the Commission on Human Rights gave the Guiding Principles a lukewarm reception, simply taking note of their development.<sup>1</sup> Particularly on account of the process by which they were developed, in the years immediately following the presentation of the Guiding Principles, several states made a point of reminding their counterparts in the Commission, as well as the Economic and Social Council (ECOSOC), and the General Assembly, that the Guiding Principles were not legally binding. The statements and attempts by these states to remove reference to the Guiding Principles from several international instruments threatened to undermine their promotion and acceptance.

Egypt, Sudan and India were the main detractors from the Guiding Principles although other states, including Algeria and Mexico, also expressed concerns in the

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<sup>1</sup> *Internally displaced persons*, CHR Res 50, Comm'n on Hum. Rts., 54th sess, [1] UN Doc E/CN.4/RES/1998/50 (1998).

years immediately following their presentation to the Commission. The unifying concern of each of these states was that the promotion of international standards not negotiated by governments and on a subject as sensitive as internal displacement could mean an erosion of state sovereignty.

Roberta Cohen has identified a confluence of four other reasons to explain why these states and at this time in particular would have raised these concerns.<sup>2</sup> First, at the UN in 1999 and 2000, there were heightened sensitivities about infringements on sovereignty following the humanitarian intervention by the North Atlantic Treaty Organisation (NATO) in Kosovo without Security Council approval. Secondly, Egypt is believed to have been asked by Sudan to assist it to stave off international criticism and pressure in relation to the situation of its four million internally displaced persons. Thirdly, personal suspicions stemming from the fact that the Representative was Dinka, a member of the tribe locked in civil war with the Sudanese government, is also thought to have played a part in the reaction of the Sudanese government to the Principles. Finally, that the process by which the Principles were developed could become a precedent for other standard-setting exercises was a concern.<sup>3</sup>

Although Mexico's concerns about the Principles were raised from the outset, from the moment they were presented to the Commission, the defiant and obstructionist position adopted by Algeria, Egypt, India and Sudan in particular, appears to have surprised the Principles' proponents. They point to the successive resolutions of the Commission and the General Assembly requesting the Representative to develop a normative framework, the reports that the Representative submitted informing the Commission and General Assembly of his progress, and the fact that Egypt and Sudan had voted in favour of the resolutions calling for the promotion and dissemination of the Principles. Furthermore, they point out, in 1999 it was Algeria that recommended

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<sup>2</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', (2004) 10 *Global Governance* 459.

<sup>3</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', (2004) 10 *Global Governance* 472-473.

that the Organisation of African Unity's (OAU) Commission on Refugees and Displaced Persons express appreciation of the Principles.<sup>4</sup>

Notwithstanding these apparent indications of support, Algeria, Egypt, India and Sudan spent from 2000 to 2003 formally raising questions about whether the Principles could achieve general international acceptance without being discussed in an intergovernmental forum such as the General Assembly. Egypt and Sudan sought to block reference to the Principles from newly drafted documents such as those emanating from the Second World Assembly on Aging and the Special Session on Children. In each instance they were successful. Only in the case of the Programme of Action emanating from the World Conference Against Racism did they fail to keep any reference to the Guiding Principles from the outcome documents. Egypt also succeeded in ensuring reference to the Principles was removed from the annual General Assembly resolution on UNHCR.<sup>5</sup> That same year Egypt prevented the adoption of any resolution on humanitarian issues by ECOSOC, in part because of objections to the Guiding Principles.<sup>6</sup>

In response to the concerns expressed by these states, and possibly in an effort to remove these rancorous debates from the most public fora, Switzerland decided in 2001 to host a series of informal meetings to facilitate dialogue between proponents and detractors of the Guiding Principles, including states, and international and regional organisations. In 2002, Egypt indicated before ECOSOC that "it [was] ready to overcome the differences" that stemmed from the development of the Guiding Principles "through the holding of consultations."<sup>7</sup> The following year Algeria, in a statement before the Commission, expressed support for the Representative and acknowledged the development and growing application of the Guiding Principles.<sup>8</sup> Finally, that same year, the Sudanese government hosted the Inter-Governmental

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<sup>4</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 472-473.

<sup>5</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 474.

<sup>6</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 474.

<sup>7</sup> Phil Orchard, "Events at the 2002 ECOSOC Humanitarian Segment", 26 July 2002 cited in Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 474.

<sup>8</sup> Cited in Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 474.

Authority for Development's (IGAD) first regional conference on internal displacement, which called the Guiding Principles "a useful tool" in building national policies on internal displacement.<sup>9</sup>

General state support for the Guiding Principles, as evidenced by the number of states sponsoring the Commission/Council resolution on internally displaced persons, increased steadily immediately after 1998 and has increased significantly since Algeria, Egypt and Sudan adopted their conciliatory stance in 2003. Over 60 states annually now support the resolution on internally displaced persons presented to the Human Rights Council as compared to 44 states in 1999.

This gradual process by which the Guiding Principles have come to be accepted culminated in 2005 when in March, the UN Secretary-General in his report "In Larger Freedom" urged Member States to accept the Guiding Principles as "the basic international norm for protection of internally displaced persons."<sup>10</sup> Several months later, in September 2005, heads of state and governments assembled at the World Summit in New York recognised the Guiding Principles as "an important international framework" for the protection of internally displaced persons and resolved to "take effective measures to increase the protection of internally displaced persons."<sup>11</sup>

At the operational level as well, UN agencies have been making increasing use of the Guiding Principles. The *United Nations Return and Reintegration Policy for IDPs to Southern Sudan and the Three Areas* of October 2006, for example, states that "UN activities related to return and reintegration are guided by international human rights law, international refugee law and international humanitarian law; and by the UN's *Guiding Principles on Internal Displacement*."<sup>12</sup> Similarly, in 2007 several UN operations, including in Côte d'Ivoire, Timor-Leste and Liberia, made use of the

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<sup>9</sup> *Khartoum Declaration*, Ministerial Conference on Internally Displaced Persons in the IGAD Sub-region, Khartoum, Sudan (2 September 2003) [7(i)].

<sup>10</sup> Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, [210] UN Doc A/59/2005, (2005).

<sup>11</sup> *World Summit Outcome Document*, GA Res 60/L.1, UN GAOR [132] UN Doc A/60/L.1 (2001). For an earlier general inter-governmental statement in favour of the Guiding Principles see: *Programme of Action*, World Conference against Racism, Racial Discrimination, Xenophobia and Religious Intolerance, September 2001 [65].

<sup>12</sup> *United Nations Return and Reintegration Policy for IDPs to Southern Sudan and the Three Areas*, (October 2006) [1].



Guiding Principles as an information and training tool for the internally displaced, civilian and military authorities; to guide the policy-making process of government agencies; and as one point of reference in the development of a national human rights action plan.<sup>13</sup>

While the Guiding Principles have enjoyed broad recognition within the UN system, the depth of the UN's commitment to the Guiding Principles as a standard to be applied in all situations of internal displacement can only be determined by a close consideration of the statements and discussions held in a variety of UN fora.

#### *A. UN Security Council*

The Security Council is not a forum in which discussion of specific human rights instruments is common, unless raised by the Secretary-General or others in their reports and recommendations to the Council. Yet, in the years immediately following the presentation of the Guiding Principles to the Commission on Human Rights, various members of the Security Council used that forum to express their support for the Guiding Principles. Kenya, Mauritius, Namibia, Brazil, the United States, Japan, Korea and several European countries, including states speaking on behalf of the European Union, on various occasions expressed support for the Guiding Principles and their implementation.<sup>14</sup> On two occasions, the positive comments made by Council members prompted the Indian delegation to reiterate concerns it had raised in the Commission, namely that the Guiding Principles do not have intergovernmental approval, are not legally binding and that, any international action to address

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<sup>13</sup> See, eg, Kofi Annan, 'Thirteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire', UN SCOR UN Doc S/2007/275 (2007) 19; Kofi Annan, 'Budget for the United Nations Integrated Mission in Timor-Leste for the period from 1 July 2007 to 30 June 2008: report of the Secretary-General', UN GAOR, 61st sess, UN Doc A/61/871 (2007); Kofi Annan, 'Performance report on the budget of the UN Mission in Liberia for the period from 1 July 2005 to 30 June 2006: report of the Secretary-General', UN GAOR, 61st sess, UN Doc A/61/715.

<sup>14</sup> See, eg, Security Council, 3932nd meeting, Tuesday, 29 September 1998, New York, UN Doc S/PV.3932, 12; Security Council, 4046th meeting, Friday, 17 September 1999, New York, UN Doc S/PV.4046, 7; Security Council, 4312th meeting, Monday, 23 April 2001, New York, UN Doc S/PV.4312, 24; Security Council, 4472nd meeting, Wednesday, 13 February 2002, New York, UN Doc S/PV.4472, 13.

situations of internal displacement "must respect sovereignty and be at the request of the country concerned."<sup>15</sup>

Beyond a mere forum in which states could express their support or dissent, the Council has presented a rich opportunity for states to consider the applicability of the Guiding Principles in specific contexts, in relation for example to children and armed conflict, as well as specific conflict situations. Indeed, former Secretary-General Kofi Annan was a strong proponent of the Guiding Principles, referring to them as one of the "notable achievements" of 1998 in the humanitarian field.<sup>16</sup> Thus, the Secretary-General sought to harness the potential of the Security Council as a vehicle for increasing their relevance and practical application. In 1999, the year after the Guiding Principles were presented to the Commission on Human Rights, in his report to the Security Council on "Protection of Civilians in Armed Conflict," the Secretary-General suggested that in situations of mass displacement, the Council encourage governments to observe the Guiding Principles.<sup>17</sup> In his report the following year, the Secretary-General made the same recommendation, which the Security Council heeded.<sup>18</sup>

On 13 January 2000, the President of the Council, in a statement relating to humanitarian assistance for refugees in Africa, urged "all parties concerned to comply strictly with their obligations under international humanitarian, human rights and refugee law, and emphasize[d] the need for better implementation of relevant norms with regard to internally displaced persons." In this regard, he added, "[t]he Council further notes that the UN agencies, regional and NGOs, in cooperation with host Governments, are making use of the Guiding Principles on Internal Displacement, *inter alia*, in Africa."<sup>19</sup> In a resolution on Burundi adopted just six days later, the

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<sup>15</sup> Security Council, 4046th meeting, Friday, 17 September 1999, New York, UN Doc S/PV.4046 (Resumption 1), 25; Security Council, 4176th meeting, Wednesday 26 July 2000, New York, UN Doc S/PV.4176 (Resumption 1), 20.

<sup>16</sup> Kofi Annan, *Report of the Secretary-General to the Economic and Social Council, Strengthening the Coordination of Humanitarian Assistance*, UN Doc E/1998/67 (1998).

<sup>17</sup> Kofi Annan, *Report of the Secretary-General to the Security Council on Protection of Civilians in Armed Conflict*, UN Doc S/1999/957 (1999) 12-13.

<sup>18</sup> Kofi Annan, *Children and armed conflict: report of the Secretary-General*, UN SCOR 55th session, UN Doc S/2000/712 (2000) recommendation 21, 12.

<sup>19</sup> Statement by the President of the Security Council, UN Doc S/PRST/2000/1 (2000) 2.

Security Council again noted the use being made of the Principles but did not go on to call for adherence to them by the authorities.<sup>20</sup>

Despite continued recommendations by the Secretary-General for the Council to encourage members, for example, to develop national laws, policies and standards consistent with the Guiding Principles,<sup>21</sup> the Presidential statement and resolution of 2000 were the last such statements relating to the Guiding Principles to be issued by the Security Council.

Ultimately, the Guiding Principles have not left a lasting footprint on the work of the Council. While brief comments in support of the Guiding Principles occasionally have been made, it is arguable that their most important contribution has been to serve as a catalyst for putting internal displacement generally on the agenda of the Council. The situation of the internally displaced in the contexts of Liberia, Georgia and Tajikistan, for example, received some attention before 1998.<sup>22</sup> Since 1998, the situation of internally displaced persons in a broad range of contexts and conflicts has been the subject of several Security Council resolutions, for example, in relation to Afghanistan, the Democratic Republic of Congo, Iraq, Sierra Leone, Sudan, and Timor-Leste as well as women and children.<sup>23</sup> What remains to be determined is whether indeed the Guiding Principles can be credited with bringing internal displacement to the attention of the Security Council, or whether this is a product of the combined effects of the increased institutional attention to the issue and the

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<sup>20</sup> Security Council resolution 1286 (2000) [on the situation in Burundi], UN SCOR UN Doc S/RES/1286 (2000), Preamble.

<sup>21</sup> Francis M Deng, 'Report of the Special Representative of the Secretary-General on internally displaced persons', UN GA, 58th session, [58(d)] UN Doc A/58/393 (2003).

<sup>22</sup> SC Res 999 (1995) [on extension of the mandate of the UN Mission of Observers in Tajikistan and on the process of national reconciliation], UN SCOR [14] UN Doc S/RES/999 (1995); SC Res 1020 (1995) [on adjustment of the mandate of the UN Observer Mission in Liberia and implementation of the peace process in Liberia], UN SCOR [15] UN Doc S/RES/1020 (1995); SC Res 1124 (1997) [on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)], UN SCOR [18] UN Doc S/RES/1124 (1997).

<sup>23</sup> See, eg, SC Res 1770 (2007) [on extension of the mandate of the UN Assistance Mission for Iraq (UNAMI)], UN SCOR [Preamble] UN Doc S/RES/1770 (2007); SC Res 1547 (2004) [on establishment of a UN advance team in Sudan as a special political mission], UN SCOR [Preamble] UN Doc S/RES/1547 (2004); SC Res 1378 (2001) [on efforts to establish a new and transitional administration leading to the formation of a government in Afghanistan], UN SCOR [1] UN Doc S/RES/1378 (2001); SC Res 1325 (2000) [on women and peace and security], UN SCOR [Preamble] UN Doc S/RES/1325 (2000); SC Res 1324 (2000) [on the protection of children in situations of armed conflicts], UN SCOR [6] UN Doc S/RES/1314 (2000); SC Res 1270 (1999) [on establishment of the UN Mission in Sierra Leone (UNAMSIL)], UN SCOR [19] UN Doc S/RES/1270 (1999).

general activities of the Representative of the Secretary-General which have been far more extensive in scope than the development and promotion of the Guiding Principles.

### *B. UN General Assembly*

The General Assembly's engagement with internal displacement and the Guiding Principles has been far more frequent and institutionalised than the Security Council's, largely on account of the Representative's mandated role to report to the Assembly on a regular basis. Every year since 1993, with few exceptions, the Representative of the Secretary-General has presented a report to the General Assembly for its consideration. Focusing always on the activities of the Representative, at first these reports emphasised the development and promotion of the Guiding Principles as well as activities aimed at the creation of an effective institutional framework for the protection of internally displaced persons. As the mandate of the Representative evolved and the need to promote the Principles generally gave way to specific activities towards their implementation, these annual reports assumed a different structure. The Representative highlighted his dialogues with states; cooperation with regional organisations; mainstreaming of the human rights of internally displaced persons within the UN system; and capacity-building activities. The presentation of these reports has precipitated a resolution on internal displacement on a biennial basis.<sup>24</sup>

The evolving language of the General Assembly resolutions on internally displaced persons with regard to the Guiding Principles has come to reflect their increasing acceptance and use at the national, regional and international levels. At first, the response of the General Assembly to the Guiding Principles, like that of the Commission on Human Rights, was lukewarm. In February 1998, the General Assembly took note of the preparation by the Representative of the Guiding

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<sup>24</sup> *Protection of and assistance to internally displaced persons*, GA Res 54/167, UN GAOR, 54th sess, UN Doc A/RES/54/167, (2000); *Protection of and assistance to internally displaced persons*, GA Res 56/164, UN GAOR, 56th sess, UN Doc A/RES/56/164, (2002); *Protection of and assistance to internally displaced persons*, GA Res 58/177, UN GAOR, 58th sess, UN Doc A/RES/58/177, (2004); *Protection of and assistance to internally displaced persons*, GA Res 60/168, UN GAOR, 60th sess, UN Doc A/RES/60/168, (2006).

Principles.<sup>25</sup> In 2000, the Assembly welcomed their use in dialogue with Governments and noted "with appreciation" their use by UN agencies, regional and NGOs.<sup>26</sup>

The first significant indication that the General Assembly itself considered the Guiding Principles to be of particular value came in 2002, when the Assembly identified the Guiding Principles as having "strengthened" international human rights law, international humanitarian law and refugee law for the protection of internally displaced persons and, for the first time, noted "with appreciation" the work of the Representative in having developed this normative framework.<sup>27</sup> Subsequently, in 2004 and 2006 respectively, the General Assembly declared the Guiding Principles "an important tool" and "an important international framework" for the protection of internally displaced persons.<sup>28</sup>

The resolutions of the General Assembly not only reflect a growing acceptance of the Guiding Principles *per se*, but rely on several precepts set out in the Principles. For example, from 2002, the Preamble to General Assembly resolutions on internally displaced persons emphasised the primary responsibility of states to provide protection and assistance to internally displaced persons within their jurisdiction.<sup>29</sup> From 2004, they also referred to the causes of displacement as set out in the Guiding Principles, including natural and human-made disasters.<sup>30</sup>

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<sup>25</sup> *Protection of and assistance to internally displaced persons*, GA Res 52/130, UN GAOR, 52nd sess, UN Doc A/RES/52/130, (1998).

<sup>26</sup> *Protection of and assistance to internally displaced persons*, GA Res 54/167, UN GAOR, 54th sess, [Preamble] UN Doc A/RES/54/167, (2000).

<sup>27</sup> *Protection of and assistance to internally displaced persons*, GA Res 56/164, UN GAOR, 56th sess, [Preamble] UN Doc A/RES/56/164, (2002).

<sup>28</sup> *Protection of and assistance to internally displaced persons*, GA 58/177, UN GAOR, 58th sess, UN Doc A/RES/58/177, (2004); *Protection of and assistance to internally displaced persons*, GA Res 60/168, UN GAOR, 60th sess, [Preamble] UN Doc A/RES/60/168, (2006).

<sup>29</sup> See, eg, *Protection of and assistance to internally displaced persons*, GA Res 54/167, UN GAOR, 54th sess, [Preamble] UN Doc A/RES/54/167, (2000); *Protection of and assistance to internally displaced persons*, GA Res 56/164, UN GAOR, 56th sess, [Preamble] UN Doc A/RES/56/164, (2002); *Protection of and assistance to internally displaced persons*, GA 58/177, UN GAOR, 58th sess, UN Doc A/RES/58/177, (2004); *Protection of and assistance to internally displaced persons*, GA Res 60/168, UN GAOR, 60th sess, [Preamble] UN Doc A/RES/60/168, (2006).

<sup>30</sup> *Protection of and assistance to internally displaced persons*, GA 58/177, UN GAOR, 58th sess, UN Doc A/RES/58/177, (2004); *Protection of and assistance to internally displaced persons*, GA Res 60/168, UN GAOR, 60th sess, [Preamble] UN Doc A/RES/60/168, (2006).

While the General Assembly has increasingly warmed to the existence and value of the Guiding Principles, going so far as to encourage others to use and implement them, the Assembly itself has not used the Principles in its own activities. In 2006, for example, the General Assembly issued over a dozen resolutions referring to internally displaced persons, including in relation to Angola, Liberia, Afghanistan, the rights of children and the rights of women.<sup>31</sup> Only one of these resolutions referred to the Guiding Principles and that was the general annual resolution concerning assistance to refugees, returnees and displaced persons in Africa.<sup>32</sup> Thus, the General Assembly, even more so than the Security Council, has indicated its support for the Guiding Principles and has even gone so far as to call for their application by relevant actors at all levels, but has not itself used them, indicating a lack of permeation throughout the UN system.

### *C. UN Commission on Human Rights/Human Rights Council*

The initial reservations expressed by states as to the standing of the Guiding Principles have given way to increased acceptance and encouragement of their use. The Commission has repeatedly expressed its appreciation for the Guiding Principles as an important tool, welcomed the fact that an increasing number of states, UN agencies and regional and NGOs are applying them as a standard, and encouraged all relevant actors to make use of them when dealing with situations of internal displacement.<sup>33</sup> It has also commended the Representative for his use of the Guiding Principles in his dialogues with Governments and expressed its appreciation for efforts to disseminate and promote them.<sup>34</sup> Closely reflecting the language of the

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<sup>31</sup> *The situation in Afghanistan*, GA Res 61/18, UN GAOR, UN Doc A/RES/61/18; *International assistance for the economic rehabilitation of Angola*, GA Res 61/219, UN GAOR, UN Doc A/RES/61/219; *Humanitarian assistance and reconstruction of Liberia*, GA Res 61/143, UN GAOR, UN Doc A/RES/61/143.

<sup>32</sup> *Assistance to refugees, returnees and displaced persons in Africa*, GA Res 61/139, UN GAOR, UN Doc A/RES/61/139.

<sup>33</sup> *Internally displaced persons*, UN Comm'n on Hum. Rts., [6] UN Doc E/CN.4/RES/2004/55 (2004); *Internally displaced persons*, UN Comm'n on Hum. Rts., [7] UN Doc E/CN.4/RES/2003/51 (2003); *Internally displaced persons*, UN Comm'n on Hum. Rts., [12] UN Doc E/CN.4/RES/2002/56 (2002); *Internally displaced persons*, UN Comm'n on Hum. Rts., [8] UN Doc E/CN.4/RES/2001/54 (2001); *Internally displaced persons*, UN Comm'n on Hum. Rts., [6] UN Doc E/CN.4/RES/1999/47 (1999).

<sup>34</sup> *Internally displaced persons*, UN Comm'n on Hum. Rts., [7] UN Doc E/CN.4/RES/2004/55 (2004); *Internally displaced persons*, UN Comm'n on Hum. Rts., [8] UN Doc E/CN.4/RES/2003/51 (2003); *Internally displaced persons*, UN Comm'n on Hum. Rts., [13] UN Doc E/CN.4/RES/2002/56 (2002); *Internally displaced persons*, UN Comm'n on Hum. Rts., [6] UN Doc E/CN.4/RES/2001/54 (2001); *Internally displaced persons*, ESCOR, UN Comm'n on Hum. Rts., [6] UN Doc E/CN.4/RES/2000/53

General Assembly resolutions, the Commission has recognised the role of the Representative in strengthening international law for the internally displaced "by identifying, reaffirming and consolidating specific rights for their protection, in particular through the Guiding Principles."<sup>35</sup> The Commission has also recognised the Guiding Principles as "an important tool for dealing with situations of internal displacement."<sup>36</sup>

Every resolution on internal displacement that has been presented to the Commission since 1998 has been adopted without a vote. That said, on every occasion that a draft resolution has been presented for vote, India, sometimes supported by Sudan, has used the opportunity to reiterate its position that:

The primary responsibility for protecting and assisting IDPs lay with the States concerned. International action should stay within the boundaries of sovereignty, and should only be carried out at the request, or with the consent, of the countries concerned. IDPs who suffered from an absence of legal or institutional protection were rarely found, and only in countries where the State had collapsed. Situations in which IDPs were unprotected owing to a lack of will on the part of the Government were fewer still. On that understanding, the Indian delegation would support the draft resolution.<sup>37</sup>

Despite continued concerns by India and allied states, the annual resolution on internally displaced persons has garnered increasing support of between 44 and 53 states from 1999 to 2002, following which support for the resolution grew to 65 in 2005. Those states conspicuously absent from the list of resolution sponsors include many of the states most affected by internal displacement: not only Sudan and India, but also Côte d'Ivoire, Lebanon, Sri Lanka, Turkey, and Uganda. What makes the failure of these states to support the resolutions on internal displacement surprising is

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(2000); *Internally displaced persons*, UN Comm'n on Hum. Rts., [5] UN Doc E/CN.4/RES/1999/47 (1999).

<sup>35</sup> See, eg, *Internally displaced persons*, UN Comm'n on Hum. Rts., [Preamble] UN Doc E/CN.4/RES/1999/47 (1999); *Internally displaced persons*, UN Comm'n on Hum. Rts., [Preamble] UN Doc E/CN.4/RES/2000/53 (2000); *Internally displaced persons*, UN Comm'n on Hum. Rts., [Preamble] UN Doc E/CN.4/RES/2001/54 (2001).

<sup>36</sup> See, eg, *Internally displaced persons*, UN Comm'n on Hum. Rts., [Preamble] UN Doc E/CN.4/RES/2002/56 (2002); *Internally displaced persons*, UN Comm'n on Hum. Rts., [Preamble] UN Doc E/CN.4/RES/2003/51 (2003); *Internally displaced persons*, UN Comm'n on Hum. Rts., [Preamble] UN Doc E/CN.4/RES/2004/55 (2004).

<sup>37</sup> See, eg, UN Comm'n on Hum. Rts., Summary Record, 57th Meeting, Tuesday, 19 April 2005, [93] UN Doc E/CN.4/2005/SR.57 (2005). For reference to Sudan, see: UN Comm'n on Hum. Rts., Summary Record, 55th Meeting, Tuesday, 25 April 2002, [17] UN Doc E/CN.4/2002/SR.55 (2002).

that in every case, with the exception of India, these states have welcomed a mission by the Representative and in two cases, Turkey and Uganda, the states have adopted policies based on the Guiding Principles. Nonetheless, they have chosen not to form part of the increasing number of states voting to support the Commission's continued attention to internal displacement.

From April 2006, with the creation of the Human Rights Council to replace the Commission on Human Rights, the question became whether the Council would continue to support the work of the Representative in promoting the application of the Guiding Principles.<sup>38</sup> The answer to this question hung in the balance while the Council conducted a general review of its methods of work, including with regard to the number and mandates of the special procedures. While the Representative had clearly earned the respect of the Commission, and the Guiding Principles had reached a high level of acceptance, it could not be assumed that the Council would continue to support the Representative, particularly in light of the controversy caused by a joint mission conducted by the Representative in 2007. In December 2007, however, the Council adopted resolution 6/32, extending the mandate of the Representative for a further three years. In relation to the Guiding Principles, the Council restated the now historic language of the Guiding Principles as "an important international framework," but emphasised the need for collaborative, rather than unilateral action, between international actors and states affected by internal displacement. In this regard, the Council encouraged:

Member States and humanitarian agencies to continue to work together in endeavours to provide a more predictable response to the needs of internally displaced persons, and in this regard calls for international support, upon request, to capacity building efforts of States.<sup>39</sup>

The renewal of the Representative's mandate without removing, adding or otherwise amending his areas of competence, can be viewed as a vote of confidence in his achievements, but also as a reflection on the continued need to integrate internal displacement and the Guiding Principles into the activities of the organisation. Indeed, just as the Security Council and General Assembly have demonstrated a

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<sup>38</sup> *Human Rights Council*, GA Res 60/251, UN GAOR, UN Doc A/RES/60/251 (2006).

<sup>39</sup> *Mandate of the Representative of the Secretary-General on the human rights of internally displaced persons*, HRC Res 6/32, UN HRC, 6th sess, 34th mtg, [5] UN Doc A/HRC/RES/6/32 (2007).



reluctance to use the Guiding Principles when addressing specific situations or rights involving internal displacement, so too the UN human rights mechanisms can by no means be said to have fully integrated the Guiding Principles into their work.

#### *D. UN treaty-monitoring bodies*

Seven human rights bodies composed of independent experts exist to monitor the compliance by states of the principal international human rights treaties: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee (HRC); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Committee Against Torture (CAT); the Committee on the Rights of the Child (CRC); and the Committee on Migrant Workers (CMW). In addition, four of the treaty bodies (HRC, CERD, CEDAW and CAT) have competence to consider complaints received from individuals who have exhausted domestic remedies in seeking redress for alleged violations of the principal treaty.<sup>40</sup>

Considerable potential exists within these treaty-monitoring bodies to address internal displacement and promote the implementation of the Principles. This is particularly so given that the treaties which these bodies are mandated to monitor form the legal basis for the Guiding Principles, with the exception only of the Convention on the Rights of Migrant Workers,<sup>41</sup> which did not exist at the time the Principles were developed. As such, the Guiding Principles could be used as a reference for interpreting and clarifying the provisions of the principal instrument, insofar as it relates to internally displaced persons.<sup>42</sup>

Several treaty-monitoring bodies have referred to the Guiding Principles, and they have done so with increasing frequency in recent years. In 2000, only the CRC referred to the Guiding Principles in relation to the situation of displacement in

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<sup>40</sup> The CESCR is in the process of drafting an Optional Protocol that will similarly allow for individual complaints.

<sup>41</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res 45/158, annex, UN GAOR, UN Doc A/45/49, (entered into force 1 July 2003).

<sup>42</sup> Brookings Institution Project on Internal Displacement, 'Report of the International Colloquy on the Guiding Principles on Internal Displacement', Vienna, Austria, September 21-23, 2000, 11.

Colombia.<sup>43</sup> In 2001, the CRC referred to the Guiding Principles in relation to Turkey and the Democratic Republic of Congo, and the HRC made reference to the Principles in respect of Sudan. In the four subsequent years there were only two references to the Guiding Principles, one in relation to the periodic report of the Central African Republic submitted to the HRC and one in relation to the periodic report of Colombia submitted to CEDAW.<sup>44</sup> Since 2006, three different Committees referenced the Guiding Principles in relation to the periodic reports of five countries: Colombia (CRC); the United States of America (HRC); Kosovo (HRC); Ethiopia (CERD); and Sudan (HRC).<sup>45</sup>

In each instance, the reference was made in the context of an ongoing or recently ended conflict. The only exception was in the case of the United States, when the HRC raised the Guiding Principles in the context of displacement caused by Hurricane Katrina in 2005. In this regard, the Committee stated that:

The state part should review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect, as well as of the United Nations Guiding Principles on Internal Displacement, in matters related to disaster prevention and preparedness, emergency assistance and relief measures.<sup>46</sup>

That the HRC would regularly reference the Guiding Principles, including in situations of natural disaster, is most likely explained by the fact that the Representative of the Secretary-General has been an expert on the Committee since 2002. Aside from the HRC, the consistency with which these bodies have used the Guiding Principles has been limited. One likely explanation is the traditional reluctance of treaty-monitoring bodies to refer to standards other than the treaty which the committee was established to monitor. While the HRC may have referred, for

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<sup>43</sup> *Concluding observations of the Committee on the Rights of the Child. Colombia* [61] UN Doc CRC/C/15/Add.137.

<sup>44</sup> *Concluding Observations of the Committee on the Rights of the Child. Turkey* [60] UN Doc CRC/C/15/Add.152; *Concluding Observations of the Committee on the Rights of the Child. Democratic Republic of Congo* [63] UN Doc CRC/C/15/Add.153.

<sup>45</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination* [14] UN Doc CERD/C/304/Add.116.

<sup>46</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination. Ethiopia* [18] UN Doc CERD/C/ETH/CO/15 (2007); *Concluding Observations of the Human Rights Committee. Kosovo (Serbia)* [14] UN Doc CCPR/C/UNK/CO/1 (2006); *Concluding Observations of the Human Rights Committee* [26] UN Doc CCPR/C/USA/CO/3 (2006).

example, to the Standard Minimum Rules on the Treatment of Prisoners when considering particular state practice and obligations,<sup>47</sup> the use of external standards in this way is rare, whether in the case of the Guiding Principles or any other standards.

What is particularly unique about the Guiding Principles, and of particular value to the treaty-monitoring bodies they may serve, is their unparalleled blend of human rights law, international humanitarian law and analogous refugee law. General Comment 29 to the International Covenant on Civil and Political Rights, for example, concerns states of emergency. The General Comment footnotes the Guiding Principles, among other instruments, as relevant "developments within international law as to human rights standards applicable in emergency situations."<sup>48</sup> Thus, the Guiding Principles are considered to provide a unique methodological perspective that is useful to the treaty-monitoring bodies when addressing human rights in situations of armed conflict and other humanitarian emergencies.<sup>49</sup> In general, however, the Guiding Principles have thus far been of limited, if somewhat increasing, use to the human rights treaty-monitoring bodies.

#### *E. Country and thematic rapporteurs*

In 1980, the Commission on Human Rights started to develop 'special procedures', individual thematic and country mandates established to provide a focus on issues or country situations giving rise to particular human rights concerns. One of the strengths of these special procedures, in contrast to the treaty-monitoring bodies, is that they are subject to fewer administrative and practical restrictions on the way they can conduct investigations into the human rights record of a particular country, the types of human rights issues they can consider, and the form that dialogue with states can take. There are currently 28 thematic mandates and ten country-specific

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<sup>47</sup> *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 4th periodic report : Sri Lanka*, UN Doc CCPR/C/LKA/2002/4 (2003); *Consideration of reports submitted by States parties under article 40 of the Covenant : concluding observations of the Human Rights Committee : Dominican Republic*, UN Doc CCPR/CO/71/DOM (2001); *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : Initial reports of States parties due in 1992 : The former Yugoslav Republic of Macedonia*, UN Doc CCPR/C/74/Add.4 (1998).

<sup>48</sup> *General Comment 29: States of Emergency (Article 4)*, [10 n6] UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

<sup>49</sup> Brookings Institution Project on Internal Displacement, 'Report of the International Colloquy on the Guiding Principles on Internal Displacement', Vienna, Austria, September 21-23, 2000, 11.

mandates. The mandates of these special procedures are established by resolution of the Council or the General Assembly, and usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, or on major phenomena of human rights violations worldwide. Various activities can be undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities.

Over the course of the past ten years, several special procedures, holding both thematic and country mandates, have addressed internal displacement and referred to the Guiding Principles, including the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, the Special Rapporteur on Torture, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the Right to Food; the Special Representative of the Secretary-General on human rights defenders; and the Special Rapporteurs for Afghanistan, Bosnia and Herzegovina, Burundi, Somalia and Sudan.<sup>50</sup>

These special procedures have demonstrated increased awareness of the relevance of the Guiding Principles to their mandates and have expressed an expectation that the Principles be used and applied in a variety of ways including, through their translation into local languages and distribution to displaced women;<sup>51</sup> as a legal framework for the national and international community;<sup>52</sup> as a guide for government authorities and international organisations in their assistance to the internally displaced;<sup>53</sup> and as a document which sets out the rights of the internally displaced. The Special

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<sup>50</sup> See, eg, Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/HRC/4/18; Hina Jilani, *Promotion and Protection of human rights. Human rights defenders. Addendum*, UN Doc E/CN.4/2005/101/Add.2; *Situation of human rights in the Darfur region of the Sudan*, UN Doc E/CN.4/2005/3; Jean Ziegler, *The right to food. Report by the Special Rapporteur on the Right to Food. Addendum*, UN Doc E/CN.4/2003/54/Add.1.

<sup>51</sup> Kamal Hossain, *Report on the Situation of Human Rights in Afghanistan*, [33] UN Doc E/CN.4/2001/43 (2001).

<sup>52</sup> Jose Cutileiro, *Report of the Special Rapporteur on the Situation of Human Rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia*, [53] UN Doc E/CN.4/2002/41 (2002).

<sup>53</sup> Marie-Therese A Keita Bocoum, *Report of the Special Rapporteur on the Human Rights Situation in Burundi*, [171, 198] UN Doc E/CN.4/2001/44 (2001).

Rapporteurs for Sudan and for Violence against Women stated that parties should abide by, implement and ensure enforcement of the Guiding Principles, but did not explain further how this should occur.<sup>54</sup> These references to the Guiding Principles, while occurring in the reports of several mandate-holders, are the exceptions to the often cursory attention paid to the Principles, their lack of contextual application and general absence from the recommendations of the special procedures.

In 2005, the Special Rapporteur on violence against women, its causes and consequences conducted missions to the Darfur region of Sudan and to Afghanistan, regions significantly affected by internal displacement. While the Rapporteur referred to this displacement, no mention was made of the Guiding Principles, either in her analysis of the human rights situation caused by this displacement, or in her recommendations.<sup>55</sup> Only in her report concerning Colombia, a country that has developed a law based on the Guiding Principles, did the Rapporteur refer to and make a recommendation based on the Principles.<sup>56</sup> Similarly, the Special Rapporteur on the right to education has visited several countries with significant internally displaced populations including Uganda, Turkey and Colombia. Only in the case of Colombia did the Special Rapporteur reference the situation of internal displacement,<sup>57</sup> but not the Guiding Principles, notwithstanding the fact that, as mentioned above, that Colombia had adopted a law based on the Guiding Principles and the law includes specific provisions regarding education for the internally displaced.<sup>58</sup>

In 2000, the Representative and the Brookings Institution Project on Internal Displacement convened a meeting of representatives of international and regional

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<sup>54</sup> Yakin Ertürk, *Violence against women, its causes and consequences. Report of the Special Rapporteur. Addendum. Mission to Colombia*, E/CN.4/2006/61/Add.5 (2006).E/CN.4/2002/83/Add.3 (2002) 3.

<sup>55</sup> Yakin Ertürk, *Violence against women, its causes and consequences. Report of the Special Rapporteur. Addendum. Visit to the Darfur Region of Sudan*, UN Doc E/CN.4/2005/72/Add.5 (2005); Yakin Ertürk, *Violence against women, its causes and consequences. Report of the Special Rapporteur. Addendum. Mission to Afghanistan*, UN Doc E/CN.4/2006/61/Add.5 (2006).

<sup>56</sup> Yakin Ertürk, *Violence against women, its causes and consequences. Report of the Special Rapporteur. Addendum. Mission to Colombia*, UN Doc E/CN.4/2006/61/Add.5 (2006).E/CN.4/2002/83/Add.3 (2002) 3.

<sup>57</sup> Katarina Tomaševski, *The right to education. Report submitted by Katarina Tomaševski, Special Rapporteur. Addendum. Mission to Colombia*, UN Doc E/CN.4/2004/45/Add.2 (2004).

<sup>58</sup> Law 387 [of Colombia] (1997), Diario Oficial (No. 43,091, 1997) art 19(10).

organisations, including the UN Special Coordinator on Internal Displacement, the Director of the Office of the UN High Commissioner for Human Rights (OHCHR) New York Office, among many others. Convened to consider progress made in promoting the Guiding Principles, participants acknowledged the relative infrequent use of the Principles by special procedures but were encouraged by the creation of new thematic mandates that related to internal displacement and which provided cause for hope that the application of the Guiding Principles may become an increased tool of general practice rather than infrequent happenstance.<sup>59</sup> These new mandates were the Special Rapporteurs on the right to housing and on the right to food, and the Representative of the Secretary-General on human rights defenders.

The current Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, in particular, has incorporated relevant issues of internal displacement into his activities and uses the Guiding Principles as a tool by which to measure state compliance with their responsibilities and as the basis for recommendations. One likely explanation for the attention paid by Kothari to internal displacement, and the Guiding Principles specifically, is not only the synergy that exists between his mandate and that of the Representative, but the active incorporation by the Representative of Kothari into his activities, both as an expert involved in the draft of a law and policy manual on internal displacement for national legislators, and as a colleague engaged in a joint mission to Lebanon in 2006. Indeed, the Representative has worked closely with several of the special procedures, both in the development and promotion of the Guiding Principles and in the conduct of country missions. For example, the Representative has collaborated with the Special Rapporteur on Torture, Manfred Nowak, who was one of the preliminary drafters of the Compilation and Analysis of Norms that formed the basis for the Guiding Principles; and the Rapporteurs on the right to health and on summary executions who, like Kothari, conducted a joint mission to Lebanon with the Representative in 2006.<sup>60</sup>

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<sup>59</sup> Brookings Institution Project on Internal Displacement, 'Report of the International Colloquy on the Guiding Principles on Internal Displacement', Vienna, Austria, September 21-23, 2000, 9-10.

<sup>60</sup> For reference to the joint mission, see: 'Mission to Lebanon and Israel (7-14 September 2006): report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing

While the direct approach of the Representative to Kothari has paid significant dividends insofar as the right to adequate housing and the rights of the internally displaced as set out in the Guiding Principles are securely linked, the otherwise unsystematic and incomprehensive approach to internal displacement and the Guiding Principles taken by most special procedures reveals the extent to which continued promotional activities need to be undertaken, even among the experts who comprise the UN human rights system.

#### *F. UN and other international agencies*

In as much as the Guiding Principles were intended to be a tool for states in the development of their national laws and policies, and as a monitoring tool for the UN human rights system as well as NGOs, the Principles were also intended to be a framework to be applied by operational agencies and humanitarian organisations in the field. Consequently, throughout the process of drafting the Principles, the Representative sought to rally a consensus around the final document from among the principal international agencies. In this regard, not only was UNHCR and ICRC's endorsement of the notion of developing international standards on internal displacement of importance<sup>61</sup>, but so too was their participation as experts in the working group dedicated to drafting the final Principles.<sup>62</sup> This core team was joined later by other international organisations, including the World Health Organisation (WHO) and the International Organisation for Migration (IOM).

By engaging these organisations in the development of the Guiding Principles, the Representative not only ensured a stronger, more operationally useful document, but also increased the likelihood that the Guiding Principles would actually be adopted by these organisations and disseminated to their operations in the field. Indeed, even before the Guiding Principles were presented to the Commission on Human Rights, they were first presented to the Inter-Agency Standing Committee (IASC). The IASC is an inter-agency body created in June 1992 pursuant to a General Assembly

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as a Component of the Rights to an Adequate Standard of Living, Miloon Kothari', UN Doc A/HRC/2/7(2006).

<sup>61</sup> Roberta Cohen, 'The Development of International Strategies to Protect Internally Displaced Persons', Presentation, 7 May 1998.

<sup>62</sup> Thomas G Weiss and David A Korn, *Internal Displacement: Conceptualization and its Consequences* (2006) 62.

resolution aimed at strengthening humanitarian assistance.<sup>63</sup> Chaired by the UN Emergency Relief Coordinator, IASC is comprised of the key UN and non-UN humanitarian partners including UNHCR, the WHO, the United Nations Development Programme and the World Food Programme (WFP).<sup>64</sup> Standing invitees include other UN entities such as OHCHR, the Representative of the Secretary-General, and NGOs including the International Council of Voluntary Agencies (ICVA), and InterAction.<sup>65</sup> When presented with the Guiding Principles, the IASC welcomed them and called upon its members to disseminate and apply them.<sup>66</sup>

Since welcoming the Guiding Principles, the IASC has worked with its members to develop several tools to assist in the protection activities of its members and the application of the Guiding Principles.<sup>67</sup> The most recent tools include the Operational Guidelines on Human Rights and Natural Disasters (2006); Guidance on Profiling Internally Displaced Persons (November 2007); and the Handbook for Protection of Internally Displaced Persons (December 2007).

#### *1. Office of the United Nations High Commissioner for Refugees*

The Protection Handbook was the result of a collaborative inter-agency effort coordinated by UNHCR. The Protection Handbook reflects the stated position of UNHCR with regard to the Guiding Principles, that they "do not constitute an

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<sup>63</sup> 'Strengthening of the coordination of humanitarian emergency assistance of the United Nations', GA Res 46/182, UN GAOR, UN Doc A/RES/46/182 (1991) Annex.

<sup>64</sup> The following organisations are full members of the IASC: Office for the Coordinator of Humanitarian Affairs (OCHA); UNHCR, World Health Organisation (WHO), United Nations Development Programme (UNDP), United Nations Fund for Children (UNICEF); the United Nations Population Fund (UNFPA); and the Food and Agriculture Organisation (FAO).

<sup>65</sup> The following organisations are standing invitees to the IASC: Office of the High Commissioner for Human Rights (OHCHR); World Bank; ICVA; International Committee of the Red Cross; Representative of the Secretary-General on the human rights of internally displaced persons; International Organisation for Migration (IOM); International Federation of the Red Cross (IFRC); Steering Committee for Human Response; and InterAction.

<sup>66</sup> The Inter-Agency Standing Committee took this decision on 26 March 1998 cited in Brookings Institution Project on Internal Displacement, 'Report of the International Colloquy on the Guiding Principles on Internal Displacement', Vienna, Austria, September 21-23, 2000, 2.

<sup>67</sup> See, eg, the IASC Policy on the Protection of Internally Displaced Persons (December 1999), the Supplementary Guidance to Humanitarian and Resident Coordinators on their Responsibilities in Relation to IDPs (March 2000); the Guidance Note on the Collaborate Approach in Responding to Crises of Internal Displacement (March 2003); and Implementing the Collaborative Response to Situations of Internal Displacement: Guidance for United Nations Humanitarian and/or Resident Coordinators and Country Teams (September 2004).



independent legal source,"<sup>68</sup> and therefore should be considered alongside international human rights and humanitarian law. That said, UNHCR has been at the forefront of most efforts to operationalise the Guiding Principles, although strictly in the context of conflict-induced displacement, in accordance with its historic mandate.

In 1997, on the basis of the compilation of legal standards alone, UNHCR developed a reference manual for its field staff on the international legal standards applicable to the protection of internally displaced persons.<sup>69</sup> Following the completion of the Guiding Principles, the Executive Committee of the High Commissioner's Programme reiterated the relevance of the Principles.<sup>70</sup> Since then, use of the Guiding Principles as the basis for protection and assistance to internally displaced persons has become an accepted practice<sup>71</sup> and has translated into practical activities in the field, including use of the Guiding Principles as an advocacy tool to train national and local officials, policy and other authorities about the rights of internally displaced persons and their responsibilities towards them;<sup>72</sup> as an informational tool to sensitise local and foreign media as to the rights of internally displaced persons;<sup>73</sup> as the basis for a rights-based approach to UNHCR programming;<sup>74</sup> as the normative basis upon which to advise on the development of national policy;<sup>75</sup> as a monitoring tool by which to determine gaps in national protection mechanisms;<sup>76</sup> and as a legal standard upon which to advocate for the protection of the rights of specific internally displaced populations.<sup>77</sup>

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<sup>68</sup> UNHCR, 'The Protection of Internally Displaced Persons and the Role of UNHCR', Informal Consultative Meeting, 27 February 2007, 5.

<sup>69</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, 53rd sess, [7] UN Doc E/CN.4/1997/43 (1997).

<sup>70</sup> UNHCR Executive Committee, Conclusions, No. 87 (L) – 1999, [(t)].

<sup>71</sup> See, eg, 'Note on International Protection', Executive Committee of the High Commissioner's Programme, 54th sess, [54] UN Doc A/AC.96/975 (2003); Statement by Ms. Erika Feller, Assistant High Commissioner for Protection', Fifty-seventh session of the Executive Committee of the High Commissioner's Programme, 2006, 4; 'Policy Framework and Corporate Strategy: UNHCR's role in support of an enhanced inter-agency response to the protection of internally displaced persons', Informal Consultative Meeting, 30 January 2007 [27].

<sup>72</sup> See, eg, UNHCR, *Global Report 2000, Sri Lanka*, (June 2001); UNHCR's Contribution to the Inter-agency Response to IDP Needs: Summary of Activities under the Supplementary Appeal, May 2007, 11 (Chad), 20 (Central African Republic); UNHCR, *Global Appeal 2003: Colombia* (December 2002).

<sup>73</sup> UNHCR, *Global Appeal 2001 – South America Regional Overview* (December 2000).

<sup>74</sup> UNHCR's Contribution to the Inter-agency Response to IDP Needs: Summary of Activities under the Supplementary Appeal, May 2007, 7 (Democratic Republic of Congo).

<sup>75</sup> See, eg, UNHCR, *Global Report 2001 – Sri Lanka* (June 2002); IASC, *Common Appeal for Transition Support: Nepal 2007*, 20.

<sup>76</sup> UNHCR, *Global Report 2003 – Serbia and Montenegro* (June 2004).

<sup>77</sup> UNHCR, *Global Appeal 2002 – Georgia* (December 2001).

Three principal reasons exist for UNHCR's active engagement in the implementation of the Guiding Principles. The first was identified by the Assistant High Commissioner for Protection, Erika Feller, who in 2006 noted that the Guiding Principles "are gaining currency as the reference point for IDP operations, not least due to their effective promotion by the Secretary-General's Representative on the Human Rights of IDPs."<sup>78</sup> Indeed, the strength of the relationship between the Representative and UNHCR is reflected in a Memorandum of Understanding signed in 2006.

The second reason relates to the parallel processes that saw the appointment of a Representative charged with strengthening the normative framework for the protection of internally displaced persons, as well as the rapid building of momentum to strengthen the institutional framework for their protection. Thus, in 1992, just as Francis Deng was assuming his newly created role as Representative of the Secretary-General, UNHCR recognised for the first time that "certain responsibilities have to be assumed on behalf" of the internally displaced.<sup>79</sup> That same year, the General Assembly explicitly recognised the extension of UNHCR's mandate to internally displaced persons.<sup>80</sup>

Between 1992 and 1998, while the Representative was completing the Guiding Principles, UNHCR was undertaking its own processes to elaborate internal guidelines concerning its involvement with internally displaced persons. Consequently, in 1993, UNHCR issued its first guidelines which were developed and refined in the following years.<sup>81</sup> In 1998, by the time the Guiding Principles had been completed, UNHCR's mandate with regard to internally displaced persons was increasingly clear and the need for operational guidelines was evident. As the Principles have gained increasing international acceptance, the synergy between the practical applicability of the Guiding Principles in situations of internal displacement,

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<sup>78</sup> Statement by Ms. Erika Feller, Assistant High Commissioner for Protection', Fifty-seventh session of the Executive Committee of the High Commissioner's Programme, 2006, 4.

<sup>79</sup> *Note on International Protection*, [33] UN Doc A/AC.96/799 (1992).

<sup>80</sup> *Office of the United Nations High Commissioner for Refugees*, GA Res 47/105, UN GAOR, 89th plen mtg, [14] UN Doc A/RES/47/105 (1992).

<sup>81</sup> See, eg, UNHCR's role with internally displaced persons, [7] IOM/33/93-FOM/33/93 (1993); UNHCR, Consistent and predictable responses to IDPs – a review of UNHCR's decision-making process, [5] EPAU/2005/2 (2005).

and the need of UNHCR for practical guidance in how to coordinate and implement its own operational activities, resulted in a natural alliance.

This leads to the third reason why UNHCR has so actively adopted the Guiding Principles – the lack of any alternative. No other document exists that provides the same level of legal as well as operational guidance as to the protection needs of internally displaced persons. For this reason, not only UNHCR, but also OCHA, the IOM, UNHabitat, as well as NGOs such as the Norwegian Refugee Council and the International Rescue Committee, have incorporated the Guiding Principles into their field activities. The primary activities of these organisations in relation to the Guiding Principles are to conduct training, sensitisation and promotion activities as well as to ensure general compliance with the Guiding Principles in relevant decision-making processes.<sup>82</sup>

## 2. *Office of the High Commissioner for Human Rights*

Two relevant actors conspicuously missing from the growing cohort of international organisations making operational use of the Guiding Principles are OHCHR and ICRC. OHCHR is yet to achieve a noticeable field presence. That said, of the few country offices which OHCHR has now opened, several are located in countries or regions significantly affected by internal displacement including Angola, Togo, Uganda, Nepal, Bosnia and Herzegovina, and Colombia. Yet, promotion and application of the Guiding Principles by these field offices is not as systematic as perhaps could be expected. The OHCHR offices most active in addressing internal displacement and applying the Guiding Principles are the offices in Colombia and Nepal. As these and other OHCHR offices become more established and grow in size and resources, so too might the organisation's advocacy with regards the Guiding Principles. For this to occur, the headquarters in Geneva need also to increase their engagement with issues of internal displacement.

The former High Commissioner for Human Rights, Mary Robinson, on occasion used the Principles in her advocacy efforts in regard to specific country situations. For

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<sup>82</sup> See, eg, United Nations, *Consolidated Appeal: Côte d'Ivoire (2008)*, 26, 33; United Nations, *Consolidated Appeal: Central African Republic (2008)*, 61.

instance, in a press release of January 2000, the High Commissioner condemned the forced relocation of the population in certain provinces in Burundi to camps where they lacked adequate shelter, access to food and water, health care and education, noting this measure as contrary to the relevant principles of international law, as restated in the Guiding Principles.<sup>83</sup> This statement, however, is the only one of its sort to emanate from the Office of the High Commissioner. In general, OHCHR pays limited attention to issues of internal displacement and even less attention to the Guiding Principles.

### 3. *International Committee of the Red Cross*

The ICRC, in contrast, works on a continual basis with the internally displaced, yet has established a conceptual distance between it and the Guiding Principles. Just as the ICRC initially opposed the creation of a special mandate to address internal displacement, so too it has remained circumspect about the relevance and applicability of the Guiding Principles to its operations. The ICRC is mandated by the Geneva Conventions and ICRC Statutes to assist victims of conflict and internal violence. As such, it does not prioritise the needs of one group over another and therefore is reluctant to appear to be singling out the internally displaced as a group with particular needs.

To the extent that the ICRC has addressed internally displaced persons as a particular group in need, it has done so based on its position paper on internally displaced persons published in May 2006. This paper, while noting that there exists no legally binding definition of an internally displaced person, acknowledges that the description most commonly used within the international community is that provided in the Guiding Principles.<sup>84</sup> It does not proffer an alternative definition of an internally displaced person to that contained in the Guiding Principles. As Jean-Philippe Lavoyer, Deputy Head of the ICRC Legal Division wrote in 1998:

The ICRC has never attempted to define the term “internally displaced person”, simply because all displaced persons fall within the category “civilian

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<sup>83</sup> Francis M Deng, *Report of the Representative of the Secretary-General*, UN Comm'n on Hum. Rts., [51] UN Doc E/CN.4/2001/5 (2001).

<sup>84</sup> International Committee of the Red Cross, *ICRC Position Paper on Internally Displaced Persons* (May 2006) 2.

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.<sup>85</sup>

Thus, while acknowledging the increased attention being paid by the international community to the needs of internally displaced persons and considering the Guiding Principles a "valuable benchmark",<sup>86</sup> the ICRC retains its commitment to addressing the most urgent humanitarian needs of civilian populations as a whole, be they displaced persons or local and host communities.

While the ICRC mandate provides a clear justification for its limited operational engagement with internally displaced persons as such, and therefore for its lack of field activities aimed at the application of the Guiding Principles, the mandates of several other humanitarian organisations suggest that they should be more actively involved in the promotion and application of the Principles. Key among these are the agencies recently identified in a UN humanitarian overhaul process as responsible for coordination of various sectors, or 'clusters', in the event of a humanitarian emergency, including WHO, United Nations Development Programme and IOM, and specifically OHCHR and the UN Children's Defence Fund (UNICEF), which are responsible, with UNHCR, as protection cluster leads in situations of natural disaster.<sup>87</sup>

As the cluster approach gains momentum and lessons are learnt from pilot operations, the promotion and application of the Guiding Principles by the responsible agencies will only become more common if the Principles are perceived as having operational relevance. Practice to date suggests that the Principles, while having achieved a high level of rhetorical acceptance at the levels of the Security Council, General Assembly and Human Rights Council, are insufficient in themselves as a basis for targeted operational activities. In the area of protection, the Principles have proven useful as a

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<sup>85</sup> Jean-Philippe Lavoyer, 'Guiding Principles on Internal Displacement: A few comments on the contribution of international humanitarian law' (September 1998) 324 *International Review of the Red Cross* 467.

<sup>86</sup> International Committee of the Red Cross, *ICRC Position Paper on Internally Displaced Persons* (May 2006) 3.

<sup>87</sup> Inter-Agency Standing Committee, *Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response*, (2006) 3.

broad framework within which to identify and highlight the specific needs of internally displaced persons, including through training. They have also been used as a monitoring tool. In the design and implementation of specific protection, relief and assistance activities, however, the Principles may suffer from too broad a level of generality.

Legal, technical and operational guidance to address the rights and responsibilities arising from situations of internal displacement remain critical to ensuring that the internally displaced are appropriately assisted, and their rights respected. To the extent that the Guiding Principles have proven inadequate in providing specific guidance, additional tools identifying in greater depth the activities to be carried out in support of the internally displaced are being developed. These include the *UNHCR Protection Handbook* and the *IASC Operational Guidelines on Human Rights and Natural Disasters*. In many cases of legal protection, however, new tools may not be necessary.

The Guiding Principles provide a comprehensive framework for identifying the rights and responsibilities arising from internal displacement. Failure to realise the potential of the Guiding Principles in this regard suggests a need for greater awareness raising and promotion of the Guiding Principles particularly *within* human rights mechanisms. As a non-binding instrument, the Guiding Principles have the advantage of not needing to be ratified in order to be considered relevant to a particular state. That said, the Guiding Principles would be especially valuable as a standard to which states that have voluntarily adopted laws and policies based on the Guiding Principles can be held to account, including not only Colombia, but also Georgia, Nepal, Turkey and Uganda, to name a few. Only once the Principles are systematically and consistently applied to situations of internal displacement can the Principles be said to be an international standard with which national authorities consider themselves obligated to comply. To date, however, the Guiding Principles are not an integrated part of the monitoring activities of the international human rights system and are still in the process of becoming integrated into operational humanitarian programming.

## II. REGIONAL

Regional inter-governmental organisations share with the international community the responsibility to promote and protect the rights of the internally displaced. The regional nature and impact of conflicts and natural disasters makes the potential role of regional organisations in addressing these crises self-evident. Furthermore, for reasons of politics, as well as effectiveness and resources, the burden of addressing humanitarian emergencies cannot rest on the shoulders of the UN system alone. Consequently, regional organisations such as the African Union (AU) and Organisation for Security and Cooperation in Europe (OSCE), sub-regional organisations, and bodies such as the Commonwealth are increasingly being expected to assume some of the responsibility in their own geographic areas.<sup>88</sup>

Regional organisations are in a position to adapt policies to regional realities and to develop conflict resolution as well as conflict prevention, early-warning and emergency response mechanisms that address the particularities of the region. In light of the growing relevance and involvement of regional organisations in addressing conflict, including as peacekeepers and providers of protection and assistance, the Representative of the Secretary-General has courted regional organisations and encouraged their adoption, dissemination and application of the Guiding Principles. The fruits of these efforts are reflected in the formal endorsement of the Guiding Principles by the governing bodies of all principal regional organisations. Furthermore, regional organisations, like their international counterparts, have started to use the Guiding Principles as a tool in monitoring, as a legal standard by which to measure states' response to internal displacement, and as a promotional and training tool. In addition, on the African continent, the Guiding Principles have started to be used as the basis for developing regional standards on internal displacement.

### *A. Acceptance and promotion of the Guiding Principles*

The OAU was the first regional organisation to consider the specific implications of the Guiding Principles in their regional context. In October 1998, only months after the completion of the Guiding Principles, the OAU convened a seminar on 'Enhancing

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<sup>88</sup> 'Internal displacement in Africa', Report of a workshop held in Addis Ababa, Ethiopia, 19-20 October 1998, UNHCR – Brookings Institution – OAU, 11.

the Participation of Returnees, Refugees and Internally Displaced Women in Reconstruction, Rehabilitation and Peace-Building.' The Plan of Action arising from that meeting called for the Secretary-General of the OAU to encourage states to ensure compliance with the Guiding Principles. At the same time, participants urged the OAU to give consideration to the establishment of a focal point for internal displacement, and possibly a dedicated unit, with the capacity to collect data on the issue of internal displacement and monitor the dissemination and implementation of the Guiding Principles.<sup>89</sup> Immediately following this seminar, the OAU convened a workshop specifically on the theme of "Internal Displacement in Africa," a principal aim of which was to promote and disseminate the Guiding Principles.

Carried by the momentum built by these meetings, the Representative was invited to present the Guiding Principles to the OAU Commission on Refugees at its 30<sup>th</sup> session, held in June 1999. The Commission called for increased awareness in Africa of the Principles, with the suggestion that a promotion campaign be launched by the OAU and other relevant actors to that end. This decision was then submitted to the OAU Council of Ministers at its 70<sup>th</sup> ordinary session held in Algiers in July of the same year. The OAU Secretary-General, in his report to the 30<sup>th</sup> ordinary session of the OAU Commission on Refugees, on the situation of refugees, returnees and displaced persons in Africa, highlighted the decision of the Commission, taking note of the Guiding Principles with interest and appreciation.<sup>90</sup> In 2000 the Guiding Principles were included as part of the Compendium of OAU Instruments and Texts on Refugees, Returnees and Displaced Persons in Africa.

African sub-regional organisations, particularly the Economic Community of West African States (ECOWAS) and IGAD, as well as the ad hoc regional process represented by the International Conference on the Great Lakes Region (ICGLR), similarly have acknowledged the relevance of the Guiding Principles.<sup>91</sup> In the case of

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<sup>89</sup> 'Internal Displacement in Africa', Report of a workshop held in Addis Ababa, Ethiopia, 19-20 October 1998, UNHCR – Brookings Institution – OAU, 11-12.

<sup>90</sup> Francis M Deng, *Report on internally displaced persons*, UN GA, GAOR, 54th sess, [25-26] UN Doc A/54/409 (1999).

<sup>91</sup> See, eg, Accra Declaration on War-Affected Children in West Africa, ECOWAS, 27-28 April 2000, [13]; Khartoum Declaration: Ministerial Conference on Internally Displaced Persons in the IGAD Sub-region, Khartoum, Sudan, 2 September 2003, [7.i]; Pact on Security, Stability and Development in the Great Lakes Region, adopted by International Conference on the Great Lakes Region, 15 December 2006, art 12.



both ECOWAS and IGAD, attention was drawn to the Guiding Principles during regional meetings sponsored by the Representative, among others.<sup>92</sup> The only key sub-regional organisation of Africa not to formally acknowledge the Guiding Principles is the Southern African Development Community.

The process by which the Organisation of American States (OAS) acknowledged their support for the Guiding Principles was also launched in a regional seminar on internal displacement. In 2004, the Representative and the Brookings Project on Internal Displacement co-sponsored, with the Government of Mexico, a seminar on internal displacement in the Americas.<sup>93</sup> Subsequently, the Mexican Foreign Minister was instrumental in the passage of a resolution in the OAS General Assembly acknowledging the achievements of the seminar and calling on Member States to consider the Guiding Principles in designing policies on internally displaced persons.<sup>94</sup> Several resolutions on internal displacement have followed. The 2007 resolution urged Member States to consider using the Guiding Principles as a basis for their plans, politics and programs in support of the internally displaced.<sup>95</sup>

Regional European entities came to the Guiding Principles at around the same time as the OAS. The apparent impetus for European consideration of the Guiding Principles was the active involvement of Austria, if not also Norway, in the process of ushering the Principles through the Commission on Human Rights and General Assembly, respectively. The OSCE, whose Austrian Chairman-in-Office convened in 2004 a Supplementary Human Dimension Seminar on migration and internal displacement, in 2003 adopted the Rotterdam Declaration of the OSCE Parliamentary Assembly, urging "the creation of additional standard-setting language concerning internally

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<sup>92</sup> Khartoum Declaration: Ministerial Conference on Internally Displaced Persons in the IGAD Sub-region, Khartoum, Sudan, 2 September 2003; Brookings-Project on Internal Displacement, *Report of the First Regional Conference on Internal Displacement in West Africa*, (2006).

<sup>93</sup> Brookings Institution Project on Internal Displacement, Regional Seminar on Internal Displacement in the Americas, Mexico City, 18-20 February 2004.

<sup>94</sup> AG/RES 2055 (XXIV O/04), Internally Displaced Persons (Adopted at the fourth plenary session, held on June 8, 2004), [2].

<sup>95</sup> AG/RES 2277 (XXXVII O/07), Internally Displaced Persons (Adopted at the fourth plenary session, held on June 5, 2007), [2].

displaced persons at the OSCE Ministerial meeting...through, *inter alia*, the endorsement of the United Nations Guiding Principles".<sup>96</sup>

Later that year, the Ministerial Council decided to take into account the Guiding Principles "as a useful framework for the work of the OSCE and the endeavours of participating States in dealing with internal displacement".<sup>97</sup> This decision, in turn, was welcomed by the Parliamentary Assembly of the OSCE which itself "urged all participating States to respect the UN Guiding Principles".<sup>98</sup>

In a separate process, in 2003 the Parliamentary Assembly of the Council of Europe issued a recommendation in which it expressed its appreciation of the decisive role played by the Representative in the development of the Guiding Principles. In the recommendation, the Assembly referred to the Guiding Principles as a "standard ... and an important tool."<sup>99</sup> While the Parliamentary Assembly continued to refer to the Guiding Principles in its consideration of situations of internal displacement,<sup>100</sup> it was not until 2006 that the Committee of Ministers of the Council of Europe adopted a Recommendation specifically calling on Member States to apply the Guiding Principles in their policy and practice.<sup>101</sup>

The Guiding Principles, as an instrument concerning the rights of internally displaced persons, addresses one of the core concerns of the Council of Europe – human rights. In contrast, the European Union (EU), a largely political and economic organisation, has not adopted any decisions or made any organisational statements concerning the Guiding Principles. Yet, it has played an important role in other fora, particularly in

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<sup>96</sup> Rotterdam Declaration of the OSCE Parliamentary Assembly, July 5-9, 2003, Chapter III, Democracy, Human Rights and Humanitarian Questions, [85].

<sup>97</sup> OSCE, Ministerial Council, Maastricht 2003, Decision No. 4/03, 'Tolerance and Non-Discrimination', [13] MC/DES/4/03, 2 December 2003.

<sup>98</sup> OSCE, Edinburgh Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Thirteenth Annual Session, Edinburgh, 5 to 9 July 2004, [94].

<sup>99</sup> Parliamentary Assembly, Council of Europe, Recommendation 1631 (2003), 'Internal Displacement in Europe', [11].

<sup>100</sup> See, eg, Parliamentary Assembly, Council of Europe, 'Internal Displacement in Europe', Recommendation 1631 (2003), Reply from the Committee of Ministers, adopted at the 890th meeting of the Ministers' Deputies (30 June 2004), 2 July 2004, Doc. 10247, [9]; Education of refugees and internally displaced persons, Parliamentary Assembly Recommendation 1652 (2004) (Reply adopted by the Committee of Ministers on 12 January 2005 at the 911th meeting of the Ministers' Deputies), CM/AS (2005) Rec 1652, 17 January 2005, [4, 5].

<sup>101</sup> Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons, Council of Europe (Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies).

the Security Council, as a vocal and consistent supporter of the Guiding Principles, particularly at the turn of the 21st century when Sudan and other states were questioning the legitimacy of the Guiding Principles.<sup>102</sup> Furthermore, on several occasions all EU member states have joined as sponsors of resolutions concerning internal displacement in the Commission on Human Rights and General Assembly. Indeed, the EU, as an institution and as a membership organisation of twenty-seven states, has been the most vocal regional organisation in support of the Principles on the international stage.

The only regions wholly unrepresented in this move towards regional adoption of the Guiding Principles have been Asia and the Arab world. In the case of the latter, the League of Arab States has demonstrated a reluctance to so much as undertake activities on behalf of the internally displaced, let alone make public statements specifically in relation to the Guiding Principles. This, notwithstanding that both the 1992 Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World and the 1995 Regional Seminar on Internal Displacement of Populations in Arab Countries, Human Rights and Humanitarian Law urged the League to play a more active role.

In the case of Asia, the mandate of the Association of Southeast Asian Nations (ASEAN) allows it to undertake initiatives to prevent or resolve internal conflicts and to address forcible displacement. Yet, in practice it has demonstrated a general wariness about taking up issues relating to the internal conditions within its member states and has given no indication that it would adopt a different stance in relation to internal displacement.<sup>103</sup> The South Asian Association for Regional Cooperation (SAARC) also emphasises non-interference in internal affairs and has not made any statement in relation to either internal displacement or the Guiding Principles.

By failing to acknowledge the Principles at the regional level, organisations also fail to promote their use at the national level. Asia, for example, is the continent in which

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<sup>102</sup> See, eg, UN SCOR, 4046<sup>th</sup> meeting, Friday, 17 September 1999, [8] UN Doc S/PV.4046 (Resumption 1); UN SCOR, 4176<sup>th</sup> meeting, Wednesday, 26 July 2000, [26] UN Doc S/PV.4176; UN SCOR, 4660<sup>th</sup> meeting, Tuesday, 10 December 2002, [4] UN Doc S/PV.4660 (Resumption 1).

<sup>103</sup> Roberta Cohen, '“Tough Nuts to Crack”: Dealing with Difficult Situations of Internal Displacement', Working Paper presented, 28 January 1999.

use of the Guiding Principles as the basis for national laws, policies or programmes is least frequent. Indeed, only Nepal has adopted a policy based on the Guiding Principles. India, a recurrent opponent of most efforts to promote the Guiding Principles, as well as Sri Lanka, Pakistan, and Indonesia have either not adopted any specific measures to address the significant situation of internal displacement within their countries, or have done so without regard to the Guiding Principles. The Philippines has taken steps towards adopting a law on internal displacement which is to be based on the Guiding Principles, however, the process from development to adoption has thus far lasted two years and the draft bill is yet to come before the parliament.

When regional organisations have promoted the Guiding Principles, they have seldom been catalytic in their impact, yet they have contributed to a process whereby national, as well as international attention is brought to the situation of the internally displaced. Momentum is thereby slowly being built leading to increasingly comprehensive and effective national policies. In May 2000, for example, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) co-sponsored, a "Regional Workshop on Internal Displacement in the South Caucasus", held in Tbilisi, Georgia. The workshop involved a preliminary analysis of the promotion and implementation of the Guiding Principles in that region<sup>104</sup> and led in the following years to the detailed analysis of the situation and legislation in Armenia, Azerbaijan and Georgia.<sup>105</sup> Although ODIHR has withdrawn from continued work on internal displacement, the Caucasus have remained on the international agenda. The Representative has conducted missions to each of the countries of the region and, in the case of Georgia, significant policy and legislative advances have been made towards fulfilling the rights of the internally displaced.<sup>106</sup>

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<sup>104</sup> Summary Report of the Regional Workshop on Internal Displacement in the South Caucasus (Armenia, Azerbaijan, Georgia), the Brookings Institution Project on Internal Displacement, Norwegian Refugee Council and OSCE/ODIHR, Tbilisi, Georgia, May 10-12, 2000.

<sup>105</sup> Roberta Cohen, Walter Kälin and Erin Mooney, 'The Guiding Principles on Internal Displacement and the Law of the South Caucasus: Georgia, Armenia, Azerbaijan', *Studies in Transnational Legal Policy*, No. 34.

<sup>106</sup> See *Law of Georgia on Internally Displaced Persons* (as amended 2006); *Law on Property Restitution and Compensation for the Victims of Conflict in the Former South Ossetian Autonomous District in the Territory of Georgia* (2007).

The Council of Europe has also been active in promoting the Guiding Principles through its Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR). In March 2003, CAHAR distributed the Guiding Principles to all its members and considered their relevance in the European context. Despite determining that some of the Guiding Principles were already incorporated in existing binding instruments of the Council, including the European Convention on Human Rights, CAHAR decided to establish a Working Party to elaborate a recommendation of the Committee of Ministers on internally displaced persons.<sup>107</sup> It was this process which ultimately led in 2006 to the Council's formal recommendation that Member States be guided by the Guiding Principles when formulating legislation and practice.<sup>108</sup>

### *B. Incorporating the Guiding Principles into regional standards*

Advocating the development of national legislation based on the Guiding Principles is one method by which regional organisations can promote and reflect their acceptance of the Guiding Principles as a legal standard, others include the adoption of regional standards on internal displacement based on the Guiding Principles, and also the adherence of regional courts to the provisions of the Guiding Principles. In this regard, promising steps are being taken in Africa, at both the regional and sub-regional levels.

In 2004, the Executive Council of the AU adopted a decision requesting the AU Commission to “collaborate with relevant cooperating partners and other relevant stakeholders to ensure that Internally Displaced Persons are provided with an appropriate legal framework to ensure their adequate protection and assistance.”<sup>109</sup> The form this legal framework would take was not initially determined. Despite suggestions that to pursue a freestanding convention incorporating the Guiding

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<sup>107</sup> Education of refugees and internally displaced persons, Parliamentary Assembly Recommendation 1652 (2004) (Rely adopted by the Committee of Ministers on 12 January 2005 at the 911th meeting of the Ministers' Deputies), [5] CM/AS (2005) Rec 1652, 17 January 2005.

<sup>108</sup> Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons, Council of Europe (Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies).

<sup>109</sup> African Union, Executive Council, Fifth Ordinary Session 25 June – 3 July 2004, Addis Ababa, Ethiopia, Decision 127 (V) on the Situation of Refugees, Returnees and Internally Displaced Persons, reproduced in Doc. EX.CL/Dec. 93 – 164 (V).

Principles was both politically too ambitious and legally unnecessary, to the extent that many of the rights covered by the Principles are already enshrined in the 1981 African Charter on Human and Peoples' Rights,<sup>110</sup> the AU ultimately did choose to develop a Convention. The Convention is still in the process of being developed. In the meantime, a preview of the possible content of the Convention has already been given in the form of the *Protocol on the Protection and Assistance to Internally Displaced Persons*, adopted by the ICGLR Region on 15 December 2006 and developed by the same legal drafter who is developing the AU Convention, Chaloka Beyani.

Internal displacement in eastern and central Africa has occurred for decades and continues in several countries of the region, most notably in Sudan where, at the end of 2006, some 5 million people remained internally displaced.<sup>111</sup> Other countries of the region with significant populations of internally displaced persons include the DRC, Uganda, the Central African Republic, Burundi, Angola and Kenya. These displacement flows are largely the product of armed conflict, particularly civil wars and their spill-over effects into neighbouring countries. Natural disasters and large-scale urbanisation projects have also led to internal displacement, including in the DRC and Sudan, countries already affected by significant displacement.<sup>112</sup>

The UN and the OAU (later the AU), recognising the regional dimension of conflicts in the Great Lakes, have for several years called for a conference on the Great Lakes region.<sup>113</sup> The primary purpose of the conference was to "tackle the interlocking root causes of the region's conflicts in a comprehensive manner and consolidate peace at the national level."<sup>114</sup> The Great Lakes process formally commenced in 1996 with the assigning of a Special Envoy by the Secretary-General, Kofi Annan, to discuss the

<sup>110</sup> Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool', (2005) 24(3) *Refugee Survey Quarterly* 27-36, 34.

<sup>111</sup> Norwegian Refugee Council and Internal Displacement Monitoring Centre, *International Displacement: Global Overview of Trends and Developments in 2006*, April 2007, 6. Figures as of December 2006.

<sup>112</sup> See, eg, 'DRC: Thousands homeless in Maniema after flood damage', IRIN News, 25 January 2007; 'Sudan: Government warns of heavy rains as number of displaced rises', IRIN News, 10 July 2007. For reference to urbanisation projects see for example: Amnesty International, 'Angola - Lives in ruins: forced evictions continue', AI Index: AFR 12/001/2007, 1.

<sup>113</sup> See, eg, 'Statement by the President of the Security Council', United Nations Security Council, UN SCOR UN Doc S/PRST/1994/59, 14 October 1994; 'Statement by the President of the Security Council', UN SCOR, UN Doc S/PRST/1997/22, 24 April 1997; SC Res 1291 (2000), UN SCOR, UN Doc S/RES/1291 (2000).

<sup>114</sup> Francis M Deng, *Report of the Secretary-General on preparations for an international conference on the Great Lakes region*, UN SCOR [4] UN Doc S/2003/1099.

matter with regional governments.<sup>115</sup> In November 2004 the First Summit of the ICGLR was held, establishing the agenda for the remainder of the Great Lakes process.

At the First Summit, participating states adopted the Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region. The Declaration addressed four priority policy areas: peace and security; democracy and good governance; economic development and regional integration; and humanitarian and social issues. Under the rubric of humanitarian and social issues internal displacement featured highly.

Paragraph 58 of the Declaration set the tone for all further consideration of internal displacement in the Great Lakes process, committing states to:

Respect and use the Guiding Principles on Internally Displaced Persons [sic] as proposed by the UN Secretariat, harmonise all relevant pieces of legislation and define a national and regional framework for the monitoring and follow-up of the standards contained therein and which relate to the access and protection of disaster victims, internally displaced persons, women and children who are victims of conflict.

The First Summit and the adoption of the Declaration ushered in the second phase of the preparatory process of the Conference. Draft Protocols and programmes of action were developed, coinciding with the four priority policy areas. Further, in February 2006, the Regional Inter-Ministerial Committee created by the Declaration finalised and adopted a draft of the Pact on Security, Stability and Development in the Great Lakes region.<sup>116</sup> The preparation of this portfolio of documents paved the way for the Second Summit and ultimately the adoption by Heads of State of the final Pact, Protocols and programmes of action.

The Protocols on the Protection and Assistance to Internally Displaced Persons and on Property Rights of Returning Persons were two among ten adopted at the Second

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<sup>115</sup> IRRI and IDMC, 'Enhancing Protection of Displaced Populations: Translating the Great Lakes Peace Pact into Action', Background Note, April 2007, 3.

<sup>116</sup> 'Report of the Chairperson of the Commission on the International Conference Process on the Great Lakes Region', Peace and Security Council, 72<sup>nd</sup> Meeting, 13 March 2007, African Union, [1] PSC/PR/2(LXXII).

Summit in December 2006. Other Protocols addressed issues including: illegal exploitation of natural resources, prevention and suppression of sexual violence against women and children and the prevention and punishment of the crime of genocide, war crimes and crimes against humanity and all forms of discrimination. The particular significance of the Protocol on Internally Displaced Persons is that it is the only regional or sub-regional instrument, not only in Africa, but globally, dedicated to internal displacement and incorporating the Guiding Principles.

The objectives of the Protocol include to establish a legal framework for the adoption of the Guiding Principles and a legal basis for their domestication, and to achieve legal protection of the physical safety and material needs of the internally displaced in accordance with the Guiding Principles.<sup>117</sup> Thus, the Guiding Principles are central to the Protocol and formally annexed to it. Furthermore, the *Annotations of the Guiding Principles on Internal Displacement* prepared by Walter Kälin, are referenced in the Protocol as the "authoritative source" in interpreting the application of the Principles.<sup>118</sup> The Protocol, however, does more than restate the Guiding Principles, it attempts to adapt them to the regional context and to also provide guidance as to the administrative and institutional steps that should be taken in order to truly make the Protocol operational.

In addition to reflecting the description of an internally displaced person set out in the Guiding Principles, the Protocol specifically adds reference to displacement as a result of "large-scale development projects,"<sup>119</sup> an issue of particular relevance to the region. Another similar regional permutation exists in Article 4(1)(h) which draws attention to the special protection that may be required for families of mixed ethnic identity.

Translating the general provisions of the Guiding Principles into the regional context is valuable to ensuring their relevance and applicability. Another way to ensure the Principles and the Protocol are implemented is by identifying the general administrative and institutional measures that need to be addressed to ensure effective

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<sup>117</sup> *Protocol on the Protection and Assistance to Internally Displaced Persons*, International Conference on the Great Lakes Region, Article 2.

<sup>118</sup> *Protocol on the Protection and Assistance to Internally Displaced Persons*, International Conference on the Great Lakes Region, Article 6(2).

<sup>119</sup> *Protocol on the Protection and Assistance to Internally Displaced Persons*, International Conference on the Great Lakes Region, Article 5(1).



implementation, coordination and monitoring. To this end, central to the provisions of the Protocol is the requirement of states not only to enact national legislation to domesticate the Guiding Principles, but also to create a practical framework for their implementation.<sup>120</sup> Member States are urged, for example, to "specify the organs of Government responsible for providing protection and assistance to internally displaced persons" and those responsible for "the implementation of the legislation incorporating the Guiding Principles" itself.<sup>121</sup> Draft model legislation that was prepared in conjunction with the Protocol, but which ultimately was not annexed to it, provides further details as to the institutions that should be involved in implementation and monitoring, their roles and means of coordination.

While the Great Lakes Protocol provides a strong regional basis for the implementation of the Guiding Principles, it is ultimately political will and donor support that will ensure the realisation of the potential created by the ICGLR process. The importance of both these factors have been emphasised often since the Second Summit came to a close. On 20 December 2006, the day that the Summit ended, the UN Security Council met to discuss the situation in the Great Lakes and specifically to reflect on the achievements of the ICGLR process. During the course of the meeting several representatives emphasised the principle of ownership, describing the next stage in the process as "the real test for the Governments concerned", requiring "strong commitment" and "political will".<sup>122</sup> Several others emphasised the need for regional and international support, including from the AU, the UN and the Group of Friends.<sup>123</sup> Already several countries and international organisations have indicated their willingness and intention to follow-up on the results of the Second Summit and provide support for the continuation of the process.<sup>124</sup>

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<sup>120</sup> *Protocol on the Protection and Assistance to Internally Displaced Persons*, International Conference on the Great Lakes Region, Article 6(3).

<sup>121</sup> *Protocol on the Protection and Assistance to Internally Displaced Persons*, International Conference on the Great Lakes Region, Article 6(4).

<sup>122</sup> 'The situation in the Great Lakes region', UN SCOR 5603<sup>rd</sup> meeting, 20 December 2006, UN Doc S/PV.5603, 11, 15, 21, 23.

<sup>123</sup> 'The situation in the Great Lakes region', UN SCOR 5603<sup>rd</sup> meeting, 20 December 2006, UN Doc S/PV.5603, 14, 20, 22.

<sup>124</sup> See, eg, Statement by Mr Olivier Bella, Ambassador, Deputy Permanent Representative to the UN, 'The Great Lakes Region', Briefing by the Special Representative of the Secretary-General, Mr Ibrahima Fall, 9 March 2007; 'Javier Solana, EU High Representative for the CFSP, welcomes today's appointment of Roeland Van de Geer as EU Special Representative for the Great Lakes Region, SO55/07, Brussels, 15 February 2007; Statement by Mr McNee, Canada, on behalf of the Netherlands

One important factor weighing in favour of success for the ICGLR process is its inclusiveness. According to observers, the difference between this process and others undertaken in the past in the region is that the ICGLR process has been an inclusive and participatory one, representing the views of not only the signatory governments and their respective parliaments, but also civil society groups such as women's groups, youth and the private sector.<sup>125</sup> Early indicators of whether this process will yield substantial results include the number of states moving towards ratification of the Pact. According to Article 33, the Pact will enter into force thirty days after the receipt of the eighth instrument of ratification. To date, seven states have ratified the Pact.

### *C. Applying the Guiding Principles in regional courts*

Courts mandated to adjudicate violations of human rights by member states have been established by each of the primary regional organisations in Africa, the Americas and Europe.<sup>126</sup> The potential for these courts to give practical effect to the Guiding Principles in their judgments is significant. Whether in practice the Guiding Principles enter the jurisprudence of these courts, however, will depend on several key factors, including: knowledge of the Principles by the parties, their legal counsel and the justices of the court; and the rules and conventions determining the sources of law to which the court may have recourse in the interpretation of their governing protocol or convention.

The African Court on Human and Peoples' Rights is yet to become operational and therefore cannot offer any examples upon which to base a discussion of the use of the Guiding Principles by regional courts. Both the Inter-American and European Courts of Human Rights, however, have considered cases of internal displacement giving rise to allegations of human rights abuse and both have, in a handful of cases, referred to the Guiding Principles. The practice of both courts with regards the Guiding

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and Canada, Co-Chairs of the Group of Friends, 'The situation in the Great Lakes region', UN SCOR 5603<sup>rd</sup> meeting, 20 December 2006, UN Doc S/PV.5603, 26.

<sup>125</sup> Humanitarian Newsmaker, OCHA RO-CEA, [undated].

<sup>126</sup> The African Court on Human and Peoples' Rights is yet to become operational. The Protocol establishing the Court entered into force on 25 January 2004 upon its ratification by 15 member states. On 2 July 2006, the eleven judges of the Court were sworn in before African leaders in Banjul, The Gambia. Staff for the Court and Registry are currently being selected.

Principles, however, is very limited and suggests the need for much greater promotion of the Guiding Principles among both judges and counsel.

In the case of the European Court, only in two specific cases have the Guiding Principles been mentioned. In the case of *Yöyler v Turkey*<sup>127</sup> the applicant alleged that State security forces had destroyed his house and possessions. Among the documents submitted by the applicant in support of his claim was the Guiding Principles. The Court, however, did not have recourse to the Principles in its judgment. In contrast, in the case of *Doğan and Others v Turkey*,<sup>128</sup> decided a year after *Yöyler*, the Court did make specific reference to provisions of the Guiding Principles.

*Doğan and Others v Turkey*, like *Yöyler v Turkey*, was a case arising from an allegation of forced eviction by the Turkish national authorities. As part of their claim, the applicants alleged that they had not been allowed by the authorities to return to their homes. Paraphrasing directly Guiding Principles 18 and 28 relating to the rights to an adequate standard of living and to return or resettle voluntarily, the Court stated:

For the Court...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 (see in this respect Principles 18 and 28 of the UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998).

Thus, the Court found that the Turkish national authorities had not taken adequate and effective measures to remedy the situation of the internally displaced and therefore had violated Article 1 of Protocol 1 to the European Convention on Human Rights relating to the right to peaceful enjoyment of one's possessions. This is the only instance in which the Court has made specific reference to the Guiding Principles despite the regularity with which cases involving internal displacement have come before the Court, including cases involving issues of return.

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<sup>127</sup> *Yöyler v Turkey* Application No. 26973/9524, Decision of 24 July 2003

<sup>128</sup> *Doğan and Others v Turkey*, (application nos 8803-8811/02, 8813/02 and 8815-8819/02) [2004] ECHR 29 June 2004.

The Inter-American Court of Human Rights has referred to the Guiding Principles in three judgments, the first relating to a claim against Suriname, and the latter two in relation to Colombia. The *Case of the Moiwana Community v Suriname*<sup>129</sup> concerned the displacement of a community from their ancestral lands as a result of internal conflict. Although neither the Inter-American Commission on Human Rights nor the representatives of the victims claimed a violation of the right to freedom of movement and residence (Article 22, American Convention on Human Rights), the Court found that Article 22 of the Convention had been violated. In reaching this decision, the Court referred to several of the Guiding Principles, including in relation to the application of international humanitarian law in situations of internal armed conflict, the rights of indigenous peoples, and the rights to life, freedom of movement and to voluntary return or resettlement.<sup>130</sup>

The Court, in referring to the Guiding Principles, emphasised that they are "based upon existing international humanitarian law and human rights standards."<sup>131</sup> Furthermore, as Justice Cançado Trindade stated in his separate judgment, "[t]he basic idea underlying the [Guiding Principles] is in the sense that the internally displaced persons do not lose their inherent rights, as a result of displacement, and can invoke the pertinent international norms of protection to safeguard their rights."<sup>132</sup> Thus the Court and Justice Cançado Trindade relied on the Guiding Principles to emphasise the application of existing human rights and humanitarian law standards to situations of internal displacement and not as a separate standard to be met.

In the *Case of the "Mapiripán Massacre" v Colombia*,<sup>133</sup> decided just three months after *Moiwana*, the Court also found that, according to the proven facts, the state had violated the right to freedom of movement and residence of the displaced. Unlike in the case of *the Moiwana Community*, in *"Mapiripán Massacre"* the applicants'

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<sup>129</sup> *Case of Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 124.

<sup>130</sup> *Case of Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 124 (Separate Opinion of Judge AA Cancado Trindade) [16], [17].

<sup>131</sup> *Case of Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 124 [111].

<sup>132</sup> *Case of Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 124 (Separate Opinion of Judge AA Cancado Trindade) [16], [17].

<sup>133</sup> *The Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 134.

pleadings included specific reference to the state's "international obligations (UN Guiding Principles on Internal Displacement) as well as its national obligations (Law 387 of 1997)".<sup>134</sup> The particular relevance of the Guiding Principles in this context is based not only on their general applicability to situations of internal displacement, but their specific incorporation by the Colombian Constitutional Court into the body of legal protections to which internally displaced persons in Colombia are entitled.

In their brief reference to the Guiding Principles, the Court did not provide any commentary. The judgment simply stated the principle that the authorities have the primary duty and responsibility to establish conditions, as well as provide the means by which the applicants can 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. Finally, in the *Case of Ituango Massacres v Colombia*, the Court similarly applied the Guiding Principles to "define the content and scope of Article 22 of the Convention in the context of internal displacement."<sup>135</sup>

Thus, in the jurisprudence of the Inter-American Court of Human Rights, the justices have revealed a tentative willingness to use the Guiding Principles as a tool of relevance both in the interpretation of regional as well as international standards. The European Court of Human Rights, however, while presented with several cases relating to internal displacement, and arguments referring to the Guiding Principles, has adopted a more cautious approach.

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Several international and regional fora have recognised the Guiding Principles as having set a standard in the protection of internally displaced persons. Indeed, the Guiding Principles enjoy almost universal acceptance across regional organisations, with the exception of sub-regional organisations in Asia and the Arab world. Once having acknowledged the value of the Guiding Principles, however, these organisations have struggled to use and apply them in a systematic and

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<sup>134</sup> *The Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 134. [165(c)].

<sup>135</sup> *The Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 134 [209].

comprehensive way. Certainly efforts have been made to promote and disseminate the document to states, and thereby encourage state application of the Principles. Within intergovernmental organs, however, application of the Principles has been rudimentary, at best.

Several organs and programmes exist within which application of the Guiding Principles would be a natural complement to their functions, most notably the special procedures of the international human rights system. These procedures enjoy great flexibility in the human rights standards to which they can call attention and on which they can rely. Furthermore, the one-on-one dialogue that these procedures promote between states should be conducive to raising sensitive issues of internal displacement and state responsibilities. The Representative has conducted this work very effectively. Sharing this responsibility and adding further influential voices to calls to address the needs of the internally displaced within the framework of the Guiding Principles, however, have been all too infrequent.

### 3: The Guiding Principles - Domestication

The Guiding Principles are premised on the notion of 'sovereignty as responsibility'. Thus, Principle 3(1) recognises the primary responsibility of states in protecting and assisting internally displaced persons. A measure of the impact of the Guiding Principles, therefore, is the extent to which they have been incorporated into domestic law, policy and programmes, and applied and implemented in practice. The paradox of emphasising the state's primary responsibility towards the internally displaced, however, is that states are usually complicit, either by omission or commission, in causing displacement. The experience of Colombia provides a valuable demonstration of this tension.

Colombia, despite being host to the second largest internally displaced population in the world, is often touted as a model of incorporation as a result of the Constitutional Court's activist, even interventionist, approach to applying the Guiding Principles in law and in practice. Following his mission to Colombia in 2006, for example, the Representative of the Secretary-General referred to the legal and policy framework governing the protection of internally displaced persons as "commendable."<sup>1</sup> At the same time, the Representative recognised, "a clear gap in implementation at the regional and local levels."<sup>2</sup> Consequently, Colombia provides a useful case study to demonstrate the challenges faced by states in meeting their obligations, but also the value of the Guiding Principles as a rallying tool, a common ground on which the judiciary, the executive, civil society and the internally displaced can come together and agree on a practical and meaningful plan to address the needs of the internally displaced.

Colombia's ongoing engagement with the Guiding Principles, however, is the exception rather than the norm. As this Chapter will reveal, national incorporation of the Guiding Principles, although a growing trend, remains limited in practice and effect.

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<sup>1</sup> See, eg, Walter Kälin, Report on internally displaced persons, prepared by the representative of the Secretary-General, UN GAOR, 61st sess, [21] UN Comm'n on Hum. Rts., UN Doc A/61/276 (2006).

<sup>2</sup> See, eg, Walter Kälin, Report on internally displaced persons, prepared by the representative of the Secretary-General, UN GAOR, 61st sess, [21] UN Comm'n on Hum. Rts., UN Doc A/61/276 (2006).

## I. NATIONAL RESPONSIBILITY FRAMEWORK

The primacy of state responsibility is the touchstone upon which the Guiding Principles are based. Yet, the Guiding Principles provide only limited guidance as to the options available to states for discharging their responsibility *in practice*. For this reason, in February 2004, the participants at a regional seminar on internal displacement adopted A Framework for Action on Internal Displacement in the Americas.<sup>3</sup> The introduction to the Framework states:

This framework places primary focus on the role of governments and outlines the steps they can take towards ensuring an effective national response to internal displacement. At the same time, it recognizes that regional and international actors have a role to play in reinforcing national responsibility and assisting states in discharging their responsibility.

Based on the Guiding Principles, the Framework identifies sixteen steps that states can take to discharge their responsibility, from training government officials to collecting data on the numbers and conditions of internally displaced persons.<sup>4</sup> The key steps identified in the Framework were later published by the Brookings Institution Project on Internal Displacement as the Framework for National Responsibility<sup>5</sup> and presented by the Representative of the Secretary-General to the Commission on Human Rights.<sup>6</sup>

The Framework for National Responsibility answers the questions "what, concretely, does national responsibility towards internally displaced persons mean? How can it be measured? Promoted? Reinforced? Supported?"<sup>7</sup> In answer to these questions, the Framework for National Responsibility sets out measurable indicators, or

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<sup>3</sup> Brookings Institution Project on Internal Displacement, 'A Framework for Action on Internal Displacement in the Americas', Regional Seminar on Internal Displacement in the Americas, Mexico City, 18-20 February 2004, 28.

<sup>4</sup> Brookings Institution Project on Internal Displacement, 'A Framework for Action on Internal Displacement in the Americas', Regional Seminar on Internal Displacement in the Americas, Mexico City, 18-20 February 2004, 29.

<sup>5</sup> Brookings Institution Project on Internal Displacement, 'Addressing Internal Displacement: A Framework for National Responsibility' (April 2005).

<sup>6</sup> Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin - Framework for national responsibility, UN Comm'n on Hum. Rts., 62nd sess, UN Doc E/CN.4/2006/71/Add.1 (2006).

<sup>7</sup> Brookings Institution Project on Internal Displacement, 'Addressing Internal Displacement: A Framework for National Responsibility' (April 2005) 5.



benchmarks, that are intended to provide guidance to governments in discharging their responsibility and as a basis for assessing whether they are effectively exercising that responsibility. The benchmarks are: prevent displacement and minimise its adverse effects; raise national awareness of the problem; collect data on the number and conditions of internally displaced persons; support training on their rights; create a legal framework for upholding these rights; develop a national policy on internal displacement; designate an institutional focal point on internally displaced persons; encourage national human rights institutions to integrate internal displacement into their work; ensure the participation of the internally displaced in decision-making; support durable solutions; allocate adequate resources to the problem; and cooperation with the international community when national capacity is insufficient.<sup>8</sup>

Echoing the emphasis in the Framework on adopting a national framework, be it a law or policy, so too the UN as well as regional bodies have in recent years formed a chorus calling for states to develop laws and policies on internal displacement in accordance with the Guiding Principles. The Representative of the Secretary-General has been a particularly strong and consistent voice in this chorus. According to the Representative, the Guiding Principles:

provide a fully-fledged framework for identifying protection needs and for planning, implementing and monitoring protection activities. In order to strengthen these functions, the Guiding Principles now need to be incorporated into domestic laws and policies.<sup>9</sup>

The Representative has emphasised the importance of developing a national legal framework based on the Guiding Principles in all aspects of his work, including in his reports to the General Assembly<sup>10</sup> and to the Commission on Human Rights,<sup>11</sup> in his

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<sup>8</sup> Brookings Institution Project on Internal Displacement, 'Addressing Internal Displacement: A Framework for National Responsibility' (April 2005) 5-6.

<sup>9</sup> Walter Kälin, 'The role of the Guiding Principles on Internal Displacement' (October 2005) Supplement, *Forced Migration Review*, Supplement October 2005, 'Protecting and assisting the internally displaced: the way forward' 8.

<sup>10</sup> See, eg, Walter Kälin, *Report of the Special Representative of the Secretary-General on Internally Displaced Persons* [20-21] UN Comm'n on Hum. Rts., UN Doc A/58/393 (2003).

<sup>11</sup> Francis M Deng, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, [26] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1997/43 (1997); Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons*, [100] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2002/95 (2002); Francis M Deng, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, [69] UN Comm'n on Hum. Rts., UN Doc

country missions,<sup>12</sup> and in his statements before international fora.<sup>13</sup> The call for national legislation was echoed by former Secretary-General Kofi Annan who, in 2005, called on Member States to “promote the adoption of [the Guiding Principles] through national legislation.”<sup>14</sup>

Resolutions of the General Assembly, the Commission on Human Rights and the Human Rights Council appear to have taken a more cautious approach. The language of these resolutions suggests a sensitivity to state concerns about the non-binding nature of the Guiding Principles. Consequently, until 2005, annual resolutions of the General Assembly and Commission welcomed “the fact that an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying [the Guiding Principles] as a standard,”<sup>15</sup> without directly calling for the implementation or application of the Guiding Principles. Since 2005, however, and the appointment of Walter Kälin as Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, the General Assembly and Commission/Council have requested the Representative to “provide support for efforts to promote capacity-building and the use of the Guiding Principles, *as well as the development of domestic legislation and policies*.”<sup>16</sup> Again, these resolutions deftly avoid calling for ‘implementation’ or ‘application’ of the Guiding Principles, while still calling for the development of domestic law and policy. A similar approach has been adopted by the OSCE<sup>17</sup> and IGAD,<sup>18</sup> each of which have called on member states to develop law and policy addressing internal displacement.

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E/CN.4/2003/86 (2003); Francis M Deng, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, [19] UN Comm’n on Hum. Rts., UN Doc E/CN.4/2004/7 (2004).

<sup>12</sup> See, e.g., Walter Kälin, *Annual report of the representative of the Secretary-General on human rights of internally displaced persons, Mission to Nepal*, [67(a)] UN Comm’n on Hum. Rts., UN Doc E/CN.4/2006/71/Add.2 (2006); Francis M Deng, *Representative of the Secretary-General on internally displaced persons, Profiles needs to be in italics* in Displacement: the Russian Federation, [14-16] UN Doc E/CN.4/2004/77/Add.2 (2004).

<sup>13</sup> See, eg, Opening Statement by Professor Walter Kälin, Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons, Workshop on the Implementation of Uganda’s National Policy for Internally Displaced Persons, Kampala, Uganda, July 3-4, 2006.

<sup>14</sup> Kofi Annan, *In Larger Freedom*, UN GAOR, 210] UN Doc A/59/2005.

<sup>15</sup> See, eg, [7] UN Comm’n on Hum. Rts., UN Doc A/RES/58/177 (2004) 7; [6] UN Comm’n on Hum. Rts., UN Doc E/CN.4/2004/L.77 (2004).

<sup>16</sup> See, eg, [9] UN Doc A/RES/60/168 (2006); [8] UN Comm’n on Hum. Rts., UN Doc E/CN.4/2005/L.60 (2005) [emphasis added].

<sup>17</sup> OSCE, Supplementary Human Dimension Meeting, “Internally Displaced Persons”, Final Report, 4-5 November 2004, [7] PC.SHDM.GAL/15/04 (2004).

The non-binding nature of the Guiding Principles appears to have presented no obstacle to the adoption of resolutions by the Parliamentary Assembly of the Council of Europe and the General Assembly of the OAS calling for the implementation of the Guiding Principles in the national legislation and policy of member states.<sup>19</sup> Similarly, in the Dar-es-Salaam Declaration of November 2004, the states of the Great Lakes Region of Africa committed themselves to the harmonisation of national legislation with the Guiding Principles.<sup>20</sup>

## II. NATIONAL LAWS ON INTERNAL DISPLACEMENT

As mentioned previously, the collapse of the Soviet Union brought about the end of the Cold War and the arrival of 'internal displacement' as a new issue of concern on the international agenda. It also precipitated civil conflicts and population displacements on an unprecedented scale.<sup>21</sup> The dispute over the territory of Nagorno-Karabakh, for example, has continued in Azerbaijan since 1988, causing a massive displacement of between 450 000 and 500 000 ethnic Azeris in 1993.<sup>22</sup> Similarly, shortly after the independence of Georgia, a conflict erupted when the autonomous republic of Abkhazia, in the north-west of Georgia, attempted to win increased political and cultural autonomy, causing the displacement of 300 000 persons between 1992 and 1994.<sup>23</sup>

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<sup>18</sup> *Khartoum Declaration*, Ministerial Conference on Internally Displaced Persons in the IGAD Sub-region, Khartoum, Sudan, 2 September 2003.

<sup>19</sup> See, eg, Parliamentary Assembly, Council of Europe, Recommendation 1631 (2003), 'Internal Displacement in Europe' [15]; Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons, Council of Europe (Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies) [Preamble]; AG/RES 2229 (XXXVI-O/06), Internally Displaced Persons, (Adopted by the Plenary at its fourth session, held on June 6, 2006) 8; AG/RES 2277 (XXXVII O/07), Internally Displaced Persons (Adopted at the fourth plenary session, held on June 5, 2007), resolution 3.

<sup>20</sup> *Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region*, International Conference on Peace, Security, Democracy and Development in the Great Lakes Region, First Summit of Heads of States and Government, Dar-es-Salaam, 19-20 November 2004 [58].

<sup>21</sup> Claire Messina, 'Refugee definitions in the countries of the Commonwealth of Independent States', in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 136.

<sup>22</sup> Francis M Deng, *Representative of the Secretary-General on internally displaced persons, Profiles in Displacement: Azerbaijan*, [30] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1999/79/Add.1 (1999).

<sup>23</sup> Francis M Deng, *Representative of the Secretary-General on internally displaced persons, Profiles in Displacement: Georgia*, [15] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2001/5/Add.4 (2001).

Consequently, even before the international community had developed a comprehensive understanding of the needs and the rights of the internally displaced, the newly independent states of the former Soviet Union were faced with a crisis of forced displacement generally that required a legislative response. In 1989, the Armenian Council of Ministers adopted a Decision on "Measures to stop migration and provide social assistance in terms of housing for persons forced from their places of permanent residence."<sup>24</sup> Similar measures were soon adopted in Azerbaijan, Georgia, the Russian Federation and Tajikistan.<sup>25</sup>

States of the former Soviet Union were not the only ones facing crises of internal displacement. During the same period, Sudan was in the middle of a civil war, Iraqi forces invaded Kuwait precipitating the first Gulf War, cease-fires and peace accords had brought about the end to hostilities in Angola, El Salvador, Haiti and Somalia, and civil war in Rwanda had lead to genocide and mass displacement. Yet, while these crises were feeding into the debate about the international community's response and responsibilities towards the internally displaced, the extent to which the national authorities could address the needs of the internally displaced was largely ignored. The one exception was in the case of Colombia which in 1997 adopted *Law 387*, a comprehensive law specifically identifying the rights of those internally displaced by the on-going armed conflict and the obligations of the state towards them. Thus momentum for the development of national laws and policies on internal displacement had been building before the development of the Guiding Principles. The Principles, however, served as a catalyst for the development of laws and policies

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<sup>24</sup> See Decision of the Council of Ministers on "Measures to stop migration and provide social assistance in terms of housing for persons forced from their places of permanent residence", Republic of Armenia, 1 February 1989, cited in Roberta Cohen, Walter Kälin and Erin Mooney, 'The Guiding Principles on Internal Displacement and the Law of the South Caucasus: Georgia, Armenia, Azerbaijan', *Studies in Transnational Legal Policy*, No. 34, American Society of International Law and The Brookings Institution – SAIS Project on Internal Displacement, Washington DC (2003) 237.

<sup>25</sup> See, eg, *Law of the Republic of Azerbaijan 'On status of refugees and forcibly displaced persons'* (21 May 1999); Decree of the Head of State of Georgia On Issuance of Financial Aid and Granting of the Right to Travel with Advantageous Fare to Refugees and Persons Forcibly Displaced from Outside the Territory of the Republic of Georgia and from Certain Regions of the Republic of Georgia because of Conflicts cite in Roberta Cohen, Walter Kälin and Erin Mooney, 'The Guiding Principles on Internal Displacement and the Law of the South Caucasus: Georgia, Armenia, Azerbaijan', *Studies in Transnational Legal Policy*, No. 34, American Society of International Law and The Brookings Institution – SAIS Project on Internal Displacement, Washington DC (2003) 120; *Federal Law on Forced Migrants*, Russian Federation (1993); *The Law of the Republic of Tajikistan on Forced Migrants* (July 1994).

on internal displacement, providing a legal and operational framework that could be incorporated and adapted by national authorities.<sup>26</sup>

Angola was the first country to adopt an instrument on internal displacement with reference to the Guiding Principles. The *Norms on the Resettlement of Internally Displaced Persons* of 2001 establish the rules governing the resettlement process of the some four million people internally displaced by the proxy Cold War conflict that had persisted in Angola since 1974. The same year, the authorities of Burundi, together with the UN, adopted a *Protocol for the Creation of a Permanent Framework for Consultation on the Protection of Displaced Persons*. Following over three decades of post-independence conflict and the displacement of almost 12 percent of the population, the purpose of the Protocol was to develop a forum for discussion and collaboration between the national authorities and international community on issues relating to the protection of displaced persons.

Several other countries have since adopted laws, policies and other instruments with reference to the Guiding Principles, including the Resettlement Strategy (2001) of Sierra Leone, the Law Concerning the Internally Displaced (2004) of Peru, the Guiding Principles on Internally Displaced Persons: Instrument of Adoption (2004) of Liberia, the National Policy for Internally Displaced Persons (2004) of Uganda, the Integrated Strategy Document (2005) of Turkey, the National Policy on Internally Displaced Persons (2006) of Nepal, the Protocol on Voluntary and Sustainable Return (2006) of Serbia, and the State Strategy for Internally Displaced Persons (2007) of Georgia.

While representing diverse geographical regions, each of these countries shares at least three of the following four common characteristics. First, all countries, by the time they adopted an instrument on internal displacement, were host to significant populations of internally displaced persons. Secondly, in all cases, conflict was the primary cause of internal displacement addressed by each instrument. Thirdly, in most cases the instrument was adopted at the time the conflict causing internal displacement was either coming to an end or had come to a formal end. The main

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<sup>26</sup> An earlier version of this section was published in 2006: Jessica Wyndham, 'A Developing Trend: Laws and Policies on Internal Displacement' (Fall 2006) 14(1) *Human Rights Brief* 7.

exception is Uganda, where peace talks continue between the Ugandan Government and Uganda and the Lord's Resistance Army. Finally, in all cases, except those of Sierra Leone and Liberia, the adoption of the particular instrument with reference to the Guiding Principles occurred following, often immediately after, a mission by the Representative of the Secretary-General.

#### *A. Existing Models*

An analysis of existing laws and policies on internal displacement, whether or not based on the Guiding Principles, reveals that there are four principal models: 1) a brief instrument adopting the Guiding Principles; 2) a law or policy formulated to address a specific cause or stage of displacement; 3) a law or policy developed to protect a specific right of the internally displaced; and 4) a comprehensive law or policy addressing all causes and stages of internal displacement.

The first model is exemplified by the one page Instrument of Adoption of Liberia. Dated November 2004, this instrument adopts the Guiding Principles “as a source of ongoing guidance and reference for the protection, dignity and rights of internally displaced persons.”<sup>27</sup> The wholesale incorporation of the Guiding Principles may, at first glance, appear an effective way of ensuring the implementation of all provisions of the principles, suggesting absolute agreement with the principles and ensuring against the dilution of its provisions. Such an approach, however, denies national authorities, relevant governmental bodies, civil society, and the internally displaced themselves opportunities that the development of a more tailored law would offer. These opportunities relate both to the process of developing a comprehensive law or policy, and to the substance of that law or policy.

The Guiding Principles contain abstract general principles of international law that, in order to be effectively implemented in a national context, should be translated into concrete action on the ground that reflects each country's situation. The process of developing a comprehensive law or policy presents an opportunity for all relevant stakeholders to share perspectives on the best practices for addressing internal displacement. This process would necessarily involve issues unique to each country,

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<sup>27</sup> Guiding Principles on Internally Displaced Persons, Instrument of Adoption [of Liberia] (2004).

such as the governmental bodies that need to be engaged in providing assistance and protecting the rights of the internally displaced; the vulnerable groups that could be adversely affected if displaced, for example, ethnic or linguistic minorities, agriculturalists, the disabled, orphaned children, and women heads of household; the potential causes of internal displacement, including conflict, and natural and human-made disaster; and the diverse means of preventing or mitigating the effects of such conflicts and disasters.

A wholesale adoption of the Guiding Principles results in many unanswered questions, including: How are the rights of the internally displaced to be protected? By whom? With what funds? Is there a penalty for failing to protect these rights? Who is monitoring compliance with the instrument?

The second model, the most common among existing instruments, is a law or policy that addresses a specific cause or specific stage of displacement. The National Policy on Resettlement and Rehabilitation for Project Affected Families of 2003<sup>28</sup> of India, for example, addresses displacement only as a result of development projects. The Angolan Norms on the Resettlement of the Internally Displaced Populations<sup>29</sup> addresses only return and resettlement of internally displaced persons. Laws and policies that address only return and resettlement have also been adopted by Azerbaijan, Bosnia and Herzegovina, Colombia, Nepal, and Serbia.<sup>30</sup> Indeed, with the exception of the Indian policy, all instruments in this category address return and resettlement, specifically in situations of conflict-induced displacement. Another common characteristic of these instruments is the context of their development. All instruments were promulgated in response to existing situations of displacement.

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<sup>28</sup> National Policy on Resettlement and Rehabilitation for Project Affected Families of 2003, Extraordinary Part-I, § 1, No-46 (2003), *Gazette of India* (2004).

<sup>29</sup> Norms on the Resettlement of the Internally Displaced Populations, Decree Number 1/01 [of Angola] (2001).

<sup>30</sup> The Law of the Azerbaijan Republic “On social protection of forcibly displaced persons and persons equated to them,” No. 669-1Q (1999); Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina (2005), Bosnia and Herzegovina Official Gazette, (no. 15/05, 2005); Law 387 [of Colombia] (1997), *Diario Oficial* (No. 43,091, 1997); Relief Program for Internally Displaced People Due to Conflict for FY 2004/05 [of Nepal] (2004); National Strategy for Resolving the Problems of Refugees and Internally Displaced Persons [of the Republic of Serbia] (2002).

The third model, like the second, is most often developed in response to an existing situation of internal displacement. Yet instead of addressing a specific cause or stage of displacement, instruments representative of the third model address a specific right of the internally displaced. The Turkish Law on the Compensation of Damages that Occurred due to Terror and the Fight Against Terrorism<sup>31</sup> is one such law. It was formulated specifically to facilitate the provision of compensation to those affected by on-going civil strife within Turkey, many of whom are internally displaced persons. Another example is the United States Hurricane Education Recovery Act,<sup>32</sup> which was enacted following Hurricane Katrina in 2005 to address, among other issues, the needs of displaced students and teachers.

The benefit of both the second and third models is that, because they were developed in response to existing situations of internal displacement, they reflect, to a greater or lesser extent, the particular institutional, procedural and regulatory challenges faced by authorities, civil society, and the internally displaced themselves in addressing the needs and protecting the rights of the internally displaced. However, their scope is also limited, which leaves broader issues concerning the internally displaced unattended. Moreover, in practice, many of these laws and policies fail to address key substantive issues that would contribute to their effective implementation. For example, they may not provide a description of an internally displaced person, identify funding sources, or provide a mechanism to monitor the implementation of the instrument in question.<sup>33</sup>

The fourth model, and one which is not yet common, is that of a comprehensive law or policy addressing all causes and stages of internal displacement. The Nepali National Policy on Internally Displaced Persons most closely approximates a comprehensive law on internal displacement.<sup>34</sup> Although developed in the specific context of an on-going internal conflict, the law addresses all stages of displacement,

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<sup>31</sup> Law No. 5233 [of Turkey] (2004).

<sup>32</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act ("Hurricane Education Recovery Act"), Pub. L. No. 109-148, 119 Stat. 2680 (2006).

<sup>33</sup> See for example, Norms on the Resettlement of the Internally Displaced Populations, Decree Number 1/01 [of Angola] (2001); Relief Program for Internally Displaced People Due to Conflict for FY 2004/05 [of Nepal] (2004).

<sup>34</sup> National Policy on Internally Displaced Persons [of Nepal] (2007).



from prevention of further displacement to creating durable solutions for return or resettlement and reintegration. The law also addresses a variety of causes of displacement, not only armed conflict, but also natural disasters and development projects. The Ugandan National Policy for Internally Displaced Persons<sup>35</sup> and the Colombian Law 387<sup>36</sup> also approximate comprehensive instruments, although having both been developed in the context of ongoing conflict, they primarily address this cause of displacement. Furthermore, the Ugandan Policy does not specifically address prevention or solutions aimed at the long-term durability of return or resettlement.

Regardless of the model chosen, the adoption of a law or policy on internal displacement is only the first step required to effectively protect the rights of the internally displaced. Often, for example, states have followed the adoption of a general legal instrument with an administrative regulation that establishes the working mechanisms for the implementation of the law or policy. Such was the case in Angola, where adoption of the *Normas* was followed shortly after by the development of regulations aimed at delineating the roles of administrative agencies in the application and monitoring of the *Normas*.<sup>37</sup> In Liberia, the one-page Instrument of Adoption was coupled with the National Community Resettlement and Reintegration Strategy which identified institutional responsibilities and substantive measures necessary to coordinate an effective return and resettlement.<sup>38</sup> In Nepal, the Ministry responsible for overseeing the policy on internal displacement created a Directives Formulation Task Force mandated to develop guidelines for the implementation of the national policy.<sup>39</sup> In Uganda, the government has drafted measures to convert the National Policy for Internally Displaced Persons into a more effective operational tool, again by clearly identifying roles, responsibilities and monitoring requirements.<sup>40</sup>

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<sup>35</sup> National Policy for Internally Displaced Persons [of Uganda] (2004).

<sup>36</sup> Law 387 [of Colombia] (1997).

<sup>37</sup> Standard Operating Procedures for the Enforcement of the "Norms on the Resettlement of Displaced Populations" (2002).

<sup>38</sup> National Community Resettlement and Reintegration Strategy (2004).

<sup>39</sup> Office for the Coordination of Humanitarian Affairs, Inter-Agency Thematic Report: Consolidated by OCHA Nepal, Kathmandu (18 July 2007) 2.

<sup>40</sup> "Operationalising the National Policy for IDPs," Office of the Prime Minister, Department of Disaster Management and Refugees, April 2005 (OPM RA 01 Draft), Uganda.

These measures reveal at minimum, an awareness among state authorities of the need to create accountability for the practical implementation of state policy by identifying institutional and administrative mechanisms and responsibilities. In practice, however, such measures too often belie systemic inefficiencies and capacity gaps which, coupled with a lack of political will, undermine the effective implementation of the protection mechanisms. In the case of Angola, for example, the regulations, like the *Normas*, suffered from a lack of comprehensive implementation. One year after their adoption, the UN reported that only 50 percent of resettlement initiatives had been implemented in compliance with the *Normas*.<sup>41</sup> In Uganda, a workshop on the implementation of the *National Policy* and related investigations revealed an absence of political will and participation in the structures created by the *National Policy*, among many other failings and challenges.<sup>42</sup> Similarly in the case of Nepal, an absence of clear commitment and guidance emanating from the central government has resulted in a lack of implementation at the district level and a general concern that the authorities are uninterested in the plight of the internally displaced.<sup>43</sup> Without sustained and meaningful engagement of the national authorities in each of these cases the potential positive impact of the adoption of a policy based on the Guiding Principles has remained unrealised. State engagement, however, is not sufficient in itself, as a study of the Colombian experience reveals.

### III. THE COLOMBIAN MODEL: MEASURING SUCCESS

The current conflict in Colombia originated as a struggle between the Conservative and Liberal parties which between 1849 and 1949 and 1990 provoked thirteen coups and uprisings.<sup>44</sup> Tensions between the parties escalated following the Second World

<sup>41</sup> Human Rights Watch, 'The War is Over: The Crisis of Angola's Internally Displaced Continues', Background Briefing Paper (2002) 7.

<sup>42</sup> Brookings Institution Project on Internal Displacement, Report of the Workshop on the Implementation of the Republic of Uganda's National Policy for Internally Displaced Persons, 3-4 July 2006, Kampala, Uganda; Internal Displacement Monitoring Centre, *"Only peace can restore the confidence of the displaced"*: Update on the Implementation of the Recommendations made by the UN Secretary-General's Representative on Internally Displaced Persons Following his visit to Uganda (October 2006).

<sup>43</sup> Office for the Coordination of Humanitarian Affairs, Inter-Agency Thematic Report: Consolidated by OCHA Nepal, Kathmandu (18 July 2007) 2; 'IDPs being neglected by government, say aid workers', Irinnews, (12 March 2008) < <http://www.irinnews.org/Report.aspx?ReportId=77249> > at 11 April 2008.

<sup>44</sup> Quoted in Human Rights Watch, 'Displaced and Discarded: The Plight of Internally Displaced Persons in Bogotá and Cartagena', (October 2005) 17(4(B)) 11.

War. At that time, wealthy entrepreneurs enjoyed a monopoly over productive land, with three percent of the population owning more than half of the country's arable land.<sup>45</sup> The conflict that ensued between the Conservatives and Liberals between 1940 and the mid-1960s was known as '*La Violencia*' (The Violence). It resulted in an estimated 393 000 farms being abandoned and caused two million peasants to resettle elsewhere in the country.<sup>46</sup> This undeclared civil war was resolved when the parties agreed to alternate in office and to share equally in the running of the state.

Following the end of *La Violencia* the majority of the liberal fighters demobilised. Some did not, however. Those who did not formed a guerrilla movement with a clearly identified socialist agrarian reform agenda.<sup>47</sup> Similar in nature to several other such movements that emerged in Latin America during the 1960s, the Colombian guerrillas continued to grow in force and in numbers, rallying support among impoverished peasants in rural areas. The *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia – FARC), for example, were initially comprised of peasants demanding land.<sup>48</sup> The state response to these guerrilla movements was to cede large parts of the country to the military.<sup>49</sup> Many regions of the country, however, remained devoid of substantial state presence.

In those regions of the country in which state presence was limited, self-defence groups were formed, sometimes with the support of drug traffickers seeking to defend their crops and trade routes, and sometimes with the encouragement of state law enforcement agencies unable to match the force of the guerrillas.<sup>50</sup> Of these groups,

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<sup>45</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [19] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>46</sup> Natalia Springer, 'Colombia: Internal displacement – policies and problems', Writenet, (June 2006) 1.

<sup>47</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [20] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>48</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [36] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>49</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [20] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>50</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [22] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

many became the private armies of civilians and others assumed a politico-military character and became known as 'paramilitaries'.<sup>51</sup> Human rights groups in Colombia maintain that it is the paramilitaries that are primarily responsible for the violence and related displacement that besets the country at present. Furthermore, they contend that, in many cases, these groups enjoy at minimum the tacit support of the state armed forces.<sup>52</sup> Indeed, it was reported by a UN Working Group in 2006 that paramilitary forces were said to "control" 30 percent of the parliament and officials such as governors and mayors.<sup>53</sup>

As the conflict in Colombia has developed, increasingly the paramilitaries and guerrillas have become both the cause and the beneficiaries of a confluence of factors that contribute to the continuing cycle of violence that characterises many regions of Colombia. These factors are: the absence of visible state presence and effective control in several parts of the country, particularly in the remote central and border regions;<sup>54</sup> the tenuous property regime that is regulated more by force than law;<sup>55</sup> and the significant drug trade originating in Colombia which is said to be the driving force behind new illegal armed groups.<sup>56</sup>

The precise number of people displaced as a result of the violence in Colombia is a highly contested issue. Indeed, until the end of the 20th century, the government did not recognise that there was even a problem of internal displacement, insisting on characterising the evident movement of people as a natural corollary to the process of

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<sup>51</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [22] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>52</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [42] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>53</sup> *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Colombia*, [30] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2006/56/Add.1 (2006).

<sup>54</sup> Walter Kälin, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Addendum, Mission to Colombia*, [11] UN Human Rts. Council., UN Doc A/HRC/4/38/Add.3 (2007).

<sup>55</sup> See, eg, Jesuit Refugee Services and Comisión Colombiana de Juristas, 'Broken Promises: Follow-up of the application of international recommendations on forced displacement in Colombia 2004-2005', (1 December 2005) 5; Walter Kälin, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Addendum, Mission to Colombia*, [53, 69] UN Comm'n on Hum. Rts., UN Doc A/HRC/4/38/Add.3 (2007).

<sup>56</sup> See, eg, Freedom House, 'Countries at the Crossroads 2007 – Colombia', 25 September 2007, Online. UNHCR Refworld, available at: <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4738692258>> at 5 March 2008.

colonisation.<sup>57</sup> In the absence of official figures, initial efforts to determine the number of internally displaced were conducted by church groups and NGOs. Thus, in 1995, the Episcopal Conference of Colombia published a study which estimated that 586 261 people had been displaced between January 1985 and August 1994.<sup>58</sup> Subsequently, the *Consultoría para los Derechos Humanos y el Desplazamiento* (CODHES) developed a system designed to estimate, on a systematic and regular basis, the size of the displaced population.<sup>59</sup>

The authorities initiated their own system of estimating displacement in the mid 1990s. Since then, significant statistical disparities have existed between the authorities' figures and those of the church, NGO and international community. In the *Global Overview* published at the beginning of 2007, IDMC reported the CODHES figures of 3.8 million internally displaced in Colombia, while the government figures were significantly lower at 1.8 million.<sup>60</sup> A year later, the government recognises 2.2 million people as internally displaced.<sup>61</sup> The reason for the lower official figures is their failure to include in the registry intra-municipal displacement, displacement by coca fumigation, and displaced populations that choose not to register or who are unable to on account of technical requirements, as well as a failure to reflect demographic changes in the displaced population such as births and deaths.<sup>62</sup> Although, in at least two areas, the state figures and those collected by the NGO community coincide, the numbers of displaced have increased steadily since statistics started to be collected, with one exception, the number of people displaced per year spiked in the early 2000s, coinciding with the clear expansion of paramilitary activity

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<sup>57</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [74] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>58</sup> Cited in Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [13] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>59</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [13] UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>60</sup> Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2006* (2007) 92.

<sup>61</sup> Andrea Lari, 'Striving for Better Days: Improving the lives of internally displaced people in Colombia', *Refugees International*, (December 2007) 3.

<sup>62</sup> Jeff Fischer, 'Conflict, Displacement, and Elections – Action Plan for Municipal Elections in Colombia', *International Organization for Migration*, (November 2006) 19.

and the breaking of peace talks with the FARC.<sup>63</sup> This overlap in data notwithstanding, the disparity that continues to exist between the government figures and those of CODHES is not only numerically but practically significant. It reflects the deficiency in the state counting system and belies all state efforts to provide protection and assistance to the internally displaced.

The government's inability to end the violence and conflict that have plagued the country for decades, has led to a situation in which approximately 50 percent of the displaced population has been displaced for 13 years, and over 10 percent has been displaced more than once during this period.<sup>64</sup> According to a comprehensive statistical study undertaken of registered displaced persons and published in January 2008, the primary cause due to which the displaced left their homes was as a result of direct threats (45.5% of respondents). Other causes of displacement include: assassinations (17%); combat (10.7%); pressure caused by indirect threats (8.5%); massacres (8%); and forced recruitment (4.8%). In 37 percent of the cases, the perpetrators of these acts, according to the respondents, were the paramilitary, with the FARC guerrillas accounting for 30 percent of the perpetrators.<sup>65</sup>

By far the majority of the displaced come from rural areas or municipal centres while fewer than a quarter previously lived in a 'populated centre.'<sup>66</sup> The rural nature of the conflict accounts for the disproportionate effect that displacement has had on indigenous and Afro-Colombian populations. According to figures published by Refugees International in December 2007, 40 percent of the displaced population is Afro-Colombian (although they only constitute 25% of the general population) and

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<sup>63</sup> Comisión de Seguimiento a la Política Pública Sobre el Desplazamiento Forzado, 'Proceso Nacional de Verificación de los Derechos de la Población Desplazada: Primer Informe a la Corte Constitucional', Bogotá, (31 January 2008) 28.

<sup>64</sup> Comisión de Seguimiento a la Política Pública Sobre el Desplazamiento Forzado, 'Proceso Nacional de Verificación de los Derechos de la Población Desplazada: Primer Informe a la Corte Constitucional', Bogotá, (31 January 2008) 29.

<sup>65</sup> Comisión de Seguimiento a la Política Pública Sobre el Desplazamiento Forzado, 'Proceso Nacional de Verificación de los Derechos de la Población Desplazada: Primer Informe a la Corte Constitucional', Bogotá, (31 January 2008) 30.

<sup>66</sup> Comisión de Seguimiento a la Política Pública Sobre el Desplazamiento Forzado, 'Proceso Nacional de Verificación de los Derechos de la Población Desplazada: Primer Informe a la Corte Constitucional', Bogotá, (31 January 2008) 29.

indigenous people constitute 8% of the displaced population (and only 3% of the general population).<sup>67</sup>

### *B. Legal Framework for the Protection of the Internally Displaced*

The legal response to internal displacement in Colombia can be divided into three distinct phases: prior to 1997 – before the adoption of specific legislative and policy measures to address internal displacement; between 1997 and 2004 – with the adoption of Law 387 on internal displacement and the National Plan for the Internally Displaced; and post 2004 – following Decision T-025 by the Constitutional Court of Colombia and the Court's on-going role as overseer of the implementation of Law 387.

#### *1. Prior to 1997*

When the Representative of the Secretary-General conducted his first mission to Colombia in 1994 government authorities had only a few years previously recognised that there was a problem of internal displacement in the country.<sup>68</sup> While the authorities were becoming increasingly aware of and open to addressing the humanitarian and human rights dimensions of displacement, their initial response was ad hoc and ineffective. The response at that time was not based on a specific national policy on internal displacement, but was framed within general social welfare and emergency response systems.

At this time, the rights of the internally displaced were legally protected only to the extent that the Constitution of 1991 created extensive human rights protections and mechanisms for their promotion, in particular, the creation of a national human rights institution, the *Defensoría del Pueblo*.<sup>69</sup> The beginnings of a legal and policy framework specifically directed to the protection of the internally displaced started to emerge in 1995 when the National Council for Economic and Social Policy (CONPES), a body of the executive branch, adopted a National Programme for

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<sup>67</sup> Andrea Lari, 'Striving for Better Days: Improving the lives of internally displaced people in Colombia', Refugees International, (December 2007) 6.

<sup>68</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia* [74] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1995/50/Add.1 (1994).

<sup>69</sup> See, in particular, Constitution of Colombia (1991), Title II.

Comprehensive Attention to the Populations Displaced by Violence.<sup>70</sup> Two years later, in 1997, the Programme was amended to address the practical challenges of inter-institutional management and coordination, information, and funding.<sup>71</sup> Thus, a national 'system' for addressing internal displacement was created, directed to the tasks of prevention, immediate assistance, and 'consolidation and socio-economic stabilisation'. The same year, the post of the Presidential Adviser for the Displaced was created.<sup>72</sup>

As the authorities began the process of identifying issues to be addressed, such as institutional responsibilities, coordination mechanisms and the financial basis for the system, the non-governmental community was assuming the role of primary provider of protection and assistance. Often with the financial support of international organisations based in Bogotá, church groups, local NGOs, and the academic community provided support in training, legal services and raised funds for the provision of basic necessities.<sup>73</sup> The *Defensoría* was still nascent and had not yet assumed the active role it would in later years as promoter and protector of the rights of the internally displaced. The international community was either absent altogether from the country or not engaged in providing support to the internally displaced. The ICRC, with its small delegation, could only provide basic support. WFP funded an NGO project for internally displaced persons in the province of Antioquia. OHCHR arrived in Colombia in 1997 and UNHCR, in 1998.<sup>74</sup>

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<sup>70</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [39] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>71</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [40] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>72</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [40] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>73</sup> Andrea Lari, 'Striving for Better Days: Improving the lives of internally displaced people in Colombia', Refugees International, (December 2007) 10.

<sup>74</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [57, 58] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).



## 2. 1997 - Law 387 and the National Plan for the Internally Displaced

The two CONPES documents elaborated between 1995 and 1997 formed the basis for Law 387 of 1997, the purpose of which was to adopt measures "for the prevention of forced displacement; assistance, protection, consolidation and socio-economic stabilisation of persons internally displaced by violence in the Republic of Colombia." The law enshrined a distinct public policy for the attention of the internally displaced, structured around three main pillars: the enumeration and definition of the rights of internally displaced persons; the creation of a national system for comprehensive attention of the internally displaced (*Sistema Nacional de Atención Integral a la Población Desplazada* – SNAIPD); and the recognition and consideration of the three phases of displacement – prevention of displacement, protection during displacement, and return and resettlement.

The definition of an internally displaced person in Law 387 largely reflects the description contained in the Guiding Principles, despite being developed before the completion of the Principles. The definition contained in Article 1 of the Law focuses on displacement caused by conflict, as well as generalised violence, violations of human rights and humanitarian law, and related circumstances. The Law recognises the primary responsibility of the state for the protection of internally displaced persons, while acknowledging the right of the displaced to request and receive international assistance.<sup>75</sup> According to the Law, the state is responsible for providing humanitarian assistance for a period of three months, renewable for a further three months in exceptional circumstances.<sup>76</sup> Other key provisions of the Law include the recognition by the state of its duty to promote medium and long-term measures aimed at creating the conditions for sustainable return and resettlement;<sup>77</sup> the establishment of a registration system by which internally displaced persons can register as a basis for receiving assistance;<sup>78</sup> a cessation of status clause that comes into effect when "consolidation and socio-economic stabilisation have been achieved";<sup>79</sup> and a

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<sup>75</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 2(1).

<sup>76</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 15.

<sup>77</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 4(1), 10(6), 17.

<sup>78</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 32.

<sup>79</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 18.

provision aimed at protecting real and personal property when possession is interrupted by forced displacement.<sup>80</sup>

In addition to establishing the rights of the displaced and the duties of the state towards them, Law 387 creates an institutional structure mandated to coordinate, implement and monitor actions taken pursuant to the law. This structure is three-tiered. First, the National Council for Comprehensive Assistance to the Displaced, comprised of senior government officials and the national ombudsman, and chaired by a delegate of the President, is responsible for the design of national policies on internal displacement and for securing the requisite financial resources for the implementation of these policies.<sup>81</sup> Second, 15 specialised national institutions are responsible for the actual implementation of the Law and related policies.<sup>82</sup> Finally, the Law requires that committees on internal displacement be created at the various levels of local government (municipality, district, and department) for the purpose of supporting the national system for the displaced at the local level. These committees are to be chaired by the civil authority, be they the governor or mayor, and are comprised of representatives of the local military authority, the police, the civil defence authority, the health authority, the family welfare agency, the Colombian Red Cross and the Church, as well as two representatives of internally displaced communities.<sup>83</sup>

The Law also provides for the creation of a National Information Network on Internal Displacement to "ensure that the National System receives rapid and effective national and regional information on violent conflicts, as well as the identification and assessment of the circumstances that gave rise to the forced displacement."<sup>84</sup> This information is intended to be used as the basis upon which to assess the magnitude of the crisis of displacement, design measures for assistance, and develop plans for long-term "stabilisation." Another function to be served by the Network is as a monitoring mechanism for actions taken pursuant to the National Plan.<sup>85</sup> According to the Law, the Information Network is to be strengthened in its work by the Observatory of

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<sup>80</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 19(1).

<sup>81</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 6.

<sup>82</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 6.

<sup>83</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 7.

<sup>84</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), sII.

<sup>85</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 11.

Internal Displacement Caused by Violence (*Observatorio del Desplazamiento Interno por la Violencia*), a monitoring mechanism comprised of experts and academics required to report annually to the government on the magnitude and trends relating to displacement.<sup>86</sup>

The final piece in the institutional puzzle was put in place in March 1999 when the position of Presidential Adviser for the Displaced was abolished and replaced by the Social Solidarity Network (*Red de Solidaridad Social*).<sup>87</sup> The Network, established in 1994, had a broad mandate to address the needs of the most vulnerable groups of society, including the poor, children, women, minorities, and now also the internally displaced. At the time, the perceived advantage of bringing on-board the Network was its nationwide operational capacity, and therefore the possibility of working directly with partners at the departmental, regional and municipal levels.<sup>88</sup>

By the end of the 1990s, therefore, the Colombian Government had established a comprehensive legal and institutional framework for the protection of internally displaced persons. The state had recognised its primary responsibility for respecting the rights of the internally displaced and had delineated what it considered to be the priority areas to be addressed by the national system including prevention, the provision of humanitarian assistance, long-term assistance, and continual monitoring.

### *C. Incorporation of the Guiding Principles*

The presentation of the Guiding Principles to the international community, barely a year after the adoption of Law 387, presented the Colombian authorities, judiciary and non-governmental sector, with a tool by which to measure the adequacy of their system of protection for the internally displaced. Indeed, Federico Guzmán Duque explains in a forthcoming book, "the process by which the Guiding Principles have been incorporated into the Colombian system for the attention of internally displaced persons has both legal and socio-political dimensions." Duque identifies several ways

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<sup>86</sup> Law 387 (1997), Diario Oficial (No. 43,091, 1997), art 13.

<sup>87</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [49] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>88</sup> Francis M Deng, *Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia*, [49] UN Comm'n on Hum. Rts., UN Doc E/CN.4/2000/83/Add.1 (2000).

in which the Guiding Principles have been incorporated including: as part of the 'Constitutional Block' of binding international law; as a guide to the minimum level of 'right satisfaction' to which all internally displaced are due; as a tool for use in government reporting, evaluation and monitoring; as a guide for design indicators; and as a legal guide to be applied in all cases bearing on the rights of the internally displaced. As a socio-political tool, the Guiding Principles are a monitoring and advocacy tool used by civil society directly in their work with the internally displaced, and in their appeals to the authorities.<sup>89</sup>

#### *D. Constitutional incorporation*

As already mentioned, the 1991 Constitution of Colombia created extensive human rights protections, including with regard to the incorporation of international law into domestic law. Article 9 establishes that the state's foreign relations are based, *inter alia*, on recognition of the principles of international law accepted by Colombia. Expressly in relation to children, Article 44 holds that children shall enjoy the rights recognised in those international treaties to which Colombia is a party. Finally, Article 93 states that, "treaties and international covenants ratified by Congress, which recognise human rights and which prohibit their limitation in states of emergency, will take legal primacy internally." Those instruments that thereby become applicable internally, are referred to as forming part of the 'Constitutional Block'.

The Guiding Principles are not a legally binding document *per se*. Not a treaty, it is impossible for Colombia to become a party to the Guiding Principles. Yet, the Guiding Principles are a restatement of existing, binding law. On this basis, they have been treated by the Constitutional Court as constituting part of the Constitutional Block. Thus, the Court in Decision SU-1150 of 2000 stated:

the Guiding Principles have not been approved by means of an international treaty. However, given that they fundamentally reflect and fill gaps in established international human rights treaties and have received widespread acceptance by the distinct international human rights bodies, the Court considers that they should be held as parameters for the normative and interpretive developments in the field of the regulation of forced displacement and the attention to displaced

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<sup>89</sup> Federico Guzmán Duque, 'The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia' (on file with the author).

persons by the state. The previous, it is clear, does not prejudice the fact that all the provisions that reiterate norms already included in international human rights and international humanitarian treaties approved by Colombia, enjoy constitutional rank, as indicated by Article 93 of the Constitution.<sup>90</sup>

In a subsequent judgment of the Court, Justice Marco Gerardo Monroy Cabra stated:

The most favourable interpretation for the protection of internally displaced persons' human rights makes it necessary to apply the Guiding Principles on Internal Displacement contained in the Report of the Special [sic] Representative of the UN Secretary-General on internally displaced persons, which form part of the international legal provisions that constitute the Constitutional Block.<sup>91</sup>

With the legal status of the Guiding Principles not in question, at least to the extent they reflect binding international law, they have been relied on heavily by the Court as an interpretative tool by which to determine the exact content and scope of the rights of the internally displaced and the obligations of the state towards them.<sup>92</sup> The description of an 'internally displaced person' in the Guiding Principles has been used as the basis for determining that neither registration nor any other form of 'status determination' should be imposed as a prerequisite for receiving assistance. Specific Principles have been referred to in support of constitutional rights, for example, to health, education and an adequate standard of living. Furthermore, the Court has also called for public officers engaged in the registration of the displaced in the public system to be trained in the Guiding Principles.

In each of these cases, the final judgment relied on the application of individual Guiding Principles and not on the document as a whole. It was not until the seminal case of T-025 of 2004, that the legal standing of the Guiding Principles as a whole was clarified.

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<sup>90</sup> Sentencia SU-1150 of 2000 (Col. Const. Ct. 30 August 2000), [38].

<sup>91</sup> Sentencia T-327 of 2001 (Col. Const. Ct. 26 March 2001), 17.

<sup>92</sup> For a general discussion of the judicial incorporation of the Guiding Principles into Colombian jurisprudence, see: Federico Guzmán Duque, 'The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia' (2007) [unpublished] (on file with author).

### *E. Decision T-025 of the Constitutional Court*

The interventionist role that the Colombian Constitutional Court has played in monitoring the implementation of state policies towards the internally displaced has been made possible by the existence of a legal concept referred to as '*tutela*'. The Colombian Constitution, in addition to establishing important rights protections, introduced '*tutela*', a mechanism by which immediate court actions can be requested by individuals who consider that their constitutional rights are being violated and that they have no other legal recourse. An 'action of *tutela*' (*acción de tutela*) is initiated by the filing of an informal claim by a citizen, without the need for legal counsel, before any judge in the country with territorial jurisdiction. The judge is required to give priority to the claim and must issue a decision within ten days of filing. Judges are at liberty to make any order necessary to protect the threatened or violated rights, even before rendering a final judgment. These judgments can be appealed to the Constitutional Court. The Court will hear those cases it considers necessary or pertinent for the development of constitutional law. The popularity of the *tutela* as a means of receiving judicial attention is evidenced by the fact that in 1992 a total of 8 060 *tutela* decisions were appealed to the Constitutional Court for discretionary review. By 2005, this number reached 221 348.<sup>93</sup>

Although the act of causing forced displacement is a criminal offence under Colombian law, increasingly fewer claims are brought for this crime due to the general reluctance of the authorities to prosecute the alleged perpetrators. Consequently, the *tutela* has become a preferred means by which the displaced raise their complaints with the authorities and seek redress for the violation of their rights. Since 1997, when the Court was first asked to consider the human rights protection of internally displaced persons, 17 cases have been decided addressing the following rights: non-discrimination; life and personal integrity; health; subsistence income; housing; movement; education; children; right of choice; personality; work; emergency assistance; right of petition; and registration.

In January 2004 a three-member Court presided over by Justice José Manuel Cepeda Espinosa, issued Decision T-025 based on 108 *tutela* actions that had been filed by

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<sup>93</sup> Sentencia T-327 of 2001 (Col. Const. Ct. 26 March 2001).

1 150 displaced families.<sup>94</sup> These actions reflected the institutional, practical and doctrinal inadequacies of the state response to internal displacement at a time when the estimated number of internally displaced had increased from 1 113 771 in 1997 to approximately four million in 2004;<sup>95</sup> during the period 1998 to 2002 just 36 percent of those families the government had aimed to reach actually received assistance; fifty percent of displaced households lived in dwellings constructed of cloth, cardboard, or scraps of wood, as opposed to only 16 percent of non-displaced households;<sup>96</sup> and children were missing school in order to care for younger family members or work.<sup>97</sup>

Following the review of these *tutela* actions, the Court found the violation of 17 separate Constitutional rights and identified two main factors accounting for the State's incapacity to respond adequately to the protection needs of the internally displaced: first, the lack of institutional capacity to implement the policy; and, secondly, insufficient resources designated to the implementation of the policy.<sup>98</sup> In conclusion, the Court held that:

given the conditions of extreme vulnerability of the displaced population, as well as the repeated omission by the different authorities in charge of their attention to grant timely and effective protection, the rights of the plaintiffs in the present proceedings – and of the displaced population in general – to a dignified life, personal integrity, equality, petition, work, health, social security, education, minimum subsistence income and special protection for elderly persons, women providers and children, have all been violated.

...

These violations have been taking place in a massive, protracted and reiterative manner, and they are not attributable to a single authority, but are rather derived from a structural problem that affected the entire attention policy designed by the State, as well as its different components, on account of the insufficiency of the resources allocated to finance such policy, and the precarious institutional capacity to implement it. This situation gives rise to an unconstitutional state of affairs.<sup>99</sup>

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<sup>94</sup> Sentencia T-327 of 2001 (Col. Const. Ct. 26 March 2001),

<sup>95</sup> Francis M Deng, Report of the Representative of the Secretary-General on internally displaced persons, Addendum, Profiles in Displacement: Colombia, [13] UN Doc E/CN.4/2000/83/Add.1 (2000).

<sup>96</sup> Human Rights Watch, 'Colombia: Displaced and Discarded – The Plight of Internally Displaced Persons in Bogotá and Cartagena', October 2005 Vol. 17, No. 4(B), 21.

<sup>97</sup> Human Rights Watch, 'Colombia: Displaced and Discarded – The Plight of Internally Displaced Persons in Bogotá and Cartagena', October 2005 Vol. 17, No. 4(B), 22.

<sup>98</sup> Sentencia T-327 of 2001 (Col. Const. Ct. 26 March 2001), 195.

<sup>99</sup> Sentencia T-327 of 2001 (Col. Const. Ct. 26 March 2001), 194.

Each of the 17 rights which the Court held was either threatened or violated, was enumerated by the Court and identified according to the relevant Guiding Principle. For example, the Court found a violation of the right to an adequate standard of living, citing Principles 18 and 21 as establishing the basic requirement of an adequate standard of living and adequate shelter.<sup>100</sup> The Court also used the Guiding Principles as one of three interrelated frameworks by which to determine whether the authorities had adopted adequate measures in the discharge of their responsibility towards the internally displaced.<sup>101</sup> In this respect, the Court used the Guiding Principles to identify the 'minimum level of satisfaction' for which the authorities were immediately responsible. That is, given the enormity of the displacement crisis in Colombia, the Court recognised that to require of the authorities the immediate satisfaction of all human rights by the internally displaced was unrealistic. Consequently, the Court identified those rights which, at a minimum, needed to be satisfied with a view to the progressive realisation of all rights over the course of time. These rights are: the right to life, to physical integrity, to family and family unity, to an adequate standard of living, to health, to freedom from discrimination, the rights of the child, to self-sufficiency, and to voluntary return or resettlement.<sup>102</sup>

The approach adopted by the Court was pragmatic, acknowledging the immensity of the displacement crisis and aiming to establish realistic benchmarks by which to measure the state's response to the crisis. It bears highlighting, however, that the 'minimum level of satisfaction' doctrine employed by the Constitutional Court is a construct of the Court alone and not of international law. While the International Covenant on Economic, Social and Cultural Rights provides for the 'progressive realisation' of the rights contained in that Covenant in the case of countries with few financial resources, the same is not true of the International Covenant on Civil and Political Rights. Yet, in the application of the 'minimum level of satisfaction' doctrine, the Court appears to have exonerated the authorities from immediate realisation of many civil and political rights, at least to the extent that they may imply public expenditure. The right to political participation, for example, in many cases can only be exercised by the internally displaced through a system of absentee voting.

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<sup>100</sup> Sentencia T-025 of 2004 (Col. Const. Ct. 22 January 2004) 39 – 40.

<sup>101</sup> Sentencia T-025 of 2004 (Col. Const. Ct. 22 January 2004) 41.

<sup>102</sup> Sentencia T-025 of 2004 (Col. Const. Ct. 22 January 2004) 76 – 77.



The question is, therefore, according to the 'minimum level of satisfaction' doctrine, are the authorities justified in not instituting such systems if they require any significant expenditure? The same question could be asked in relation to the right to employment, for example, in the event that special programmes, including job training, are necessary in order to assist internally displaced persons with rural backgrounds to find employment in urban settings.

By declaring an "unconstitutional state of affairs," the Court had jurisdiction to adopt 'complex orders' for the benefit of the entire displaced population and not just those who had filed *tutela* actions. Thus, the Court made orders regarding the following: the adoption of a budget in accordance with the identified needs of the registered displaced population; development of an action plan which addresses the deficits of state action; implementation of a campaign to inform the internally displaced about their basic rights and entitlements; implementation of steps to guarantee a court-defined minimum level of protection for all internally displaced persons; full participation of the displaced population in the decision-making process affecting them; and sanctions for any civil servant or agencies that forced the internally displaced to have recourse to legal remedies as a necessary precondition for obtaining their entitlements.

Also flowing from the Court's finding of an "unconstitutional state of affairs" was the ability and duty of the Court to monitor the execution of its orders as a means of determining whether the unconstitutional state was being adequately redressed with a view to issuing further orders as necessary and ultimately determining when the unconstitutional state had come to an end. The process by which the Court has undertaken this monitoring has been exhaustive, involving regular reporting by the state to the Court about its implementation of the Court's orders; representations by civil society to the Court to present their view of the state's progress; the issuance of further orders by the Court; and the development of indicators which, ultimately approved by the Court, will form the basis for monitoring state compliance with its obligations.

Much of the focus of the follow-up to Decision T-025 has centred around budgetary concerns<sup>103</sup> and issues of coordination among and between national and local authorities, particularly with regard to returns and resettlement.<sup>104</sup> In this regard, the Court has ordered the Director of the Social Solidarity Network to design, implement and promptly apply a coordinated program of action aimed at ensuring returns and resettlements can be carried out in conditions that are compatible with full respect for the Guiding Principles.<sup>105</sup> To a large extent, however, several of the concerns raised by the Court in Decision T-025 are practical matters that require political will to be adequately addressed.

*F. Using the Guiding Principles to address Court-identified limitations*

Some concerns raised, by the Court, however, are open to guidance by the Guiding Principles, in particular, the definition of an 'internally displaced person' for the purposes of the registration system, the implementation of the registration system itself, the duty to consult and provide effective participation mechanisms for the internally displaced, and the issue remedies for property loss. These issues will be considered below.

*1. 'Internally displaced person' for the purposes of receiving assistance*

Central to the Guiding Principles is the description of an 'internally displaced person'. Many laws and policies on internal displacement do not include a definition of an internally displaced person.<sup>106</sup> Of those that do, several quote directly or closely reflect the Guiding Principles.<sup>107</sup> In some cases, however, the definition has been drafted in a way that limits the rights of internally displaced persons, either by incorporating refugee concepts into the definition or by deliberately excluding those displaced by particular causes when to recognise those displaced persons may, for example, require the authorities to admit their role in displacement.

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<sup>103</sup> See, eg, Award No. 176 of 2005, Constitutional Court of Colombia, 29 August 2005; Award No. 177 of 2005, Constitutional Court of Colombia, 29 August 2005

<sup>104</sup> Award No. 178 of 2005, Constitutional Court of Colombia, 29 August 2005

<sup>105</sup> Award No. 178 of 2005, Constitutional Court of Colombia, 29 August 2005

<sup>106</sup> See, e.g., Norms on the Resettlement of the Internally Displaced Populations, Decree Number 1/01 [of Angola] (2001).

<sup>107</sup> See, e.g., National Policy for Internally Displaced Persons [of Uganda] (2004), Glossary of terms (x).

In the case of the Russian law relating to forced migrants, the definition is not limited to those displaced *within* the country, but includes those who have been forced to leave the country for reasons including “persecution for reasons of race, nationality... or membership of some particular social group.”<sup>108</sup> This reference to ‘persecution’ on certain grounds is a direct reference to the definition of a ‘refugee’ found in the Refugee Convention.<sup>109</sup>

Laws that seek to deal jointly with refugees and internally displaced persons run the risk of failing to adequately address the specific needs of both. Particularly in relation to the Russian law on forced migrants, the lack of a logical and conceptual boundary between refugees and internally displaced persons has been highlighted as an issue of concern.<sup>110</sup> The definition of ‘forced migrant’ includes Russian citizens and non-citizens, persons residing outside of the Russian Federation and within it, and persons who crossed international borders and persons who did not. Specifically for the internally displaced, this situation is said to have resulted in them becoming “lost among the other categories of forced migrants.”<sup>111</sup>

Laws that apply refugee concepts to the internally displaced are also problematic. The Bosnia and Herzegovina law contains separate definitions for ‘displaced persons’ (those who have remained *within* the country) and ‘returnees’ (those returning from *outside* the country), but it applies the refugee concept of exclusion to internally displaced persons. This concept excludes certain individuals from being legally recognized as refugees, such as individuals who have committed certain crimes.<sup>112</sup> This makes sense in the case of refugees, who seek a legal status from a host state of

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<sup>108</sup> Federal Law on the Introduction of Amendments and Additions to the Law of the Russian Federation on Forced Migrants Article 1(1) (1995), Official Gazette (1995) cited in Roberta Cohen, Walter Kälin and Erin Mooney (eds.), *The Guiding Principles on Internal Displacement and the Law of the South Caucasus*, American Society of International Law, Studies In Transnational Legal Policy, No. 34 (2003) 215.

<sup>109</sup> Refugee Convention, art 1.

<sup>110</sup> Report of the Conference on Internal Displacement in the Russian Federation, Moscow, Russia, April 25-26 (2002) 21.

<sup>111</sup> Vladimir Shkolnikov, Office for Democratic Institutions and Human Rights, *Presentation to the Organization for Security and Cooperation in Europe*, International Conference on Internal Displacement in the Russian Federation, Moscow, Russia, April 25-26, 2002, as cited in the *Report of the Conference on Internal Displacement in the Russian Federation* (2002) 6.

<sup>112</sup> Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 198 UNTS 137, (entered into force April, 22 1954), art 1F.

which they are not citizens. Exclusion, however, is not a concept that can be applied to the internally displaced. Internally displaced persons are citizens (or residents) of their own country. They retain all the rights and freedoms under international and domestic law that all other persons in their country enjoy. Thus, the commission of a crime cannot affect whether a person is internally displaced.

Similarly, an administrative definition of an internally displaced person, such as that created in Colombia as a basis for the system of registration, should not seek to limit or delineate the rights of those displaced directly as a result of state action under the pretences that somehow they are not truly internally displaced persons. For example, in Nepal, before the adoption of its National Policy in 2007, the Government had proposed a definition that only recognised those persons displaced as a result of guerrilla activity and not as a result of the activities of the state.

In the case of Colombia, fumigations conducted by the national authorities, or on their behalf, are aimed at driving out coca growers but are also leading to the displacement of village communities.<sup>113</sup> Yet, the authorities do not recognise these persons as displaced for the purposes of the unified registration system and therefore, they are ineligible to receive assistance. Intra-municipal displacement is similarly not recognised.<sup>114</sup>

The state of being displaced is a factual situation; it is not a legal status. According to the Guiding Principles, the provision of a definition of internal displacement is not meant to create or limit new rights or entitlements, but rather to acknowledge a factual situation. The Guiding Principles most accurately describe the state of being internally displaced and should be used as the basis for any definition of an internally displaced person contained in national laws and policies. The description is broad and can be adapted as appropriate, for example, in the case where the law or policy seeks to address only one cause of displacement.

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<sup>113</sup> Andrea Lari, 'Striving for Better Days: Improving the lives of internally displaced people in Colombia', Refugees International, (December 2007), 2

<sup>114</sup> Jeff Fischer, 'Conflict, Displacement, and Elections – Action Plan for Municipal Elections in Colombia', International Organization for Migration, (November 2006), 20.

## 2. *Registration*

The failure to recognise all the internally displaced as such, is one basis underlying the disparity in figures produced by the state and NGOs when counting internally displaced persons in Colombia. Another arises as a result of basing the provision of assistance on a system of registration. In this respect, the Guiding Principles provide only limited guidance.

As discussed earlier, the Guiding Principles do not seek to establish a legal status of 'being displaced,' rather they establish a description which recognises a state of fact. Difficulties arise, however, when displacement recognised as such is accompanied by preferential access to particular goods and services, and therefore the natural interest on the part of the state to ensure that preferential treatment is enjoyed only by the targeted population.

Registration is a common practice and one that is often provided for in laws on internal displacement. It can serve several useful purposes including: identifying and locating the displaced, whether they are living in camps or in host communities; determining their needs; and identifying particularly vulnerable groups. Based on this information, states can budget and create tailored benefits packages.

Registration, however, has its challenges and limitations. First, in many circumstances, the internally displaced may not wish to register for fear of reprisals, particularly when government authorities are complicit in the events causing displacement. Secondly, registration procedures may be manipulated, preventing some internally displaced persons from registering and therefore denying them the benefits of being identified as an internally displaced person. For example, in an armed conflict when internal displacement is caused by both rebel groups and government activities, the government may only recognise those displaced by the rebel groups. Finally, in many cases internally displaced persons will not have any personal identification and other documentation. It may have been lost, destroyed or left behind in the rush to escape a conflict or disaster. In such cases, a flexible registration system is required to ensure that their lack of documentation is not a barrier to registration and ultimately to accessing services and other benefits.

The importance of ensuring a fair and effective registration system can be as important as ensuring an overall effective legislative framework for the internally displaced. If the law bases distribution of benefits for internally displaced persons on their registration, but their registration is not comprehensive and fair, then the law is largely meaningless.

The Constitutional Court has continued to grapple with the challenges of the registration system. First, in 2000, decree 2569 modified certain aspects of registration: it defined the registration process along with criteria for evaluating the declaration and conditions for registration in the unified system. Furthermore, in 2001 the Constitutional Court stipulated that recognition of the status of victims of displacement cannot be considered a *sine qua non* requirement for exercise of fundamental rights. The court found that such recognition involves only an administrative procedure, whereas forced displacement is a *de facto* situation, the proof of which must not fall on the victim.

### 3. *Remedies for property loss*

The Guiding Principles recognise both the right to own property, and also the duty of states to provide a remedy for the loss of property as part of the steps necessary to achieve sustainable solutions for the displaced, whether they choose to return to their places of previous residence, or resettle elsewhere. Thus, Principle 29(2) states:

Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

Land is an issue of central importance in the Colombian conflict. Control of land is a primary motivator for many actors on both sides. Given the largely rural nature of the conflict, loss of land by the displaced has been particularly marked. Finally, land security is an important factor in the ability and willingness of the internally displaced

to commit to a durable solution, either to return to their place of origin or resettle elsewhere.

While Law 387 provided for the protection of the property of the displaced, it was not until 2001 that a system was established to give effect to the Law. Decree 2007 of 2001 introduced public protection for the property of displaced people, and a land assignation procedure in cases of resettlement. The mechanism relies on a declaration of a state of imminent risk of forcible displacement in a particular area or region, which enables the competent authority to take over the property of those persons who abandon the area. According to the decree, the sale of properties in such zones is only permissible with explicit permission, so as to avoid the application of pressure to persuade the sale of property. In the event that the displaced person chooses not to, or is unable, to return to their abandoned land, they can apply for an exchange of their abandoned land and house for a similar property in another region of the country.

The implementation of this programme has been found lacking in several respects, including low efficiency, limited capacity of the executing agencies, a lack of flexible registration systems in the event that the owner does not possess formal title deeds for their land, and high-levels of under-registration of properties.<sup>115</sup> Even if the system were to be applied effectively, it suffers from another considerable limitation, that it provides no redress for the millions of displaced persons who had already been forced to abandon their property before the adoption of the Decree.

Indeed, failure to address long-term strategies for resolving the displacement crisis is one of the failures of the Constitutional Court and particularly the state programmes of assistance. The Colombian displacement situation has been characterised as one of 'protracted displacement' reflecting the length of period for which people have been displaced without achieving a 'durable solution'. One of the likely reasons for this is the continued insistence of the authorities to focus on return as the only solution for the displaced while the displaced population continually express their desire to resettle permanently. As Principle 29(2) reflects, however, whether return or resettlement is

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<sup>115</sup> Natalia Springer, 'Colombia: Internal displacement – policies and problems', Writenet, June 2006, 28-29.

the option voluntarily chosen by the displaced, the authorities are responsible for assisting in the recovery or granting of compensation for lost property.

#### 4. *Consultation and participation*

The Guiding Principles emphasise the importance of participation by the internally displaced in programmes and decision-making processes that involve their interests. Guiding Principle 18(3), for example, requires that “special efforts be made to ensure the full participation of women in the planning and distribution of ... basic supplies.” Principle 29(2) stipulates that “special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”

The general importance of consultation and participation in contributing to the effectiveness of humanitarian assistance is highlighted in the report of the Representative of the Secretary-General entitled “Protection of Internally Displaced Persons in Situations of Natural Disaster.”<sup>116</sup> The report notes the tendency of governments to centralise decision-making in the interest of efficient management, with the effect that the internally displaced are excluded from planning the location and layout of camps and settlements, the type of food and other items selected, the manner in which aid is distributed, and other matters central to their daily lives. This can heighten the sense of helplessness among displaced populations, undermine the effectiveness of humanitarian assistance, and even put at risk the physical security of displaced persons, especially that of women.<sup>117</sup>

A handful of existing laws and policies contain consultation and participation provisions. The *Angolan Norms on Resettlement of the Internally Displaced Populations*, for example, require that the provincial government ensure the active participation of displaced populations in the resettlement or return process.<sup>118</sup> The

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<sup>116</sup> *Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons*, Walter Kälin, 27 February to 5 March 2005.

<sup>117</sup> *Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons*, Walter Kälin, 27 February to 5 March 2005, 20-21.

<sup>118</sup> Norms on the Resettlement of the Internally Displaced Populations, Decree Number 1/01 [of Angola] Article 9(1)(c), Article 14(2)(a) (2001).



Norms, however, do not elaborate on how such participation is to be facilitated and whether displaced populations will be able to participate in all, or only some, aspects of resettlement and return. The Ugandan policy is more detailed in its provisions inviting the participation of the internally displaced. Section 2.3.1(iii) requires the Human Rights Promotion and Protection Sub Committee to work in collaboration with representatives of the internally displaced to find ways to promote respect for and protect the human rights of the displaced. Section 2.4(v) states that representatives of displaced women shall be consulted and may be invited to participate in meetings of the District Disaster Management Committees.

The Colombian Law 387 specifically provides for the participation of internally displaced persons in relevant committees established in accordance with the Law.<sup>119</sup> The Constitutional Court, however, in Decision T-025 noted the lack of effective participation of the internally displaced<sup>120</sup> and specifically ordered the authorities to remedy the situation as a requirement to overcome the unconstitutional state of affairs.<sup>121</sup> Indeed, the Court has contributed itself to the effective inclusion of internally displaced persons and their representatives in the process affecting them, requiring that the meetings held to monitor state progress in complying with Decision T-025 involve their active participation.

Beyond the Court's proceedings, however, the Colombian Commission of Jurists and Jesuit Refugee Services have identified barriers to the effective participation of the internally displaced, including practical concerns about when the displaced are told of a meeting; the level of information, including documentation that is provided to them; and the inherent limits of attempting to bring the internally displaced together with security forces.<sup>122</sup>

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While domestic incorporation of the Guiding Principles remains relatively rare, it is a growing trend and it is central to Deng's original conception of 'sovereignty as

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<sup>119</sup> Law 387 [of Colombia] (1997), Diario Oficial (No. 43,091, 1997) art 19(10), art 7.

<sup>120</sup> Sentencia T-025 of 2004 (Col. Const. Ct. 22 January 2004), Section 6.3.1.

<sup>121</sup> Sentencia T-025 of 2004 (Col. Const. Ct. 22 January 2004), Section 10 (order 5). See also, Award No. 177 of 2005, Constitutional Court of Colombia, 29 August 2005

<sup>122</sup> Jesuit Refugee Services and Comisión Colombiana de Juristas, 'Broken Promises: Follow-up of the application of international recommendations on forced displacement in Colombia 2004-2005', 1 December 2005

responsibility.' Colombia has led the way in developing a comprehensive law on internal displacement and, through the Constitutional Court, has wrestled with the practical challenges and opportunities presented in implementing the law in accordance with human rights standards, particularly the Guiding Principles. What the Colombian experience reveals is the value of the Guiding Principles in providing a human rights framework directly applicable to internal displacement, and the uses to which that can be put. At the same time, the Colombia experience highlights the many practical challenges that are beyond the remit of the Guiding Principles, but which have a significant bearing on the effective protection of the internally displaced.

## Conclusion

The Guiding Principles on Internal Displacement were developed to improve efforts for the protection and assistance of internally displaced persons.<sup>1</sup> In the ten years since they were presented to the UN Commission on Human Rights, they have met their goal in many substantial respects. Largely due to the efforts of a small group of dedicated individuals, the Principles have received widespread acceptance. They have been acknowledged by international and regional inter-governmental organisations and increasingly used as an operational tool and legal standard for the protection of the displaced. The Guiding Principles, however, are not a panacea. Challenges lying at the intersection of law and practice still mar the protection process, while state concerns about sovereignty and a recurring absence of political will remain significant barriers to the effective protection of internally displaced persons.

In his report to the Commission on Human Rights in 1998, when the Representative of the Secretary-General presented the Guiding Principles to the Commission for the first time, he identified a series of goals to be met by the Principles. These goals were: to identify, reaffirm and consolidate the specific rights of the internally displaced; to fill in gaps and grey areas in existing law; to be a tool for promoting and protecting the rights of the internally displaced; and to contribute to the creation of a "moral and political climate necessary to improve protection." The Principles were also intended to be used as a tool in training of relevant actors, particularly national authorities, and as a benchmark against which to monitor and measure the treatment of the internally displaced.<sup>2</sup> Encompassing each of these goals is the purpose identified within the Guiding Principles themselves, which is simply to "provide guidance to" relevant actors in the field of displacement: the Representative of the Secretary-General; states; "all other groups and authorities in their relations with

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<sup>1</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [4] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1998/53 (1998).

<sup>2</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [4, 22-24] UN Comm'n on Hum. Rts., UN Doc E/CN.4/1998/53 (1998). See, also, Roberta Cohen, 'The Guiding Principles on Internal Displacement: a new instrument for international organisations and NGOs' (1998) 2 *Forced Migration Review* 33.

internally displaced persons: inter-governmental and non-governmental organisations.<sup>3</sup> Notably absent from this list are the displaced themselves.

The primary proponents of the Guiding Principles, responsible for actively promoting the existence and use of the Principles, have been: Francis Deng, the first Representative of the Secretary-General on internally displaced persons and his successor, Walter Kälin; Roberta Cohen, Director of the Brookings Institution Project on Internal Displacement; representatives of the governments of Austria and Norway; and a growing cohort of local, national and international NGOs, particularly IDMC. OCHA, OHCHR, local NGOs and individual experts must also be credited with making the Guiding Principles widely accessible through their translation into over forty-five languages and wide dissemination.<sup>4</sup> It is through the combined efforts of these organisations and individuals that the goals of the Guiding Principles have been pursued.

The recognition in the World Summit Outcome Document of the Guiding Principles as “an important international framework” reflects the broad international, regional and national acceptance enjoyed by the Guiding Principles.<sup>5</sup> The UN General Assembly and the Commission on Human Rights/Human Rights Council have expressed on numerous occasions their support for the Guiding Principles. Several regional organisations have done the same, including principally the Council of Europe, AU, and the OAS. The OSCE, as well as sub-regional organisations in Africa, have also indicated their support for the Guiding Principles. Acceptance of the Principles, however, is not universal. The statement contained in the World Summit Outcome Document belies many regional and national idiosyncrasies.

Addressing human rights issues on a regional basis is challenging in Asia in the absence of a regional inter-governmental body equivalent to the AU, Council of Europe or OAS. Those sub-regional bodies that do exist, ASEAN and SAARC, are

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<sup>3</sup> Francis M Deng, *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General*, UN Doc E/CN.4/1998/53/Add.2, (1998) 1.

<sup>4</sup> For a full list of the languages into which the Guiding Principles have been translated and the organisations or individuals responsible for their translation, see: <[http://www.brookings.edu/projects/idp/gp\\_page.aspx](http://www.brookings.edu/projects/idp/gp_page.aspx)> at 21 March 2008.

<sup>5</sup> *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, [132] UN Doc A/RES/60/1 (2005).

not mandated and are unaccustomed to considering human rights issues. This may soon change, however, with the adoption in November 2007 of a landmark Charter paving the way for the establishment by ASEAN of a human rights body, the precise form, scope and mandate of which is yet to be determined.<sup>6</sup> In the meantime, however, the continent must rely for its guidance on the UN and on the influential states of the region, including India, which has routinely expressed its concerns that the Guiding Principles may be used to justify an encroachment on state sovereignty; a concern shared by other states beyond Asia, particularly Sudan and also expressed on occasion by Egypt and Algeria.

Notwithstanding the vocal minority of states that, primarily out of concern for their own state interests, have continued to challenge the legitimacy and status of the Guiding Principles, it is unquestionable that they have achieved a high degree of acceptance. The major significance of the Guiding Principles, however, lies not in their rapid acceptance by the international community but in the extent to which, as a unified statement of rights and responsibilities, they have succeeded in bringing attention to the needs of the internally displaced and forming a framework within which those needs can be addressed.

As a document encapsulating all relevant human rights and humanitarian law applicable to the internally displaced, pulled together from a myriad of disparate instruments, the Guiding Principles present in one easily presentable and digestible package, the rights of internally displaced persons. As such they form the basis for training activities conducted by the IDMC with government authorities, national human rights institutions, and NGOs; they underpin a rights-based approach to UNHCR programming;<sup>7</sup> they form the basis of recommendations made by the Representative in his reports following individual country missions;<sup>8</sup> and they inform the advice provided to states when developing laws and policies on internal displacement.

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<sup>6</sup> *Charter of the Association of Southeast Asian Nations*, 20 November 2007, art 15.

<sup>7</sup> UNHCR, 'UNHCR's Contribution to the Inter-agency Response to IDP Needs: Summary of Activities under the Supplementary Appeal', (May 2007) 7.

<sup>8</sup> See, eg, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons. Addendum. Mission to the Sudan*, UN Comm'n on Hum. Rts. [5] UN Doc E/CN.4/2006/71/Add.6 (2005).

More than simply an operational tool, the Guiding Principles have also evolved as a useful legal tool. As a document addressed to the needs of internally displaced persons, the Guiding Principles have clarified how existing human rights and humanitarian law applies specifically in situations of internal displacement, thereby ensuring a rights-based approach to internal displacement. Furthermore, by addressing grey areas in the law and filling in existing gaps, the Principles have made a substantial contribution to the body of law applicable in situations of internal displacement. This is particularly evident by the relatively frequent reliance on some of the 'filled gaps', such as the right to return which has been referenced in several fora.<sup>9</sup>

Indeed, it is with respect to the Guiding Principles as a legal framework that some of the most significant, and perhaps unexpected, gains have been made. The Guiding Principles were not intended to be a legally binding document in themselves. This was a pragmatic choice, reflecting the challenge at the time of developing a binding instrument on internal displacement, but also the value of being able to negotiate with states without the threat of sanctions being imposed for non-compliance.<sup>10</sup> Nonetheless, in three specific contexts the Guiding Principles have informed judicial proceedings relating to internal displacement. The first example arose in the European Court of Human Rights, where the Principles were referenced in support of the proposition that the internally displaced have a right to return or resettle, and the authorities have a duty to facilitate this.<sup>11</sup> In the second instance, the Colombian Constitutional Court decided that the Guiding Principles form part of the 'Constitutional Block' of binding human rights law on account of their foundation in existing law.<sup>12</sup> Finally, the Inter-American Court of Human Rights (IACHR) has applied the Principles on several occasions.<sup>13</sup>

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<sup>9</sup> See, eg, *Dogan and others v Turkey*, (application nos. 8803-8811/02, 8813/02 and 8815-8819/02), [2004], European Court of Human Rights, 29 June 2004; *Case of Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-American Court of Human Rights (Ser. C) No. 124.

<sup>10</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 475.

<sup>11</sup> *Dogan and others v Turkey*, (application nos. 8803-8811/02, 8813/02 and 8815-8819/02).

<sup>12</sup> Sentencia SU-1150 of 2000 (Col. Const. Ct. 30 August 2000).

<sup>13</sup> *Case of Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 124.

The establishment of the Guiding Principles as the normative framework to be complied with in times of internal displacement, is being aided by parallel regional initiatives in Africa. In processes that began in 2004, the International Conference on the Great Lakes Region and the AU have undertaken measures to incorporate the Guiding Principles into the regional human rights framework and require of states the development of domestic laws in accordance with the Principles. If successful in achieving regional adherence to the Guiding Principles, even if only in a small measure at the outset, these initiatives may serve as models for other regions.

In the meantime, acceptance of the Guiding Principles as legal standards unto themselves remains the notable exception. As the United States District Court for the Eastern District of Louisiana stated in a case arising from the events surrounding Hurricane Katrina, "the Guiding Principles on Internal Displacement do not have the force of 'law'."<sup>14</sup>

It is for this reason that it is too early to claim that the Guiding Principles have themselves set new standards, it is certainly too soon to claim that they constitute customary international law, and it would be premature to suggest the Guiding Principles have opened the way for a treaty to be negotiated on the subject of internal displacement. As several commentators on these questions agree, the Guiding Principles are still in the process of setting standards.<sup>15</sup> And as Representative Deng has himself conceded, "[w]hile the Guiding Principles have been well received at the rhetorical level, their implementation remains problematic, and often rudimentary."<sup>16</sup>

International and regional human rights monitoring and adjudicatory bodies have made use of the Guiding Principles but their application of the Principles has been ad hoc at best. Furthermore, with very few exceptions, the Principles have been applied only to address situations of conflict-induced displacement, exceptionally rarely in

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<sup>14</sup> *Yolanda Anderson et al v. Alphonso Jackson et al*, Civil Action, No. 06-3298, United States District Court for the Eastern District of Louisiana.

<sup>15</sup> See, eg, Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 470, 477; Patrick L Schmidt, 'The Process and Prospects for the UN Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment' (Spring 2004) 35 *Georgetown Journal of International Law* 483, 519.

<sup>16</sup> Francis M Deng, *Internally displaced persons. Report of the Representative of the Secretary-General*, [98] UN Doc E/CN.4/2002/95 (2002).

cases of disaster-induced displacement and never in the context of development. Similarly, domestic application of the Principles has focused on conflict-induced displacement and never as a means of preventing or mitigating the effects of displacement.

With regard to the domestic incorporation of the Guiding Principles, while this is certainly a growing trend, it remains relatively infrequent as compared to the number of countries affected by internal displacement. Furthermore, in few cases is there evidence to suggest that incorporation of the Guiding Principles has made a practical difference in the effective implementation of state policy. Even in Colombia, where the Constitutional Court has demanded of the state that it fulfill its responsibilities towards the internally displaced and has identified clear measures to be taken in order to achieve this, many challenges remain, many of which are beyond the scope of the Guiding Principles to resolve.

That the Constitutional Court has relied on the Guiding Principles to guide state policy toward the internally displaced, however, is significant. It is evidence of how, within just ten years, the Guiding Principles have permeated international and regional discourse and influenced state practice with regard to internal displacement. That there remain approximately five million internally displaced persons globally without any significant humanitarian assistance from their governments, and a further six million whose governments are indifferent or hostile to their protection needs, however, demonstrates that the contribution to be made by the Guiding Principles has only begun.<sup>17</sup> These first ten years mark the beginning of a process. Only time will tell whether the focus, energy and commitment that have been brought to the promotion of the Guiding Principles in the last ten years will translate to measurable gains in the lives of the internally displaced in the future.

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<sup>17</sup> Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2006* (2007) 6.



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