

Soft Law

Despite the staggering number of over 40 million internally displaced persons (IDPs) throughout the world,¹ there is very little explicit international protection for them. Few international legal documents directly pertain to internally displaced persons compared to refugees who have fled across an international border. Therefore, from a legal standpoint, assisting IDPs can be even more complicated for international actors than assisting refugees. Nevertheless, specifically related to IDPs, there have been some important international and national legal developments, including the creation by the United Nations of a Special Rapporteurship dedicated to internally displaced persons in 2010² and the adoption of The Guiding Principles on Internal Displacement in 1998.³

Unlike the “hard law” of multilateral treaties or UN Security Council Resolutions, “soft law” instruments such as the UN Guiding Principles on Internal Displacement, the New York Declaration, and reports by Special Rapporteurs submitted to the General Assembly, are not *directly, immediately* applicable. The content and background of a given soft law document varies e.g., in its use of legalese, the identity of the authors and supporters, the instrument’s outright legal authority, the weight of pre-existing jurisprudence, etc. Other examples of soft law include UN treaty body declarations, General Assembly resolutions, and reports by Special

¹ This number does not include Palestinians.

² The first Rapporteur was appointed in 2010, but there have been IDP representatives to the UN Commission on Human Rights (now the UN Human Rights Council) since 1992. *See*: <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Mandate.aspx>.

³ Additionally, some regional human rights bodies, such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) specifically address the plight and protection needs for IDPs. The Kampala Convention was adopted in 2009 and entered into force in 2012. <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>.

Rapporteurs. Soft law “can be understood as a broad category that captures the increasing plurality and complexity of standard setting and law-making processes.”⁴ It functions more like a strong political suggestion how humans *should* interact with one another (not how they *must* interact with one another).

Still, one should not underestimate the importance of soft law. It expresses norms that can influence public opinion and international legal expertise, eventually making their way into regional and international jurisprudence, treaties among nations, or customary law.⁵ Soft law instruments “can be part of the formative stages of customary international law or treaty-making. States and international organizations frequently adopt resolutions and such instruments with a view to developing the law. [They] constitute international law in an embryonic state.”⁶ However, although soft law instruments contain normative statements (i.e., “nuggets of law”), one must not confuse what *should* be the law for what actually *is* the law.

Soft law is most likely to be initially complied with – and in that aspect to be legally significant – by States with democratic, non-corrupt systems. Soft law instruments used by regional courts create legal precedence, can have a persuasive effect on domestic systems, and

⁴ Ilias Bantekas and Lutz Oette, “International Human Rights Law: The Normative Framework,” in *International Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2016), 65.

⁵ Dinah Shelton, “Soft Law,” in *Handbook of International Law* (forthcoming, Routledge Press, 2008).

⁶ Ilias Bantekas and Lutz Oette, “International Human Rights Law: The Normative Framework,” in *International Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2016), 66.

might lead to public pressure to build stronger enforcement mechanisms.⁷ This reiteration and expansion of pre-existing, internationally supported norms can further influence future treaty development, international customary law and/or domestic legislation.

The Guiding Principles

The Guiding Principles on Internal Displacement, then, are not legally binding on States, but its Introduction does stress that the Principles therein reflect and reiterate existing international humanitarian and human rights law.

The Guiding Principles are consistent with and reflect international human rights and humanitarian law, as well as refugee law by analogy. The principles interpret and apply these existing norms to the situation of displaced persons. Although not a binding legal instrument, the principles have gained considerable authority since their adoption in 1998. The UN General Assembly has recognised them as an important international framework for IDP protection and encouraged all relevant actors to use them when confronted with situations of internal displacement. Regional organisations and states have also deemed the principles a useful tool and some have incorporated them into laws and policies.⁸

In other words, the Guiding Principles are intended to provide States with “guidance” in IDP protection.⁹ Guiding Principle 28 mandates that States should help IDPs to voluntarily return and reintegrate or voluntarily resettle in another part of the country and that they ensure the full participation of IDPs in the planning and management of such. Additionally, although

⁷ Chris Esdaile, “Whilst We Wait for a Binding Treaty, Court Endorses UN Guiding Principles,” last modified March 7, 2016. <https://www.lexology.com/library/detail.aspx?g=7ec1f0fb-405e-4e1d-b7c9-94add086884a>.

⁸ “Guiding Principles on Internal Displacement,” International Displacement Monitoring Centre, accessed March 30, 2018, <http://www.internal-displacement.org/internal-displacement/what-is-internal-displacement/guiding-principles-on-internal-displacement/>

⁹ “Training Manual on Human Rights Monitoring - Chapter X: Monitoring and Protecting the Human Rights of Refugees and/or Internally Displaced Persons Living in Camps,” University of Minnesota Human Rights Library, accessed April 7, 2018. <http://hrlibrary.umn.edu/monitoring/chapter10.html>.

the New York Declaration says very little about IDPs, the Comprehensive Refugee Response Framework of Annex 1 states that origin countries should “ensure that national development planning incorporates the specific needs of returnees and promotes sustainable and inclusive reintegration, as a measure to prevent further displacement.”¹⁰

To that end, Afghanistan endorsed a National Policy on Internally Displaced Persons in 2013, which was heavily inspired by the Guiding Principles. The National Policy adopted the Guiding Principles’ definition of IDPs as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”¹¹ The National Policy includes, *inter alia*, the rights of IDPs, durable solutions, funding, monitoring and reporting, and the responsibilities of various ministries within the Afghan government, especially the Refugees and Repatriation (MoRR). Also mentioned throughout as playing key roles are the AIHRC, IDP and displacement-affected community groups, and UN international humanitarian agencies.¹²

The drawbacks of the National Policy, however, are best summarized in one recent study of the Internal Displacement Monitoring Centre.

¹⁰ New York Declaration for Refugees and Migrants, A/RES/71/1, Annex 1, para 12. <https://refugeesmigrants.un.org/new-york-declaration-refugees-and-migrants-ares711>.

¹¹ Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2. <https://daccess-ods.un.org/TMP/2893103.36112976.html>.

¹² The Government of the Islamic Republic of Afghanistan, Ministry of Refugees and Repatriation. *National Policy on Internally Displaced Persons*, November 25, 2013. <http://morr.gov.af/>.

The policy was widely praised when it was introduced, but putting its provisions into practice has proved another matter, particularly at the provincial and local level...[D]iscussions inevitably lead to factors seen to limit national ownership. These include an overriding perception that it was written by international organisations and without commitment on the part of the government; the country's political transition and the arrival of new staff in key government departments who lack awareness and knowledge of the policy; the lack of financial and technical capacity for implementation and constraints caused by conflict and insecurity.¹³

Afghanistan also created a petition system to aid IDPs. However, in order to file a claim, they must personally visit a Directorate of Refugees and Repatriation (DoRR) facility. DoRR consolidates all petitions and then sends them to UN Office for the Coordination of Humanitarian Affairs (OCHA), which determines the level and type of necessary aid, with the goal of responding within 72 hours. Unfortunately, in a country where travel is very difficult, costly and dangerous, only a minority of IDPs can access the system (assuming they are aware of petition procedure in the first place), or successfully meet the criteria.¹⁴ Eligibility requires possession of *tazkira* documents, which confirm displacement and prove landlessness, and are extremely difficult to secure.¹⁵

Indeed, according to the UN Special Rapporteur for the Human Rights of Internally Displaced Persons, Chaloka Beyani, who helped to draft the national policy and conducted an official visit to Afghanistan just before the expiration of his mandate in 2017, significant implementation gaps remain. During his meetings, observations and interviews with local actors, he found problems such as grossly under-resourced institutions, widespread unawareness of the National Policy, complaints of ministerial corruption and heavy reliance upon international actors (to the point

¹³ "Escaping War: Where to Next?" Internal Displacement Monitoring Centre, Norwegian Refugee Council, last modified January 31, 2018, 45. <http://www.internal-displacement.org/library/publications/2018/escaping-war-where-to-next>.

¹⁴ "Escaping War: Where to Next?" Internal Displacement Monitoring Centre, Norwegian Refugee Council, last modified January 31, 2018, 22-23. <http://www.internal-displacement.org/library/publications/2018/escaping-war-where-to-next>.

¹⁵ Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Afghanistan, para. 57, A/HRC/35/27/Add.3 (April 12, 2017). <https://reliefweb.int/report/afghanistan/report-special-rapporteur-human-rights-internally-displaced-persons-his-mission>.

where assisting IDPs was regarded by some local officials to be entirely the job of international agencies).¹⁶

¹⁶ Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Afghanistan, paras. 14-21, 53, A/HRC/35/27/Add.3 (April 12, 2017). <https://reliefweb.int/report/afghanistan/report-special-rapporteur-human-rights-internally-displaced-persons-his-mission>.