

United Nation's Guiding Principles and India's Domestic Laws on Conflict Induced Internal Displacement

Tajamul Maqbool

Ph.D. student, Centre for Studies in Society and Development, Central University of Gujarat, Gandhinagar, Sector-29, Gujarat-382029, email id: tajbhat@gmail.com , Mobile No. 8825080877

Abstract: *Through the twentieth century there has been a significant growth in the frequency of armed conflicts across the globe. These conflicts have not only led to widespread death but extensive displacement, fear and economic devastation. The main aim of this paper is to identify how the Guiding Principles on Internal Displacement were developed and drafted by the United Nations. Further Light will be thrown on the impact as well as the limitations of the Guiding Principles and finally how much India has been successful in implementing these principles through their Domestic Laws.*

Key words: Conflict, Communal Violence, IDPs, Refugees, Guiding Principles, NGOs, PCTV, UNHCR,

Introduction

Since the end of World War II, there has been large scale of displacement of people all over the globe due to the armed conflicts, ethnic strife and therefore there have been human rights violations. This displaced population has been given the name of 'internally displaced persons (IDPs)' and have suffered severe destitution and were susceptible to all forms of human rights abuse. But this population did receive little or no protection from their respective governments because of either their incapacity or their unwillingness towards these people, nor did they receive any assistance from the international community (Cohen, 2013).

As these dislocated people did not cross the international border, the 1951 Convention on Refugees could not be applied to them. Further the United Nations High Commissioner had no mandate to protect and assist these people in exile. Though the International Committee of the Red Cross (ICRC) has been engaged in the protection of civilians affected by armed conflicts long before, but it was beyond their scope to address the problems of IDPs because of its magnitude and their limited access to the IDPs. James Grant, a former Executive

Director of the UNICEF observed in 1993 that, “The world has established a minimum safety net for refugees. Whenever people are forced into exile...refugees can expect UNHCR to be on the scene in a matter of days or on the outside, a matter of weeks. This is not yet the case with respect to internally displaced populations” (Grant, 1993).

Development of the Guiding Principles on Internal Displacement

It was in 1990s that the gravity of the problem became a matter of concern as the number of IDPs rose from 20 to 25 million, which means IDPs, were almost twice than refugees. This severity of the problem led the international humanitarian agencies to raise questions such as, proper definition of IDPs, their rights, and the responsibilities of their respective governments and the role of United Nations towards this vulnerable population. The main goal of the international agencies was to set up at least an ‘international legal standards’ by the United Nations for the assistance and the protection of the internally displaced persons. The agencies (NGOs and research institutions which were dealing with IDPs) argued that before establishing the international legal standards, the IDPs should be ‘put on the map’ first. For this they started developing statistics of the people who were in ‘refugee like situations’ in their respective countries and highlighted their vulnerable conditions and tried to minimise the gap at the international system when it comes to IDPs (Cohen and Deng, 1998).

In 1992, the Secretary-General of the United Nations in his Analytic Report observed that “there is no clear statement of IDP rights in international law” and recommended that the Human Rights Commission should develop “one comprehensive, universally applicable body of principles, from the existing standards to assure effective human rights protection to the IDPs”. The report also laid emphasis on designing a focal point on IDPs within the ambit of United Nations human rights system. Abdul Rahim Farah, who was the Under Secretary to UN informed the General assembly that, “Clearly, the problem has begun to rival that of political refugees, both in scope and severity” (Cohen, 2013).

In 1992, on the request of the Commission on Human Rights, the General Assembly of UN appointed Francis M. Deng as the representative on Internally Displaced Persons. The appointment reflects not only the concerns about increasing numbers of IDPs and their needs for assistance and protection, but it also reflects the institutional as well as legal gaps which

were evident at the international level. Under the guidance of Deng, a team comprised of lawyers, human rights groups, the ICRC, OHCHR and the members from UNHCR compiled the existing norms by which they were able to find the grey areas in the existing laws. The members from the ICRC made it sure that the Guiding Principles does not affect the Geneva Convention 1949 while the representatives from UNHCR want to make it sure that these Principles does not harm the right to asylum. For the better assistance and protection of IDPs, the team recommended that the existing laws should be restated and the both General assembly and Commission on Human Rights expressed their support for developing a normative framework (Cohen, 2013).

In 1998, Francis M. Deng introduced the thirty principles, which came to be known as Guiding Principles on internal Displacement, to the Commission on Human Rights. These principles were based on the laws related to international human rights, international humanitarian laws (IHL) and laws related to refugees. These principles covered the broad range of needs of IDPs not only during the displacement but prior to displacement and during their return and reintegration. The main purposes of the Guiding Principles were:

- 1) To define persons who got dislocated within their own countries.
- 2) To identify the rights that these displaced people are entitled.
- 3) To suggest and set up the obligations for the governments, international agencies and non-governmental agencies towards these displaced populations (Cohen, 2013).

Though the principles were based on the laws already in existence, but these were equipped, renewed and drafted by a team of experts who were external to the traditional system of intergovernmental process of committee formation. The principles were opposed too by the prominent organisations such as the International Committee of the Red Cross (ICRC) and International Organisation for Migration (IOM). The representatives from ICRC argued that by giving the special status to IDPs would undermine the Geneva Convention of 1949. However, they agreed that there should be a ‘code of conduct’ which would be beneficial for IDPs, “Provided that there is a consensus among the governments in favour of it and it does not weaken the existing laws”. The IOM opposed the principles on the ground that these principles provided the opportunity for resettlement to all migrants whether internally displaced or externally (Weiss and Korn, 2006).

Despite the opposition from the International non-governmental organisations, the guiding principles gained acceptance and authority at the international level. The UN General Assembly strongly came in support of the principles and the various governments and other organisations at international, national and regional level began to cite the principles and applied them too. In 2003, the Commission on Human Rights expressed their “appreciation” to the Guiding Principles “as an important tool for dealing with situations of internal displacement”. The Commission also welcomed the fact that “an increasing number of States, United Nations agencies and regional and non-governmental organisations are applying them as a standard”. In the World Summit 2005, where 193 state heads took part, recognised these principles as an “important international framework for the protection of IDPs”. This wide range of acceptance and success of the Guiding Principles led the experts from human rights to study them as a basic model for the development of new standards in various other fields (Cohen, 2013).

Drafting of the Guiding Principles

The drafting of the Guiding Principles on Internal Displacement was benefitted from a wide range of Consultative process that was asked by the General assembly to comment on the issues related to the principles and to mobilise the support for their implementation. As Roberta Cohen noted that, “Deng and I recognized that principles developed in a closed room by a team of lawyers would never see the light of day unless there was international understanding and support for those principles” (Cohen, 2004).

The members engaged in the consultative process supported for the development of a declaration or a convention for the better protection and assistance of IDPs, but the General Assembly chose the drafting of the Guiding Principles. There were various reasons for this. First, most of the governments do not want any legal binding as they fear of their state sovereignty. Keeping the Geneva Convention in view, the ICRC also expressed their reservation about declaration or convention but favoured the strengthened and reinforcing the existing laws on IDPs. Second, there was an imperative need to document the issues of IDPs. Third, as there were already sufficient laws in existence regarding IDPs, there was an urgent need to bring the myriad provisions together from the existing laws to address the specific needs of internally displaced persons (Cohen, 2013).

While drafting the Guiding Principles, two approaches were proposed by the members of the legal team. One was “needs-based approach” and another was “rights-based approach”. The “needs-based approach” was proposed by Robert Kogod Goldman, who argued that it is important to recognize the specific needs of IDPs before the law could be made to deal with those needs. He notes that, “Internal displacement after all...often breaks up the nuclear family, cuts off the important social and cultural community ties, terminates stable employment relationships, precludes or forecloses formal educational opportunities, and deprives those in need of special protection, such as infants, expectant mothers, and the sick, of vital public/private sector services” (UN 1998).

On the other hand, a lawyer from Europe proposed the “rights-based approach” which contrasted with the needs-based approach. According to the rights-based approach, the principles should rely on hard laws to decide the rights of IDPs. Both the approaches were merged, and a new approach was derived as “actual needs of IDPs” which favours optimum protection of IDPs and covers all spheres of their life. In the beginning of the Guiding Principles it was affirmed that the principles will address the “specific needs” of IDPs. While addressing their specific needs, Deng pointed out that, “This was not intended to confer on IDPs a privileged status or to claim that they are always worse off than non-displaced populations, but to ensure that in given situation their unique concerns are addressed along with those of others (Cohen and Deng, 1998).

The Guiding principles on Internal Displacement were largely based on three branches of law-refugee law, international human rights law and international humanitarian law. While addressing the Commission on Human Rights in 1994, Sadako Ogata, the High Commissioner for Refugees told, “I believe the commission in its work to strengthen the protection of the internally displaced must seek to bring about a convergence of refugee law, international human rights law and international humanitarian law...Each has a useful contribution to make to the protection of the internally displaced....It is only through such convergence that the lacuna in the law can be addressed”(Ogata 1994).

The drafting of the Guiding principles came to an end with the “Expert Consultation on the Guiding Principles on Internal Displacement” which was hosted by the Austrian government in the year 1998 at Vienna. The meeting was attended by 50 members from various

organizations such as UN, the inter-American Institute of Human Rights, the Organization for Security and Co-operation in Europe (OSCE), the Organization of African Unity (OAU), NGOs, and some scholars from the international human rights organizations. Finally, in 1998, the Guiding Principles on Internal Displacement were drafted with 30 principles. The principles were further divided into five sections. Section I of the Guiding Principles deal with the general principles of the IDPs and include principles from 1 to 4. Section II contains the principles relating to the protection of people from displacement and includes principles from 5 to 9. Principles from 10 to 23 regarding the protection of IDPs during displacement are contained under section III. Section IV of the Guiding principles deals with the humanitarian assistance for the IDPs and includes principles from 24 to 27. And the last section, section V includes the principles from 28 to 30 and are related to the return, resettlement and reintegration of IDPs.

Impact of the Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement received an enormous support from the United Nations. Kofi Annan, the General Secretary of UN praised the principles and requested the Security Council to persuade the states to examine these principles. The General Secretary also recommended that the states should accept these principles as a basic model for the protection and assistance of IDPs and the states should promote and adopt these principles through their national legislation. The UN welcomed the propagation of the principles, their promotion and worldwide acceptance. Security Council too began to quote the principles in its resolutions as well as in its Presidential statements. In 2005 the state heads at the World Summit recognized the Guiding Principles as, “an important international framework for the protection of internally displaced persons” (Cohen, 2013).

In the beginning some of the UN agencies found it complicated to translate the Guiding Principles into practice in the field, while humanitarian agencies and NGOs used the principles extensively, developed awareness programs and started training sessions for their staff based on the Guiding Principles. Further the principles were employed as a legal tool to monitor and assess the needs of IDPs. UNHCR on the other hand incorporated the principles directly into its protection and assistance activities for the IDPs and argued that the Principles have generated “concrete benefits to IDPs” in various countries (Diagne and Entwisle, 2008).

Majority of the intergovernmental organizations at the regional level such as in Africa, Europe and the Americas have acknowledged the Guiding Principles and have incorporated them into their national laws too. By contrast at the sub-regional level, like in Asia, the governments resisted to accept the principles fearing about their sovereignty. In the Americas and Europe, the human rights courts began to quote the principles in their rulings on IDPs. Apart from it the Guiding principles acted as a catalyst in developing a binding law on internal displacement. In 2006 eleven state heads from Africa adopted a protocol in the 'Great Lakes Region' conference, demanding the member states to incorporate the Guiding Principles into their domestic laws. In 2009, fifty-three states from Africa, at Kampala Convention adopted the principles as a legally binding. The Convention recommended its member state to develop tangible measures for the betterment of the IDPs (Cohen, 2013).

In late 1990s, more than 20 countries began to develop their national policies and laws based on the Guiding Principles and some countries had directly incorporated these principles in their national laws. The adoption and incorporation of the Guiding Principles benefitted the IDPs in solving their day to day problems such as food, shelter, clothing, and compensation and most important their return (Cohen, 2004). It has also been seen that national courts sometimes while dealing with the cases of displaced persons quotes the Guiding Principles to make sure that the IDPs get adequate protection and material assistance (Cepeda-Espinosa, 2006). Though the courts are citing the principles in their rulings on IDPs, but at the same time the governments have not been successful in implementing these principles into their legislation (Koser, 2011).

Initially the impact of the Guiding Principles was confined to the situations of conflict only, though while defining IDPs, the principles had mentioned natural and human-made disasters. But after 2005 tsunami which displaced thousands of people, it was felt that the Guiding Principles should not be confined to the situations of conflicts only but to the natural disasters and climate change. The awareness campaign which was earlier launched for the conflict driven displaced persons was restarted for the displaced people due to natural disasters and climate change (IA SC, 2006).

Many scholars concluded that the Guiding Principles have acquired "legal significance" because of their usage by the international organizations, UN agencies, governments and

courts. UNHCR used the principles in such a manner that its staff observed the principles, “contribute not only to improved protection but also to strengthening the principles as a legal...tool” (Diagne and Entwistle, 2008). The governments of Germany and Iraq expressed their view that the Guiding Principles on Internal Displacement are now “part of international law”. The Kampala Convention though recognized the principles as an “important international framework” but does not accepted them as a “basic international norm” as was proposed by the UN secretary-General. Kalin (2008) argued that the domestic laws, court judgements and other references are not sufficient to claim the Guiding Principles as a customary law. However, there seems a trend moving towards the customary law. Many of the non-binding elements of the principles have become customary law or on the way to become so (Cohen, 2013).

Limitations of the Guiding Principles

The main limitation of the Guiding Principles on Internal Displacement is that they have not been regarded as a “treaty” so; they do not come under any monitoring or enforcement machinery. A global effort is hence needed to watch over the fulfilment of the principles. This requires the participation of the governments at the national and local levels, NGOs, organization dealing with the displaced people and the people affected by displacement. But such efforts have not been always consistent, dynamic or well-equipped which weakened the incorporation of the principles into the domestic law. As the Representative of the General Assembly on Internal Displaced Persons observed that it is only “if states, international organisations and other actors continue to insist that specific guarantees exist for the internally displaced”, that “the law of internal displacement will grow” (Kalin, 2008).

Another limitation of the Guiding Principles is their non-binding status, which makes it easy for the governments to reject them. Many a times the governments have little or no awareness regarding the provisions of the Guiding Principles and sometimes they resist their application because they are non-binding in nature. Because of the non-binding status of the Guiding Principles, one in-depth study concluded that it is easier for the states to “insist on the applicability of domestic laws that are not beneficial to IDPs”. If the Guiding Principles were legally binding instrument, the governments could have been made more accountable. Further its authority would have got international acceptance and its implementation could

have been easier. A Burmese based NGO observed “The Guiding Principles have proven invaluable in promoting awareness about displacement and mobilizing assistance to respond to grave needs. Yet, in Burma, as in some other contexts, the Principles offer little diplomatic leverage when national authorities are unable and or unwilling to fulfil their obligations” (Cohen, 2013).

However, a legally binding instrument of Guiding Principles cannot always guarantee better conditions of IDPs. The treaties adopted by governments are not always ratified and the ones ratified are not obeyed by the governments. The monitoring bodies under which treaties are adopted may force the governments to implement them but these too are not always effective. To influence a government to carry out its responsibilities regarding IDPs is a challenge to conclude whether the document is binding or non-binding. There is a need to have a holistic approach for the protection and assistance of the IDPs which they themselves believe could be the route to follow (Cohen, 2008).

One more limitation of the Guiding principles is that sometimes the states label the internally displaced as ‘migrants’ or ‘terrorists’ just to avoid the responsibility towards them. Sometimes under civil wars, it becomes a challenge for the states to assume the responsibility as they fear that the assistance provided would strength the insurgent groups. At other times, the state governments resist the international efforts for negotiating with the insurgent groups as they fear such efforts would provide the insurgents legal status. When the state is the main reason for the displacement of its own people, it becomes quite difficult for the state to implement the guiding principles into their legislation and if the principles were legally binding it would have not happened (Cohen, et. al, 2006).

India and the Guiding Principles

Displacements due to the conflicts are a worldwide phenomenon and India is no exception to it. Since independence the country has experienced many armed conflicts, ethnic or communal violence which generated thousands of internally displaced persons (IDPs) within the country (IDMC, 2008). Though the Guiding Principles on Internal Displacement were formed for the protection and assistance of IDPs, but they were non-binding in nature, that means the UN cannot force any of its member country to incorporate these laws into their

legislature and it is up to the member country whether they want to implement these principles into their laws or not. Some of the countries adopted these guiding principles in their legislation while other avoided them for the reasons of sovereignty. India too is a country with no policy or legal framework to deal with the issues of IDPs. India has drafted some laws for the rehabilitation of development induced displaced people, but these laws have excluded people displaced due to conflicts, human rights violation and other sources of tension and these people constitute a significant number (Lama, 2000). Here is the brief review of some of the laws drafted by Government of India from time to time for its displaced population.

National Policy on Resettlement and Rehabilitation for Project Affected Families 2003

The National Policy on Resettlement and Rehabilitation was formulated by the Ministry of Rural Development, Government of India in 2003. The NPRR set up the criteria that a minimum facilities and fair compensation should be provided for the Resettlement and Rehabilitation (R&R) of the persons who got displaced due to acquisition of land by the government for 'public purposes'. It further lay down that it is the joint responsibility of the State Government concerned and the Project Implementing Authority (PIA) to resettle and rehabilitate the displaced masses. The policy recommended that a grievance and monitoring mechanism should be set up at State and Central Government level to address the issues with relate to the resettlement and rehabilitation. The policy has been primarily oriented towards providing the support to more vulnerable groups- BPL and tribal families, the tribal families who are at the risk of losing access to their traditional resources and occupations. At the same time the policy had made focus to address the issues related to the rights of not only titleholders but also of tenants, share croppers and agricultural landless labourers by ensuring compensation for these groups. This policy unlike earlier ones which provided resettlement to select populations, ensured minimum resettlement and rehabilitation support to all the affected groups, with the acknowledgment that the States and PIA can take up higher benefit packages (MRD, GOI, 2004).

The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act 2013(LARR)

For the first time on 26 September 2013, a historic bill “The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act” (LARR) was adopted by the India to deal with the internal displacement due to development. This bill abolished the old Land Acquisition Act (LAA) 1894, which was based on the forced occupation of land by the state. This act has led to mass displacement and the more perverse of the act was that the state was directly responsible for the displacement. Jairam Ramesh, who was India’s Union Minister for Rural Development at that time stated, “The old law was draconian and led to the impoverishment of livelihood losers”. In contrast to LAA, the LARR does not make rules only for acquiring land but made obligations on the authorities to resettle the displaced communities and ensure their recovery from the loss of land. It also included the measures for the protection of human rights of IDPs. This act also put forth the new economic entitlements for the internally displaced persons, new entitlements regarding information and consultations on the changes which displacement imposes on the work, income and entire existence of the IDPs (Cernea, 2013).

The act in contrast to LAA, gave legal powers to the land owners over their land. So their consent became necessary for the state to acquire the land for development purposes. And secondly for land acquisition by private companies, consent of 80% of affected families are required and for public-private projects it is 70% is at least required. Regarding financing, the LARR changed the existing compensation rates. It made the compensation rates to four times to the market value of land in rural areas and twice for urban areas. Apart from it the affected families will receive one-time payment equal to the market value of the land. The other provisions made in the LARR are as:

- i) A separate social impact assessment (SIA) should be carried out to determine the impacts on all displaced families.
- ii) Those who have land as only source of livelihood should be given both compensation as well as resettlement and rehabilitation assistance.

- iii) To protect the lands of scheduled tribes and scheduled castes, specific provisions were made for their protection and assistance.

Though the act was able to incorporate fundamental changes in the existing laws, but it had its limitations too. The law is a good progressive act, though not the not the best (Cernea, 2013).

The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011

The Bill was introduced in 2011 with the aim of addressing the issues of displaced masses due to communal or targeted violence. It defines the internally displaced person as those who left their habitual residence because of violence and to avoid its impacts. The bill has mentioned specific rights related to the displaced and responsibilities of the authorities. Under section 87 of the PCTV, the rights of the violence induced displaced has been mentioned. It has also been mentioned in the Bill that a fair compensation should be given to the persons who lost their property because of the violence. It has further been added that the steps should be taken for the return, resettlement and reintegration of the displaced persons. The Bill has also incorporated few principles such as 15, 21, 28 and 29 from the Guiding Principles to deal with the issues of IDPs (Peer, 2011).

Conclusion

Soon after the independence, the country got partitioned and subsequently resulted in displacement of hundreds of thousands of people. Since then the country had witnessed large numbers of armed conflicts, ethnic violence. Some of the people crossed the national boundaries and got protected under refugee law while those who could not or wished to stay within their country but moved to other parts of the country for safety measures became a vulnerable category with no legal security. Apart from the conflicts, India has been investing in development projects to compete with the developed countries with in turn have resulted forced migration of people. But there is no legal policy adopted by the government of India to deal with the issues of IDPs. To some extent laws have been made regarding displacement due to development but there are no laws to deal with conflict induced displaced, though their

number is significant. At the international level the Guiding Principles have been formed to address the problems of IDPs, but it is up to the native country to adopt and implement these principles in letter and spirit for the optimum protection and assistance of internally displaced people.

References

Cepeda-Espinosa, M. J. (2006). How far may Colombia's Constitutional Court go to protect IDP rights. *Forced Migration Review*, 21-23.

Cernea, M. (2013). Progress in India: New Legislation to Protect Persons Internally Displaced by Development Projects. *Washington: The Brookings Institution*, 21.

Cohen, R. (2004). Dear to his Heart: Internally Displaced Persons. *J. Refugee Stud.*, 17, 367.

Cohen, R. (2006). Strengthening protection of IDPs: the UN's role. *Georgetown journal of international affairs*, 101-109.

Cohen, R. (2013). Lessons learned from the development of the guiding principles on internal displacement. *The Crisis Migration Project. Working Paper (October)*. Washington, DC: Georgetown University. http://issuu.com/georgetownfs/docs/isim_working_paper_series__roberta.

Cohen, R., & Deng, F. M. (1998). Exodus within Borders-The Uprooted Who Never Left Home. *Foreign Aff.*, 77, 12.

Diagne, K., & Entwistle, H. (2008). UNHCR and the Guiding Principles. *Forced Migration Review*, 31(1), 33-26.

Grant, J. P. (1993). Refugees, Internally Displaced and the Poor: An Evolving Ethos of Responsibility. *address at Round Table on the Papal Document, UNICEF*, 9.

Inter-Agency Standing Committee 2006, *IASC Operational Guidelines on Human Rights and Natural Disasters*, Brookings-Bern Project on Internal Displacement.

Internal Displacement Monitoring Centre (IDMC) 2008, 'India: New and Protected Displacement ongoing in Absence of Formalised Responses'.

Kalin, W 2008, 'Guiding Principles on Internal Displacement: Annotations', *The American Society of International Law and The Brookings Institution*, No. 38.

Koser, K. (2011). Climate change and internal displacement: challenges to the normative framework. *Migration and climate change*, 289-305.

Lama, M. P. (2000). Internal Displacement in India: causes, protection and dilemmas. *Forced Migration Review*, 8, 24-26.

Ministry of Rural Development, Govt. Of India 2004, "National Policy on Resettlement and Rehabilitation for Project Affected Families-2003", Published in Gazette of India, Extraordinary Part-I, Section 1, No- 46.

Ogata, S 1994, Statement before the UN Commission on Human Rights.

Peer, G. (2011). Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011: An Insight. *J. Indian L. & Soc'y*, 3, 144.

United Nations 1998, *Compilation and Analysis of Legal Norms*, Part I; and Part II, *Legal Aspects Relating to Protection Against Arbitrary Displacement*, UN Doc. E/CN/4/1998/53

Weiss, T. G., & Korn, D. A. (2006). *Internal Displacement: Conceptualization and its consequences*. Routledge.