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# The right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacement

*Romola Adeola**
Post-doctoral researcher, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

## Summary

*Globally, the issue of internal displacement has over the years emerged as one of the most pressing human rights concerns. For many years, millions of people have been displaced for various reasons, including conflicts, natural disasters and development projects. Recognising the need to address the issue of internal displacement, the United Nations developed a set of Guiding Principles in 1998. One significant provision of the Guiding Principles is their recognition of a right not to be arbitrarily displaced, which requires states to ensure the protection of persons in displacement situations with reference to fundamental human rights safeguards. However, the Guiding Principles are not clear on the yardstick against which to assess compliance by states with the duty. In light of the foregoing, the article explores the normative content of the right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacement.*

**Key words:** *internal displacement; Guiding Principles on Internal Displacement; internally-displaced persons; arbitrary displacement*

* LLM LLD (Pretoria); aderomola.ade@gmail.com. An excerpt of this article was presented at the Conference on the United Nations at 70: The UN and the Developing World: Seventy Years On, University of Johannesburg, South Africa, 22-23 October 2015.

## 1 Introduction

Internal displacement has for many years been a human rights challenge. While Syria has in recent times emerged as the poster child for the problem with over 7 000 000 conflict-induced displacees, the issue of internal displacement has been a recurring concern globally. During the last six decades, millions of people have been displaced by various causes of internal displacement ranging from conflict to development projects. Recognising the need to address the problem at the international level, the United Nations (UN) developed a common standard on internally-displaced persons (IDPs) in 1998. This standard, known as the UN Guiding Principles on Internal Displacement (Guiding Principles),[1] is the first attempt by the international community to create a set of obligations for states in relation to internal displacement.

A novel creation of the Guiding Principles is the recognition of the right not to be arbitrarily displaced, which frames internal displacement as a rights-based problem and creates a duty on states to ensure that arbitrary displacement is prevented. While this right is recognised under the Guiding Principles, the yardstick against which to assess the arbitrariness of displacement is not explicitly contained in the Guiding Principles. The article explores the content of this right. The article begins with a discussion of the prevalence of internal displacement globally. Following this discussion, the creation of the Guiding Principles is discussed and the content of the right not to be arbitrarily displaced is analysed.

## 2 The prevalence of internal displacement

Internal displacement has been a major human rights challenge in countries across various continents. Across Africa, Asia and the Americas, the problem of internal displacement resonates in the context of conflicts, natural disasters and development projects.[2]

1 UN Commission on Human Rights, Addendum 'Guiding Principles on Internal Displacement' *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights Resolution 1997/39*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) (Guiding Principles).

2 In Europe, natural disasters have been a significant cause of internal displacement. In a 2011 report, the European Environment Agency observed that floods between 1998 and 2009 'produced more than 1 100 fatalities and affected more than 3 million people'. During the conflict situation in Ukraine, around 1 382 000 individuals were displaced, mostly in the eastern region of Luhansk and Donetsk. See European Environment Agency Technical Report 13 'Mapping the impacts of natural hazards and technological accidents in Europe: An overview of the last decade' (2010) 65; United Nations High Commissioner for Refugees 'Ukraine factsheet: July 2015: Highlights' (2015) 1 http://unhcr.org.ua/attachments/article/317/UNHCR%20-%20Ukraine%20Factsheet%20-%20JULY%202015.pdf (accessed 12 April 2016).

## 2.1 Africa

In Africa, conflicts, natural disasters and development projects have been significant drivers of internal displacement. In Uganda, the over two decade-long conflict between the government and the Lord's Resistance Army has displaced more than 2 000 000 people in the northern province.[3] In 2014, about 2 700 000 people were displaced in the Democratic Republic of the Congo (DRC), mainly from the eastern region, as a result of conflicts between government forces and armed militias groups[4] The ethno-political tensions within the Sudan People's Liberation Movement in South Sudan has resulted in the displacement of an estimated 1 500 000 people since 2013. In Nigeria, the conflict between government forces and members of the Boko Haram sect for close to a decade has internally displaced over 2 100 000 people in the northern region.[5]

Natural disasters in countries such as Togo, Niger and Malawi have contributed to internal displacement in the region. Over 20 000 people were displaced in Niger due to torrential rains in August 2015.[6] Torrential rains in Mozambique displaced over 150 000 people in January 2015.[7] In Malawi, around 200 000 people were displaced by heavy rainfalls in the same month.[8]

Development projects in Uganda, Angola and Kenya have equally led to several displacements. In the early 2000s, Ugandan authorities displaced about 2 041 persons (401 peasant families) without adequate compensation for the Kaweri Coffee Plantation. In Angola, between 2002 and 2006 an estimated 20 000 to 30 000 persons were reportedly displaced by government authorities for the purpose of development. In Kenya, between 1 000 and 2 000 persons were displaced in Raila village in Kibera in 2004[9] for a road bypass,[10] without prior notice, compensation, resettlement or legal remedies.[11]

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3 S Finnström *Living with bad surroundings: War, history and everyday moments in Northern Uganda* (2008) 77; BH Williams *The colour of grace: How one woman's brokenness brought healing and hope to child survivors of war* (2015) 304-305.

4 Norwegian Refugee Council and Internal Displacement Monitoring Centre *Global overview 2015: People internally displaced by conflict and violence* (2015) 26.

5 'Over 2,1 million displaced in Nigeria by Boko Haram insurgency' *News24* 4 September 2015.

6 'Niger floods kill four, displace 20 000' *Punch Nigeria* 15 August 2015.

7 A Essa 'Malawi faces "unprecedented" flood disaster' *AlJazeera* 19 January 2015.

8 M Mucari 'Death toll rises as Mozambique weighs up flood costs' *Mail & Guardian* 23 January 2015.

9 V Metcalfe et al 'Sanctuary in the city? Urban displacement and vulnerability in Nairobi' Humanitarian Policy Group Working Paper, September 2011 7.

10 Amnesty International *Kenya the unseen majority: Nairobi's two million slum dwellers* (2009) 18.

11 Centre on Housing Rights and Evictions 'Listening to the poor? Housing rights in Nairobi, Kenya' Fact-Finding Mission to Nairobi Kenya, Final Report, June 2006 4 11 13 55; UN-Habitat *Forced evictions – Towards solution? Second report of the Advisory Group on Forced Evictions to the Executive Director of UN-Habitat* (2007) 26.

## 2.2 Asia

In Asia, all three factors, not least natural disasters and conflicts, have been significant drivers of internal displacement in various countries. The 2004 Indian Ocean tsunami that affected 12 countries in the Indian ocean region, including India, the Maldives, Thailand, Sri Lanka and Indonesia,[12] displaced more than 500 000 people in South-Western Sri Lanka.[13] Typhoon Haiyan, which affected parts of Palau,[14] displaced an estimated 4 000 000 people in the Philippines in 2013.[15] Around 40 000 people were displaced in Indonesia following torrential rain in 2014.[16] In 2015, heavy rainfalls displaced over 100 000 people in Japan[17] and around 500 families in the Kailali district of Nepal.[18]

Aside from natural disasters, conflicts have also been a significant driver of displacement in the Asian region. Over five decades of protracted conflict between the military junta and ethnic groups in Myanmar have resulted in the displacement of over 1 000 000 people.[19] In 2002, between 600 000 and 1 000 000 people were internally displaced in states in the eastern region, including the states of Rakhine, Karen, Karenni, Shan and Mon.[20] The majority of these were women and children fleeing the war and sexual violence.[21] In Sri Lanka, the protracted civil war from 1983 to 2009 between the Sri Lankan government, mostly dominated by the Sinhalese majority, and the Liberation Tigers of Tamil Eelam, composed of members of the

12 KF Inderfurth & D Fabrycky 'The 2004 Indian Ocean tsunami: One year report' Sigur Centre for Asian Studies Papers, George Washington University, December 2005 5; 'Profile of internal displacement: Sri Lanka' Compilation of the information available in the global IDP database of the Norwegian Refugee Council (as at 7 March 2005) 7.

13 UN Human Rights Council, Addendum, 'Mission to Sri Lanka' *Report of the Representative of the Secretary-General on the Human Rights of Internally-Displaced Persons, Walter Kälin,* UN Doc A/HRC/8/6/Add.4 (21 May 2008) para 17; D Colombage 'Tsunami horror haunts Sri Lanka survivors' *AlJazeera* 26 December 2014.

14 'Typhoon Haiyan devastates northern island of Palau' *ABC* 9 November 2013.

15 P Baylis & C Larano 'Philippines disaster leaves millions without homes' *The Wall Street Journal* 18 November 2013.

16 K Quiano & J Mullen '13 dead, 40 000 displaced in floods in Indonesia's North Sulawesi' *CNN* 16 January 2014.

17 I Kato 'More than 100 000 flee floods in Japan after "once-in-50 years" rain' *Reuters* 10 September 2015.

18 'Floods displace 500 families in Kailali' *The Himalayan Times* 18 July 2015.

19 M Mahn et al 'Health security among internally-displaced and vulnerable populations in Eastern Burma' in M Skidmore & T Wilson (ed) *Dictatorship, disorder and decline in Myanmar* (2008) 209.

20 J Hampton *Internally-displaced people: A global survey* (2002) 111.

21 P Banerjee et al 'Resisting erasure: Women IDPs in South Asia' in P Banerjee et al *Internal displacement in South Asia: The relevance of the UN's Guiding Principles* (2005) 287-288.

marginalised Tamil minority, resulted in the displacement of between 730 000 and 1 000 000 people.[22] This resulted in socio-economic deprivations and psychosocial problems and affected specific groups, including women and children.[23]

Development projects, particularly dam-building projects in various parts of Asia, particularly India and China, have significantly occasioned internal displacement. Although these projects are often intended for the economic benefit of the states, their socio-economic consequences for those displaced are often not considered properly. Projects are often carried out with the understanding that the displaced persons are 'necessary sacrifices'.[24] In mid-1985, when the loan agreement for the Sardar Sarovar dam in India was signed, its actual effect on the displaced population was not adequately factored in.[25] Following widespread criticism, the World Bank set up an independent review team.[26] In its report, the team noted that dam projects were 'flawed' and that the environmental impacts were not properly taken into account or sufficiently addressed.[27] It was initially projected that the Sardar Sarovar dam would displace around 6 147 families and, on the strength of this figure, the economic feasibility of the project was ascertained.[28] However, in the 1980s, the government placed the figure at around 13 335 families.[29] While the Supreme Court acknowledged a figure of over 40 000 in 2002, estimates of those displaced, in recent times, have been placed at around 40 000 to 100 000 families.[30] In China, around 1 200 000 people were displaced from the Yangtze River region between the 1990s to early 2000s to make way for the Three Gorges dam, the majority of whom were not adequately compensated.[31] Although resettlement plans were developed and implemented, some displaced

22 Profile of internal displacement: Sri Lanka (n 12 above) 20; L Starke & Worldwatch Institute *State of the world: A Worldwatch Institute report on progress towards a sustainable society* (2006) 128; H Adelman & E Barkan *No return, no refuge: Rites and rights in minority repatriation* (2011) 117-118.

23 Profile (n 12 above) 19.

24 R Fujikura et al 'Introduction' in R Fujikura & M Nakayama (eds) *Resettlement policy in large development projects* (2015) 2.

25 B Morse & TR Berger *Sardar Sarovar: Report of the independent review* International Environment Law Research Centre, 1992 3.

26 P Penz et al *Displacement by development: Ethics, rights and responsibilities* (2011) 272.

27 Morse & Berger (n 25 above) 1.

28 P Cullet 'The Sardar Sarovar dam project: An overview' in P Cullet (ed) *The Sardar Sarovar dam project: Selected documents* (2007) 20.

29 As above.

30 As above.

31 International Rivers Network *Human rights dammed off at Three Gorges: An investigation of resettlement and human rights problems in the Three Gorges Dam project* (2003) 2; B Terminski *Development-induced displacement and resettlement: Causes, consequences, and socio-legal context* (2015) 96.

persons have been 'considerably poorer'[32] after the move and 'worse off than … [those] who were not moved'. [33]

### 2.3 The Americas

In the Americas, conflicts, natural disasters and development projects have also been significant drivers of internal displacement. More than three decades of conflict[34] between armed groups of the Guatemalan National Revolutionary Unity and the Guatemalan government displaced between 500 000 and 1 500 000 people in Guatemala,[35] mostly from the indigenous Mayan communities.[36] The protracted conflict in Colombia between the government and the Revolutionary Armed Forces of Colombia (FARC) since the 1960s internally displaced an estimated 6 400 000 people.[37] In 2012, it was observed that around 30 per cent of the displaced population lacked access to health care.[38] In Peru, over 500 000 people were displaced by conflicts between government forces and militia groups in the 1980s and 1990s.[39]

Aside from conflict, natural disasters have accounted for a significant number of displacements in the region. The 2005 hurricane, Katrina, in the United States displaced around 1 500 000 people, and led to the permanent displacement of around 300 000.[40] In Venezuela, 32 000 people were displaced by floods after heavy rains in 2010.[41] In the same year, an estimated 1 500 000 people were displaced by an earthquake in Haiti,[42] and in early 2015, around

32 J Jing 'Rural resettlement: Past lessons for the Three Gorges Project' (1997) 38 *The China Journal* 65 70.

33 As above.

34 The Guatemalan conflict ended in a peace agreement in 1996 following 36 years of armed conflict. M Line 'Case study: Comparative aspects of the human rights field operations in Bosnia and Herzegovina and Guatemala' in M O'Flaherty (ed) *The human rights field operation: Law, theory and practice* (2007) 346.

35 Internal Displacement Monitoring Centre and Norwegian Refugee Council 'Guatemala: 12 years after conflict, few solutions for IDPs or other victims' (2008) http://www.internal-displacement.org/assets/library/Americas/Guatemala/pdf/Guatemala-Overview-Aug08.pdf (accessed 27 October 2015).

36 Internal Displacement Monitoring Centre (n 35 above) 3; 'Guatemala's Mayan Indians endure poverty' *Voice of America* 27 October 2009; M Benton 'Guatemalan migration in times of civil war and post-war challenges' *Migration Information Source* 27 March 2013.

37 E Rosser 'Colombia's 6,4 million displaced lead global figures after Syria: UN' *Colombia Reports* 22 June 2015.

38 PC Webster 'Health in Colombia: Treating the displaced' (2012) 184 *Canadian Medical Association Journal* E291-292.

39 GD White 'Displacement, decentralisation and reparation in post-conflict Peru' (2009) 33 *Forced Migration Review* 44.

40 N Fernando et al 'Migration and natural hazards: Is relocation a secondary disaster or an opportunity for vulnerability reduction' in T Afifi & J Jäger *Environment, forced migration and social vulnerability* (2010) 145-146.

41 'Venezuelan flooding claims 21' *CNN* 1 December 2010.

42 'In pictures: Haiti five years after the earthquake' *BBC News (Latin America & Caribbean)* 12 January 2015; O Laurent 'Haiti earthquake: Five years after' *Time* 12 January 2015.

85 500 people were living in IDP camps in Haiti with limited access to social services for children.[43]

Development projects in the region have equally resulted in displacements. In Chile, some members of the Pehuenche Mapuche indigenous communities were displaced to make way for a hydropower installation plant.[44] In 2013, around 19 000 families were displaced in Brazil to make way for infrastructural developments in preparation for the 2014 World Cup.[45] In some cases, displaced families were neither adequately notified nor properly compensated. Indigenous communities in Ecuador, Peru, Honduras and Paraguay have faced significant threats of displacement from development projects bound to affect their cultural existence. In Peru, thousands of people belonging to the Ashaninka tribe are likely to be displaced by the Pakitzapango dam.[46] In Brazil, over 20 000 people and about 1 000 indigenous peoples are set to be displaced in the near future for the creation of the Belo Monte Dam.[47]

In light of the prevalence of the problem, the need for states to recognise and protect the right not to be arbitrarily displaced as required by the Guiding Principles is essential. Article 6(1) of the Guiding Principles provides that '[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence'.[48] The key word in this provision is the term 'arbitrary' which, although not defined in the Guiding Principles, suggests that certain rules must be followed to prevent displacement as a violation of international law. Below the article considers the yardstick against which the arbitrariness of internal displacement should be assessed. Before engaging in this, however, it is relevant to consider the development of the Guiding Principles as a response to internal displacement in the UN system.

## 3 Development of the Guiding Principles

While explicit mention of the right not to be displaced is made first in the Guiding Principles, discussions on internal displacement date back to the 1980s. In the 1980s, conflicts in Southern African states, including Angola and Mozambique, and the mass population

43 *BBC News* (n 42 above).

44 R Stavenhagen *The emergence of indigenous peoples* (2013) 90.

45 O Gibson & J Watts 'World cup: Rio favelas being "socially cleansed" in run-up to sporting events' *The Guardian* 5 December 2013.

46 N Hamdi *The spacemaker's guide to big change: Design and improvisation in development practice* (2014) 23; A Nelsen 'Dam project threatens a way of life in Peru' *The New York Times* 15 May 2012.

47 Amazon Watch 'Fact sheet: The Belo Monte dam' (2011) https://amazonwatch.org/assets/files/2011-august-belo-monte-dam-fact-sheet.pdf (accessed 27 October 2015); G Elizondo 'Dam it: Brazil's Belo Monte stirs controversy' *AlJazeera* 20 January 2012.

48 Guiding Principles (n 1 above) para 6(1).

displacement in South Africa due to the policies of the apartheid government resulted in a mass population displacement that affected millions of people. These displacements called for an immediate response to the humanitarian situation in the Southern African region. The Organisation of African Unity (OAU) requested an international meeting to discuss the situation of the population affected by mass displacements in the Southern African region in 1984. Two years later, the OAU called on the Secretary-General of the United Nations (UNSG) and the UN agency for refugees to constitute a committee in collaboration with the Southern African Development Community (SADC) to prepare for the meeting. A year later, a resolution was passed by the United Nations General Assembly (UNGA), endorsing this request for a meeting on the displaced population, and requesting the UNSG in collaboration with the UN agency for refugees and the Secretary-General of the OAU to convene a meeting. The UNGA also called on the global community to provide increased support to Southern African countries 'to enable them to facilitate their capacity to provide the necessary facilities and services for the care and well-being of refugees, returnees and displaced persons in their countries'.[49]

In 1988, an International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (Southern African Conference) was assembled in Oslo, Norway. At the Southern African Conference, mention was made of the legal and institutional *lacuna* for the protection and assistance of IDPs. President Moussa Traorpé, the President of Mali and Chairperson of the OAU at the time, 'appealed to the international community to consider the need for such a mechanism or arrangement to deal with … persons [internally displaced]'.[50] A Declaration and Plan of Action were adopted at the meeting. In the Plan of Action, the UNSG was implored to 'undertake studies and consultations in order to ensure … timely implementation and overall co-ordination of relief programmes for … persons [internally displaced]'.[51] In December 1988, after the Southern African Conference, the UNGA passed a resolution endorsing the Declaration and Plan of Action and requested the UNSG to conduct studies in determining whether there was a need to develop a United Nations committee to co-ordinate relief to internally-displaced persons.[52] In July 1990, the United Nations Economic and Social Council also called upon the UN Secretary-General to carry out a

49 *International conference on the plight of refugees, returnees and displaced persons in Southern Africa*, adopted by UN General Assembly Resolution 42/106, UN Doc A/RES/42/106 7 December 1987 para 6.

50 *Report of the Secretary-General Pursuant to General Assembly Resolution 42/106: International Conference on the Plight of Refugees, Returnees and Displaced Persons*, UN Doc A/43/717.

51 As above.

52 *International conference on the plight of refugees, returnees and displaced persons in Southern Africa*, adopted by UN General Assembly Resolution 43/116, UN Doc A/RES/43/116 8 December 1988.

'United Nations system-wide review'[53] and 'recommend ways of maximising co-operation and co-ordination among … various organisations of the United Nations system in order to ensure an effective response … to the problems of refugees, displaced persons and returnees'.[54]

While, at the level of the UN, relief-based solutions to the issue of internal displacement were being proposed, civil society organisations called for a more legal response. Organisations such as the World Council of Churches, the Friend World Committee for Consultation and the Refugee Policy Group called for the development of an international instrument on IDP protection and for the appointment of a UN special rapporteur on IDPs.[55] However, the appropriateness of this approach at the level of the UN was queried by agencies such as the UN High Commissioner for Refugees and the UN Development Programme. When lobbied, the UN Commission on Human Rights (CHR) responded differently.[56] The CHR was asked to 'designate a representative to again seek views and information from all [g]overnments on the human rights issues related to internally-displaced persons, including an examination of existing international human rights'.[57]

In 1992, the UNSG appointed Francis Deng, a Sudanese diplomat and scholar, to carry out the mandate.[58] Deng highlighted that the problem of IDPs was 'so severe and particular that they cannot be adequately remedied by the general law applicable to human rights protection but should instead be addressed separately'.[59] Deng further recognised that there was a *lacuna* in international law protection which the refugee framework could not adequately respond to as refugees, unlike IDPs, crossed international borders and the notion of a refugee as a displaced person triggers a well-

53 Refugees, displaced persons and returnees, UN Economic and Social Council Resolution 1990/78, UN Doc E/RES/1990/78 27 July 1990 (Resolution 1990/78) para 7.

54 Resolution 1990/78 (n 53 above) para 8.

55 R Cohen 'The guiding principles on internal displacement: An innovation in international standard setting' (2004) 10 *Global Governance* 459 462; R Cohen 'UN human rights bodies should deal with the internally displaced' presented at a meeting for delegates to the UN Commission on Human Rights by the Quaker United Nations Office and the World Council of Churches 7 February 1990 5; 'Human rights protection for internally-displaced persons' international conference convened by the Refugee Policy Group 24-25 June 1991.

56 Cohen (1990) (n 55 above) 7; Internally-Displaced Persons, adopted by UN Commission on Human Rights Resolution 1991/25, UN Doc E/CN.4/RES/1991/25 5 March 1991.

57 As above.

58 FM Deng 'The global challenge of internal displacement' (2001) 5 *Washington University Journal of Law and Policy* 141.

59 UN Commission on Human Rights, *Note by the Secretary-General pursuant to the UN Commission on Human Rights Resolution 1992/73 – Annex: Comprehensive study prepared by Mr Francis Deng, Representative of the Secretary-General on the human rights issues related to internally-displaced persons,* UN Doc E/CN.4/1993/35 21 January 1993 (January 1993 report) para 55.

established body of international norms distinct from internal displacement.[60] Under the UN Refugee Convention, a person could claim refugee status where there was a 'well-founded fear' of persecution.[61] However, the triggers of internal displacement are not always identical to those of refugees. For instance, development projects are not recognised as triggers of refugee status, but it may trigger internal displacement and leave displaced persons without adequate protection and in a precarious situation.

As the legal implications of the status of refugees and IDPs differ in international law, it was useful to develop a set of norms for the protection of IDPs.[62] The UN Special Representative further noted that it was important to develop such norms for IDP protection in view of the fact that the international law standards applicable to IDPs at the time consisted of a 'highly complex web of norms originating from a variety of legal sources which makes its application in specific situations of internal displacement difficult unless it is restated in a concise form'.[63] To fill this *lacuna*, the UN Special Representative developed the Guiding Principles on Internal Displacement which

60 UN 1951 Convention Relating to the Status of Refugees 189 UNTS 137 (UN Refugee Convention); January 1993 report (n 59 above) para 66; UN Commission on Human Rights *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights resolution 1993/95 – Internally-displaced persons* UN Doc E/CN.4/1994/44 (25 January 1994) para 26.

61 UN Refugee Convention (n 60 above) art 1(2).

62 In the January 1993 report, it was emphasised that 'that there is at present no clear statement of the human rights of internally-displaced persons, or those at risk of becoming displaced. The applicable international law is a patchwork of customary and conventional standards: Parts of it are applicable to all persons, parts only to certain subgroups of displaced persons such as those displaced as a result of armed conflict, and parts may not be applicable in certain situations, such as an emergency threatening the life of the nation or, on the contrary, may be applicable only during a state of emergency. There are about 24 million internally-displaced persons around the world, most of whom suffer, have suffered or risk suffering extremely serious violations of their basic human rights. This constitutes a humanitarian and human rights crisis of major proportions, which calls for clear guidelines that could be applied to all internally-displaced persons, regardless of the cause of their displacement, the country concerned, or the prevailing legal, social, political or military situation.' January 1993 report (n 59 above) para 75; for a discussion of refugee law in Africa, see C d'Orsi *Asylum seeker and refugee protection in sub-Saharan Africa: The peregrination of a persecuted human being in search of a safe haven* (2015).

63 During this period, express prohibitions of arbitrary displacement were only to be found in norms relating to international humanitarian law and indigenous peoples' protection. In international human rights law, arbitrary displacement was only implicitly provided in rights relating to freedom from arbitrary interference with one's home, choice of residence, freedom of movement and housing rights. However, the UN Special Representative observed that these rights 'do not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not spell out the circumstances under which displacement is permissible'. UN Commission on Human Rights *Report of the Representative of the Secretary-General, Mr Francis M Deng submitted pursuant to the UN Commission on Human Rights Resolution 1995/57 – Internally-displaced persons: Compilation and analysis of legal norms* UN Doc E/CN.4/1996/52/Add.2

recognise the right not to be arbitrarily internally displaced.[64]

## 4 Defining the term 'arbitrary'

The Guiding Principles explicitly provide for the right not to be displaced.[65] This recognition has three pertinent implications. It offers a platform on which IDPs may bring a claim for their protection that is constitutive and instrumental.[66] Further, it creates awareness on the issue of internal displacement distinct from other forced migration discourses, including the discussion on refugees and stateless persons. Additionally, it frames the discussion on internal displacement as a rights-based problem requiring rights-based solutions that touch on states' human rights commitments. Although the Guiding Principles provide for the right not to be arbitrarily displaced within the context of internal displacement, it does not explicitly set out the constitutive element of this right.

In line with international law, there are two constitutive elements of this right. The first key element is that displacement must be grounded in international law.[67] The significance of this element resonates from the need to ensure that displacements are not done without recourse to the law. Within the context of displacements, international human rights and humanitarian law standards are pivotal. These standards form the fulcrum of internal displacement norms from which the Guiding Principles and other regional norms on internal displacements have emerged. Article 6 of the Guiding Principles provides for grounds upon which displacement may be founded in international law. The provision sets out the permissible grounds on which various root causes of displacement will be considered non-arbitrary. In relation to armed conflict, displacement will be considered non-arbitrary where it is premised on the need to protect the civilian population or for the realisation of certain military exigencies.[68] In situations of large-scale development projects, displacement will be considered non-arbitrary where the project is in the realisation of a public interest need, and where it is for a compelling and overriding public interest.[69] In situations of disasters, displacement will be considered non-arbitrary where it is carried out

(5 December 1995) para 5; UN Commission on Human Rights, Addendum, *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights resolution 1997/39 – Compilation and analysis of legal norms, part II: Legal aspects relating to the protection against arbitrary displacement,* UN Doc. E/CN.4/1998/53/Add.1 (11 February 1998) (Compilation and analysis of legal norms) para 84.

64 Guiding Principles (n 1 above) art 6(1).

65 M Morel *The right not to be displaced in international law* (2014) 82-83.

66 M Stavropoulou 'The right not to be displaced' (1994) 9 *American University International Law Review* 689 745.

67 Compilation and analysis of legal norms (n 63 above) para 88.

68 Guiding Principles (n 1 above) art 6(2)(b).

69 Guiding Principles art 6(2)(c).

on the grounds of safety and health.[70] However, for certain types of displacements, such as apartheid and ethnic cleansing, the Guiding Principles do not set out the grounds on which these will be permissible as they are absolutely prohibited under international law.[71]

Aside from the requirement of compliance with international law, the second key element for determining arbitrariness is due process or the 'minimum procedural requirements'.[72]

Article 7(1) of the Guiding Principles provides that prior to displacement, feasible alternatives must be considered. In relation to conflict-induced displacement, international humanitarian law provides for a specific alternative that must be considered where protected persons are to be displaced in situations of armed conflict, either for military exigency or for safety.[73] The Fourth Geneva Convention provides that where protected persons are to be relocated, the occupying power should consider relocating them within the 'bounds of the occupied territory'[74] unless it is impracticable to do so for a 'material reason'.[75] In the context of disaster-induced displacement, the Peninsula Principles on Climate Displacement require states to consider climate adaptation and mitigation measures.[76] In the context of development projects, alternatives to the proposed projects must be considered.

However, where alternatives to displacements are not feasible, a second due process requirement is that strategies for minimising displacement and avoiding the adverse effect of displacements must be considered. In avoiding adverse effects, prior-impact assessments are relevant. While prior impact assessments may not always be feasible in the context of conflict-induced displacement, such assessments are feasible to avoid the adverse impact of development projects and natural disasters. In the context of development projects-induced displacement, socio-economic and environmental impact assessments are relevant. In relation to natural disasters, states must ensure that climate displacement risk managements are conducted.[77]

A third due process requirement that resonates from the Guiding Principles is adequate resettlement. Article 7(2) of the Guiding Principles mandates authorities to ensure that displaced persons are properly accommodated and basic social amenities are provided,

70 Guiding Principles art 6(2)(d).
71 Guiding Principles art 6(2)(a).
72 Compilation and analysis of legal norms (n 63 above) para 88.
73 The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 12 August 1949 (Fourth Geneva Convention).
74 Geneva Convention (n 73 above) art 49.
75 As above.
76 Peninsula Principles on Climate Displacement (2013).
77 Peninsula Principles (n 76 above) art 9.

including sanitation, nutrition and health care. The provision further requires that family members are not separated.[78]

A fourth due process requirement integral to preventing arbitrary displacement is that displaced persons must be sufficiently informed prior to displacement. Article 7(3) of the Guiding Principles incorporates this requirement. In line with this provision, displaced persons must be informed of displacement prior to its occurrence; the free, prior and informed consent of displaced persons must be sought; and affected individuals, and women in particular, must be involved in resettlement planning and co-ordination.[79] However, an exception to this requirement is in the 'the emergency stages of armed conflicts and disasters'.[80]

Another significant due process requirement is that displacement must not be carried out in violation of human rights law. This fifth requirement, integral to an understanding of 'arbitrariness', contemplates that displacement must not be orchestrated in a way that 'violates the rights to life, dignity, liberty and security of those affected'.[81] Articles 10, 11 and 12 clearly set out what the nature of the protection of the rights to life, dignity, liberty and security entails within the context of displacement. In situations of internal displacement, the right to life is often considered one of the most significant human rights concerns, particularly in situations of armed conflict and displacements orchestrated by development projects. Article 10 specifically requires that IDPs are to be protected against '(a) genocide; (b) murder; (c) summary or arbitrary executions; (d) enforced disappearances' and threats to commit any of these crimes. The Guiding Principles further mandate states to ensure that in situations where IDPs are not involved in hostilities, acts of violence against such persons should be prevented.[82] Aside from the right to life, the right to dignity also must not be violated. As a norm underlying various rights and as a right in itself, the concept of dignity is fundamental to the nature of human life.[83] Glensy notes that 'dignity has been considered to be an elemental part of personhood',[84] and scholars like Waldon,[85] Howard and Donnelly[86]

78 Guiding Principles (n 1 above) art 7(2).
79 As above.
80 Guiding Principles (n 1 above) art 7(3).
81 Guiding Principles art 8.
82 Guiding Principles art 10(2).
83 RD Glensy 'The right to dignity' (2011) 43 *Columbia Human Rights Law Review* 65 69; EK White 'There is no such thing as a right to human dignity: A reply to Conor O'Mahony' (2012) 10 *International Journal of Constitutional Law* 575 578.
84 Glensy (n 83 above) 72.
85 J Waldon 'Dignity, rank and rights' The Tanner Lectures on Human Values delivered at University of California, Berkeley, 21-23 April 2009; J Waldon 'How law protects dignity' Public law and legal theory research paper series, New York University School of Law Working Papers 11-83 (2011).
86 See RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' (1986) 80 *American Political Science Review* 801.

have taken similar positions on the notion of dignity as an intrinsic worth of every human. States do not only have the passive obligation of respecting the right,[87] but they have an obligation to positively take steps to ensure its realisation as a norm underlying all forms of rights and also as a right in itself. Article 11(2) specifically sets out some of the acts to be avoided intrinsic to the protection of this right, among which are acts of torture, rape, sexual abuse and acts directed at orchestrating terror. Article 12 provides for the security of persons and mandates states to protect internally-displaced persons from unjustifiable arrests or detention. Articles 13 to 23 further recognise the rights to movement; respect for family life; an adequate standard of living; equal recognition before the law; expression; assembly; vote; political participation; education; and the right against arbitrary deprivation of property.

A sixth requirement of the due process requirement is that adequate safeguard measures must be in place. The essence of these measures is to ensure that concerns resonating from displacements are adequately addressed in line with international standards in order to prevent the negative impact of displacement on the enjoyments of other human rights. These safeguard measures should include recognition of the right of IDPs to receive protection[88] and to be duly involved in the planning processes and co-ordination of resettlement, return and reintegration.[89] Additionally, competent lawful authorities should carry out law enforcement measures where such measures are required, and the right to effective remedies must be ensured.[90] Further, adequate safeguards must exist to protect specific categories of persons, including children, persons with disabilities and the elderly, and expectant mothers and mothers with children must be adequately protected.[91]

Although the Guiding Principles are non-binding, their norms have served as a tool for constructive engagement with states for the protection of IDPs[92] and for the creation of norms in domestic systems.[93] National courts in countries such as Colombia and South Africa have made reference to the Guiding Principles.[94] The Guiding

87 Howard & Donnelly (n 86 above) 803.
88 Guiding Principles (n 1 above) art 3(2).
89 Guiding Principles art 28(2).
90 As above.
91 Guiding Principles (n 1 above) art 4(2).
92 See E Ferris 'Assessing the impact of the principles: An unfinished task' (2008) *Forced Migration Review* 10.
93 D Fisher 'Epilogue: International law on the internally-displaced persons' in Banerjee et al (n 21 above) 316 328.
94 MJC Espinosa 'The constitutional protection of IDPs in Colombia' in RA Rivadeneira (ed) *Judicial protection of internally-displaced persons: The Colombian experience* (2009) 1 32; *City of Cape Town v All those adult males and females whose names are set out Annexure 'hs 1' to affidavit and who reside at Bluewaters Site B and C, Lukannon Drive, Strandfontein in Western Cape & Others* (2010) ZAWCHC 32 24 February 2010.

Principles have equally influenced the creation of regional frameworks in the Great Lakes region and within the African Union.[95] While the right not to be displaced is recognised in the framework of these systems, indications of appropriate recognition in domestic legal systems are few and far between.[96] However, it is important to note that if the right is to serve its purpose of providing IDPs with a claim that is both constitutive (of other human rights violations implicated in internal displacement) and instrumental (for the realisation of specific redress), national legal frameworks must adequately respond by explicitly recognising this right. This is important in view of the fact that the 'ultimate test of international human rights law is the extent to which it takes root in national soil'.[97]

## 5 Conclusion

Aside from being the first global normative standard on internal displacement, the Guiding Principles form the first human rights framework to recognise the right not to be arbitrarily displaced. While the Guiding Principles explicitly provide for this right, they do not provide for the yardstick against which to assess the arbitrariness of internal displacement. Two significant standards may be inferred from international instruments relevant to the Guiding Principles. First, displacement must be permissible under international law. Second, displacement must be in line with due process requirements. The article identifies six due process requirements, namely, that (i) feasible alternatives must be considered; (ii) strategies for minimising displacements must be explored; (iii) adequate resettlement must be implemented; (iv) displaced persons must be sufficiently informed; (v) displacement must not be carried out in violation of human rights law; and (vi) adequate safeguards must exist.

For over a decade, the Guiding Principles have significantly influenced the creation of normative standards, particularly at the supranational level. While the Guiding Principles have inspired national frameworks, little explicit provision in domestic legal systems has been made for the right not to be arbitrarily displaced. However, if the Guiding Principles are to take root in national legal systems and if the protection of IDPs within national systems is to be enhanced,

95 Protocol on the Protection and Assistance to Internally-Displaced Persons, November 2006 in S Ebobrah & A Tanoh (eds) *Compendium of African sub-regional human rights documents* (2010) 127; African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa, adopted by the African Union Heads of State and Government, Uganda, October 2009, in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 143.

96 Notably, the internal displacement law in Kenya incorporates the Guiding Principles and places a duty on states to 'protect every human being against arbitrary displacement'. Prevention, Protection and Assistance of Internally-Displaced Persons and Affected Communities Act 56 (2012) arts 3(b) & 6(1).

97 F Viljoen *International human rights law in Africa* (2012) 517.

the explicit recognition of this right is useful. Not only does it provide IDPs with a legitimate human rights claim which is useful for engaging states constructively, but it reinforces the need for the institutionalisation of adequate safeguards and the formation of durable rights-based solutions to the issue of internal displacement.