

The Guiding Principles: Legal origins and international obligations

Legal origins of the Guiding Principles

The Guiding Principles have not been developed, signed and ratified by States and are therefore not considered binding international law. However, they restate and reflect international conventions in the fields of International Human Rights Law, International Humanitarian Law and International Refugee Law. Practically all the Guiding Principles can be traced to a particular instrument under one of these three categories of binding international law.

Some general rights have been developed and made more explicitly relevant to displaced persons (See example in box 1 below). Thanks to the drafters of the Principles we now have a comprehensive tool, which not only gathers all rights relevant to the displaced but also expands and make them more explicitly applicable to IDPs. To fully understand the Guiding Principles it is useful to have a clear idea of their sources.

International Human Rights Law

Human Rights Law consists of a large number of instruments addressing general and specific human rights. The most important are:

- Universal Declaration of Human Rights (UDHR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (CAT)

The Universal Declaration of Human Rights has not been signed and ratified by States, but it is considered an interpretation of the human rights articles in the UN Charter (Arts. 55-56), which has become something of a constitution for the international community. The UDHR could therefore be seen as binding on UN member states.

The two international covenants on civil and political rights and economic, social and cultural rights make up the basis for many of the more thematic and specialised human rights conventions. The right to life and freedom from torture are some of the most important civil rights, while the right to vote is an example of an important political right. States are expected to implement these rights as soon as they become a State Party to the covenant. The implementation of the Covenant on Economic, Social and Cultural Rights often requires resources (to improve access to food, health care, and housing for example), which are not at hand in many countries. The implementation of these rights is therefore likely to be progressive and often in close collaboration with the international community. However, State parties to this

covenant have the obligation to prioritise vulnerable groups and to take steps to the maximum of its available resources to realise all the rights covered by this covenant.

Among the more specialised conventions, four of them have constituted particularly important sources for the Guiding Principles: Convention on the Rights of the Child, Convention against Torture and the two conventions against racial discrimination and discrimination against women. In addition to the international human rights instruments developed by member states of the United Nations, a number of regional human rights instruments have been drawn on during the development of the Principles. These conventions – the Inter-American Convention on Human Rights, the European Convention on Human Rights and the African Charter on Human and Peoples’ Rights – have been developed by the respective regional intergovernmental body. A regional human rights instrument for Asia is yet to be developed.

Box 1: The structure of the Guiding Principles: The example of Principle 12	
1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention.	General restatement of existing law, derived from: – Universal Declaration of Human Rights, arts. 3 and 9 – International Covenant on Civil and Political Rights, art. 9(1)
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.	Applicable to IDPs: this paragraph gives an indication on how the general standards should be applied with respect to IDPs. The expression " <i>to give effect to this right for internally displaced persons</i> " can be found in several other Guiding Principles.
3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.	Applicable to IDPs
4. In no case shall internally displaced persons be taken hostage.	Applicable to IDPs

Who does international human rights law apply to?

States generally owe human rights to individuals. State parties to the UN conventions have the obligation to respect, protect and fulfil the rights included in the human rights conventions and in the Universal Declaration of Human Rights. This concept is clearly linked to the States’ traditional monopoly on the use of legitimate force to maintain law and order in a democratic society. Consequently, only state agents, and sometimes individuals acting on the instigation of or with the consent or acquiescence of a public official, are said to violate human rights. On the other hand, violent acts committed by private individuals would normally be classified as a common crime and would therefore fall under the Criminal Code of a particular country.

Some exceptions apply to this traditional concept of human rights. For example, the Convention on the Prevention and Punishment of the Crime of Genocide explicitly applies to individuals,

whether they are state agents or not. Furthermore, the possible responsibility of illegal groups under human rights law has long been the subject of discussion.

International Humanitarian Law (IHL)

Humanitarian law can be simplified as the internationally accepted norms determining certain limitations on how warfare can be conducted by the warring parties. These international laws strive to protect non-combatants from the effects of war and to limit the use of certain methods of warfare. The main instruments are made up of the four Geneva Conventions and their two additional protocols.

The fourth Geneva Convention is explicitly dedicated to the protection of civilians and therefore contains important protection provisions applicable to internally displaced persons. In the fourth Convention, Article 3 dealing with internal conflicts and the treatment of persons taking no active part in the hostilities is particularly relevant to IDPs¹. The full text of this article is reproduced in box 2 below.

The content of Article 3 is developed in more detail in Additional Protocol II to the Geneva Conventions, the Protocol on Protection of Victims of Non-International Armed Conflicts. In this protocol, particular attention should be paid to Article 17, which explicitly prohibits the displacement of the civilian population “unless the security of the civilians involved or imperative military reasons so demand”. The full text of this article as well as a commentary by the International Committee of the Red Cross is included in the box below. Also, from the IV Geneva Convention you will see that persons evacuated for their own protection have the right to be returned as soon as possible.

Because internal displacement so often occurs in situations of internal armed conflicts, the Geneva Conventions and their additional protocols have been an important source for the UN Guiding Principles.

Box 2: Art 17. Prohibition of forced movement of civilians (Protocol II):

The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

ICRC commentary to Art. 17 of the Protocol II:

Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.

Art. 49 Geneva Convention IV:

¹ Because the third article in each of the four Geneva Conventions reads exactly the same, this article is often referred to as “Common Article 3”.

...Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

Who does international humanitarian law (IHL) apply to?

IHL applies to Contracting Parties to the Geneva Conventions and the additional protocols. In addition, armed opposition groups (as citizens of a country-Contracting Party to the conventions) are also bound by international humanitarian law, particularly Article 3, Common to the four Geneva Conventions (see box 3 below). Armed opposition groups fulfilling certain minimum conditions regarding military capacity and capacity to implement IHL are also bound by the II Additional Protocol on Protection of Victims of Non-International Armed Conflicts (see II Additional Protocol Art.1.1).

In addition, the 1998 Rome Statute of the International Criminal Court provides for individual responsibility for war crimes committed in internal or international conflicts.

Box 3: Geneva Conventions – Common Article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.