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# CHALLENGES IN THE LAW OF IDP RETURNS

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**Ben Hudson**

A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of PhD Law in the Faculty of Social Sciences and Law

University of Bristol Law School

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## ABSTRACT

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Today the world faces the greatest internal displacement crisis it has ever known. As of the end of 2017, a total of 40 million people are internally displaced due to conflict and violence. Add to this the 18.8 million new disaster-induced displacements in 2017 alone, and the total global IDP figure now far exceeds the number of refugees worldwide.

The precise focus of this Thesis is on the IDP right to return. As this Thesis comprehensively demonstrates, despite multiple high-level proclamations in support of an IDP right to return, any such explicit legal right applicable to all IDPs remains elusive in international law. What exists is a patchwork of context-specific rights and a general IDP right to return that remains to be deduced from general international law provisions.

As will be argued in this Thesis, this legal landscape has a demonstrable impact on the very essence of the IDP right to return. This impact is felt in terms of eligibility, as well as in respect to issues of reparation and time. The consequence of this continuing omission of an explicit general IDP right to return in international law is that return remains subject to limitations and restrictions to which the right to return to one's own country is not exposed. Not only does this therefore have profound consequences for IDP movement-related rights and the securing of durable solutions, but it sustains an increasingly unjustifiable gulf in protection between those subject to involuntary movement who have crossed an internationally-recognised border and those who have not. In addition, it reveals a variation in IDP rights standards not envisaged by an international legal regime that otherwise seeks to espouse equality as its overarching aim.



## **DEDICATION AND ACKNOWLEDGEMENTS**

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**AUTHOR'S DECLARATION**

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I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: ..... DATE: 25 March 2019





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## LIST OF ABBREVIATIONS, ACRONYMS AND INITIALISMS

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ACHR	American Convention on Human Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AU	African Union
Analytical Report	Analytical Report on Internally Displaced Persons
Annotations	Annotations to the Guiding Principles
ASIL	American Society of International Law
Banjul Charter	African (Banjul) Charter on Human and Peoples' Rights
Basic Principles and Guidelines (Development)	United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement
Basic Principles and Guidelines (IHRL and IHL)	United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	United Nations Committee on the Elimination of Discrimination against Women
CERD	United Nations Committee on the Elimination of Racial Discrimination
CESR	Center for Economic and Social Rights
CIHL	Customary International Humanitarian Law
CIREFCA	International Conference on Central American Refugees
CMW	United Nations Committee on Migrant Workers
COHRE	Centre on Housing Rights and Evictions
Compilation and Analysis	Compilation and Analysis of Legal Norms
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
Cuénod Report	United Nations Report on Refugees, Displaced Persons and Returnees
Darfur communication	<i>Sudan Human Rights Organisation (SHRO) and Centre on Housing Rights and Evictions (COHRE) v Sudan</i>
Dayton Agreement	General Framework Agreement for Peace in Bosnia and Herzegovina
DDPD (Sudan)	Doha Document for Peace in Darfur
DHA	Department for Humanitarian Affairs
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECHR Protocol No 1	Protocol No 1 to the European Convention on Human Rights
ECHR Protocol No 4	Protocol No 4 to the European Convention on Human Rights

ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
Endorois communication	<i>Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya</i>
ERC	Emergency Relief Coordinator
EU	European Union
FAO	Food & Agricultural Organization of the United Nations
FDP	Forcibly Displaced Person
GoS	Government of Sudan
Guiding Principles	United Nations Guiding Principles on Internal Displacement
HC	Humanitarian Coordinator
IAC	International armed conflict
IASC	United Nations Inter-Agency Standing Committee
IASC Durable Solutions Framework	United Nations Inter-Agency Standing Committee Framework on Durable Solutions for Internally Displaced Persons
HCPR	Harvard Program on Humanitarian Policy and Conflict Research
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICRC	International Committee of the Red Cross
ICRC CIHL Database	International Committee of the Red Cross customary international humanitarian law database
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International humanitarian law
IHRL	International human rights law
IIDH	Instituto Interamericano de Derechos Humanos
ILO	International Labour Organization
ILO Convention No 169	International Labour Organization Convention on Indigenous and Tribal Peoples
ILO Manual	International Labour Organization Convention on Indigenous and Tribal Peoples 1989 (No 169): A Manual
INGO	International non-governmental organisation
Inter-American Commission	Inter-American Commission on Human Rights
Inter-American Court	Inter-American Court of Human Rights
IOM	International Organization for Migration
IRO	International Refugee Organisation
ISIL	Islamic State in Iraq and the Levant
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
Law 387 (Columbia)	Law 387 on Internal Displacement of 1997

LJM	Liberation and Justice Movement (Sudan)
Madrid Principles	Basic Principles for Settlement of the Nagorno-Karabakh Conflict
The Movement	International Red Cross and Red Crescent Movement
National Societies	National Red Cross and Red Crescent Societies
NGO	Non-governmental organisation
NIAC	Non-international armed conflict
NKAO	Nagorno-Karabakh Autonomous Oblast
NPC	Nigerian Petroleum Company
NRC	Norwegian Refugee Council
OAS	Organization of American States
Ogiek case	<i>African Commission on Human and Peoples' Rights v Republic of Kenya</i>
Ogoni communication	<i>Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria</i>
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territories
Peace Accord	Comprehensive Peace Accord Signed between Nepal Government and the Communist Party of Nepal (Maoist)
Pinheiro Principles	United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons
Pinheiro Principles Explanatory Notes	Explanatory Notes on the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons
Pinheiro Principles Handbook	Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'
PISG	Kosovo's Provisional Institutions of Self-Government
PKK	Workers' Party of Kurdistan
Quadripartite Agreement	Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons
Refugee Convention	United Nations Convention Relating to the Status of Refugees
SARRED	International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa
SERAC	Social and Economic Rights Action Center
SHRO	Sudan Human Rights Organisation
SIDs	Small island developing States
South Ossetia	Republic of South Ossetia-the State of Alania
SPDC	Shell Petroleum Development Corporation
SSR	Soviet Socialist Republic
TRNC	Turkish Republic of Northern Cyprus
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme



UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UN IDP mandate-holder	United Nations IDP mandate-holder
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIK Protocol	Protocol on Voluntary and Sustainable Return
USA	United States of America
USSR	Union of Soviet Socialist Republics
VRRC	Voluntary Return and Resettlement Commission (Sudan)
Vienna Declaration	Vienna Declaration and Programme of Action
WFP	World Food Programme
WHS	World Humanitarian Summit

## **PART I**

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## CHAPTER 1 – INTRODUCTION

---

Forced migration<sup>1</sup> has become one of the defining features of our time. Indeed, it is somewhat trite to proclaim its importance. Global figures are at a record high, with the United Nations High Commissioner for Refugees (UNHCR) reporting that 68.5 million people were displaced as of the end of 2017<sup>2</sup> – a figure now greater than the entire population of the United Kingdom (UK).<sup>3</sup> Of this figure, 40 million are internally displaced persons (IDPs) who, on account of persecution, conflict, violence, or human rights violations, find themselves displaced within the national borders of their home countries.<sup>4</sup> Yet, despite over two-thirds of all UNHCR-reported forcibly displaced persons being displaced internally, their ‘plight’, a term used by former United Nations (UN) IDP mandate-holder, Francis Deng,<sup>5</sup> remains under-represented.<sup>6</sup> Indeed, the world’s attention is still largely transfixed on the one-third who have fled across international borders. It is within this unprecedented context that this Thesis is positioned, and it is on this under-represented majority that its attention is focused.

This introductory chapter is structured into three sections. The first section will briefly outline the internal displacement phenomenon, in particular, its conceptual scope and practical scale, with reference to current trends. The second section will then introduce IDP return, which forms the precise focus of this Thesis. Here, attention will be given to the framing of return as a means by which to achieve a durable solution to internal displacement, and to IDP return specifically as a ‘right’. Upon

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<sup>1</sup> The term ‘forced migration’ will be used on occasion throughout this Thesis. This is being used as an umbrella term for all forms of forced migration, including, but not necessarily limited to, IDPs, refugees, asylum seekers, and other similarly displaced persons.

<sup>2</sup> UNHCR, ‘Global Trends: Forced Displacement in 2017’ (UNHCR 25 June 2018) 2. This figure represents the number of persons forcibly displaced as a result of persecution, conflict, violence or human rights violations. This figure includes 25.4 million refugees, 19.9 million of whom are under the UNHCR’s mandate, and 5.4 million of whom are Palestinian refugees registered by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA); 40 million IDPs; and 3.1 million asylum-seekers.

<sup>3</sup> The World Bank, ‘Population, total’ (2019)

[data.worldbank.org/indicator/SP.POP.TOTL?end=2016&page=2&start=2016&view=map&year=2016&year\\_high\\_desc=true](https://data.worldbank.org/indicator/SP.POP.TOTL?end=2016&page=2&start=2016&view=map&year=2016&year_high_desc=true) accessed 19 March 2019. This reports the UK’s population as of the end of 2017 at just over 66 million people.

<sup>4</sup> UNHCR (2018) 33. This figure includes only those who have been internally displaced on account of ‘persecution, conflict, violence or human rights violations’ as this is the measure that is used here by the UNHCR. As will be discussed later in this Chapter and in Chapter Two, the recognised causes of internal displacement do, however, extend beyond these four reasons.

<sup>5</sup> The term UN IDP mandate-holder will be used throughout this Thesis as a single term that encompasses all iterations of the mandate’s title throughout its history. Since its inception in 1992, the name of the mandate has changed twice.

<sup>6</sup> Current UN IDP mandate-holder, Cecilia Jimenez-Damary, puts the point bluntly when she says that ‘it is clear that the world is facing a massive and neglected crisis of internal displacement’ (see UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons’ (11 April 2018) UN Doc A/HRC/38/39, para 19).

having introduced these core elements, in the third section, the research questions posed by this Thesis will be outlined in greater detail, as will the research approach and Thesis structure.

### **1.1 Understanding Internal Displacement**

As detailed in the 1998 UN Guiding Principles on Internal Displacement (Guiding Principles),<sup>7</sup> internal displacement involves the forced movement of persons from their homes or places of habitual residence to another part of their home country.<sup>8</sup> The Guiding Principles explicitly recognise armed conflict, generalised violence, violations of human rights, and natural or human-made disasters as causes of internal displacement.<sup>9</sup> Yet, this list is not exhaustive. For example, although development-induced displacement does not feature in the IDP definition, it is nonetheless explicitly recognised as a potentially prohibited form of arbitrary internal displacement later in the Guiding Principles.<sup>10</sup> Internal displacement is characterised therefore by two essential elements – first, forced or involuntary movement, which, second, takes place within the ‘internationally-recognised State border[s]’ of one’s home country or country of habitual residence.<sup>11</sup> The concept of internal displacement is therefore importantly distinguished from refugee movements, both on account of the non-international nature of the movement<sup>12</sup> and its amenability to a non-exhaustive list of displacement causes.<sup>13</sup>

As introduced above, 40 million people were reported by the UNHCR as being internally displaced worldwide as of the end of 2017. This figure represents a dramatic increase over recent decades in the number of IDPs displaced by conflict and violence,<sup>14</sup> which, having stood at 1.2 million in 1982,<sup>15</sup>

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<sup>7</sup> UN Commission on Human Rights, ‘Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission resolution 1997/39: Addendum: Guiding Principles on Internal Displacement’ (11 February 1998) UN Doc E/CN.4/1998/53/Add.2.

<sup>8</sup> *ibid*, introductory para 2. The Guiding Principles do not explicitly define the term ‘internal displacement’, but instead provides a ‘description’ of ‘internally displaced persons’.

<sup>9</sup> *ibid*.

<sup>10</sup> *ibid*, Principle 6(2)(c).

<sup>11</sup> *ibid*, introductory para 2.

<sup>12</sup> Article 1(A)(2) of the Convention Relating to the Status of Refugees (Refugee Convention) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and the associated Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 stipulates that to be considered a refugee requires that an individual is ‘outside the country of his former habitual residence’.

<sup>13</sup> In contrast to the non-exhaustive list of displacement causes envisaged in the Guiding Principles, Article 1(A)(2) of the Refugee Convention outlines an exhaustive list of displacement causes that is restricted to persecution for reasons of ‘race, religion, nationality, membership of a particular social group or political opinion’.

<sup>14</sup> ‘Conflict and violence’ is a category used by the IDMC. It encompasses armed conflict (both international and internal), generalised violence and human rights violations.

<sup>15</sup> Roberta Cohen and Francis M Deng, ‘Introduction’ in Roberta Cohen and Francis M Deng (eds), *The Forsaken People* (Brookings Institution Press 1998) 1.

reached a peak year-end figure of 40.8 million at the end of 2015.<sup>16</sup> This ‘unprecedented’<sup>17</sup> number of conflict and violence-induced IDPs has been as a result of particularly steep year-on-year increases over recent years.<sup>18</sup> The events that have contributed to these increasing IDP numbers will be familiar to many. These include displacement in the Middle East and North Africa associated with social uprisings and the actions of the so-called Islamic State in Iraq and the Levant (ISIL),<sup>19</sup> displacement due to the conflict that erupted in eastern Ukraine in 2014,<sup>20</sup> and displacement resulting from the escalation of unrest in Sub-Saharan Africa.<sup>21</sup> As the Internal Displacement Monitoring Centre (IDMC) reports, Syria hosts the highest total number of conflict and violence-induced IDPs, at 6.8 million,<sup>22</sup> with Syria also recording the most new displacements in 2017, at 2.9 million, followed by the Democratic Republic of Congo (DRC), at 2.2 million.<sup>23</sup> As a result of these steep increases, IDP numbers are now sustained at a level far higher than has ever been seen before, with the five years since 2013 (inclusive) being the five years with the highest ever recorded IDP levels.<sup>24</sup> Indeed, total IDP numbers are now substantially and consistently above the previous highest peak of 28 million recorded in 1994.<sup>25</sup> While just over three-quarters of all conflict and violence-induced IDPs reside in only ten countries,<sup>26</sup> it is important to recognise that a number of smaller States also host a not insignificant number of IDPs. For example, Cyprus is home to an estimated 217,000 IDPs,<sup>27</sup> meaning that the displaced population constitutes approximately 20% of the Republic’s total population.<sup>28</sup> Indeed, while the majority of conflict and violence-induced IDPs may be concentrated in a relatively small number of States, situations of conflict and violence-induced displacement are being recorded in all regions of the world.<sup>29</sup>

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<sup>16</sup> IDMC, ‘Global Report on Internal Displacement’ (IDMC May 2016) 8 and 27.

<sup>17</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons’ (29 April 2016) UN Doc A/HRC/32/35, para 90.

<sup>18</sup> IDMC, ‘GRID 2017: Global Report on Internal Displacement’ (IDMC May 2017) 9. The year 2014 saw the highest number of new conflict and violence-induced displacements ever recorded by the IDMC, at 11 million (see IDMC, ‘Global Overview 2015: People Internally Displaced by Conflict and Violence’ (IDMC May 2015) 7).

<sup>19</sup> IDMC (2016) 9.

<sup>20</sup> *ibid* 10.

<sup>21</sup> *ibid*, 9.

<sup>22</sup> IDMC, ‘GRID 2018: Global Report on Internal Displacement’ (IDMC May 2018) 48.

<sup>23</sup> *ibid*, 6.

<sup>24</sup> IDMC, ‘Global Internal Displacement Database: Displacement Data’ (2019)

<[www.internal-displacement.org/database/displacement-data](http://www.internal-displacement.org/database/displacement-data)> accessed 19 March 2019.

<sup>25</sup> IDMC (2017) 25. The 1994 peak was to a large extent associated with the dissolution and aftermath of the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia.

<sup>26</sup> IDMC (2018) 48. These ten countries include (ordered in size of IDP population, largest first): Syria, Colombia, Democratic Republic of the Congo (DRC), Iraq, Sudan, Yemen, South Sudan, Nigeria, Afghanistan and Turkey.

<sup>27</sup> *ibid*, 94.

<sup>28</sup> IDMC-reported IDP numbers do not include persons displaced within the self-proclaimed Turkish Republic of Northern Cyprus (TRNC), as such information is unavailable (see IDMC, ‘Global Overview 2015: People Internally Displaced by Conflict and Violence’ (IDMC May 2015) 45).

<sup>29</sup> In 2016, a total of 55 countries were affected by conflict and violence-induced displacement. This figure has been calculated using IDMC data (see IDMC (2017) 113-116).

While the total cumulative number of conflict and violence-induced IDPs is close to its highest ever recorded level, to accurately understand the true scale of internal displacement demands adding to this figure the 18.8 million IDPs newly-displaced by disasters in 2017.<sup>30</sup> This figure is dominated by new displacements triggered by weather-related hazards, which in 2017 totalled 18 million, with the remainder triggered by geophysical hazards.<sup>31</sup> New disaster-induced displacements were recorded in a total of 135 countries and territories in 2017.<sup>32</sup> Nevertheless, East Asia and the Pacific experienced by far the greatest levels of disaster-induced displacement, at 45.8% (8.6 million) of the global total.<sup>33</sup> Major sudden-onset weather-related hazards (notably flooding and storm events) contributed overwhelmingly to new displacements in China and the Philippines,<sup>34</sup> which at 4.5 million and 2.5 million respectively, experienced the highest levels of new disaster-induced displacements in 2017.<sup>35</sup> In April 2016, Ecuador and Japan experienced near simultaneous large-scale geophysical hazards (earthquakes and aftershocks) that displaced at least 259,000 and 196,000 people respectively.<sup>36</sup> Disaster-induced displacement is particularly prevalent in small island developing States (SIDs), which, given their mostly low-lying nature, tend to face a level of 'disproportionately high disaster risk'.<sup>37</sup> For instance, in March 2015, approximately 25% of Vanuatu's total population was internally displaced by the destruction caused by tropical cyclone Pam.<sup>38</sup> Yet, although these current disaster and conflict-induced displacement figures may be some of the highest ever seen, it is anticipated that these numbers will continue to rise in the coming decades, with global megatrends, such as population growth, climate change, and unplanned rapid urbanisation, expected to lead to further displacement in the future.<sup>39</sup>

While there is no doubt that new situations and new waves of displacement contribute significantly to increasing global IDP numbers, these figures are bolstered by the prevalence of protracted internal

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<sup>30</sup> IDMC (2018) 7.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*, 6.

<sup>33</sup> *ibid.*, 16.

<sup>34</sup> *ibid.*, 28.

<sup>35</sup> *ibid.*, 7.

<sup>36</sup> IDMC (2017) 32. Both States were affected by geophysical events on 16 April 2016.

<sup>37</sup> IDMC (2016) 19.

<sup>38</sup> *ibid.*

<sup>39</sup> UNGA, 'Protection of and Assistance to Internally Displaced Persons' (10 August 2012) UN Doc A/67/289, paras 55-58. Indeed, Jimenez-Damary has recently said that the adverse effects of climate change and seemingly unending conflicts means 'internal displacement on this scale will be difficult to reverse' (see UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons' (11 April 2018) UN Doc A/HRC/38/39, para 18).

displacement.<sup>40</sup> The IDMC defines a situation of protracted internal displacement as ‘a situation in which the process for finding durable solutions for internally displaced persons (IDPs) is stalled and/or IDPs are marginalised as a consequence of a lack of protection of their human rights’.<sup>41</sup> Although monitoring gaps and a lack of definitional clarity mean there is some uncertainty as to the true scale of protracted internal displacement,<sup>42</sup> the IDMC has reported a significant increase in the number of protracted internal displacement situations in recent years.<sup>43</sup> In 2015, the IDMC identified instances of protracted displacement in which IDPs have been living in displacement for more than ten years in almost 90% of countries they monitor.<sup>44</sup> The scale of protracted displacement has become so great that, in 2011, refugee studies expert, Roger Zetter, stated that situations of protracted displacement have ‘now become the norm’, with humanitarian emergencies the exception.<sup>45</sup>

Examples that demonstrate the persistence of protracted internal displacement can be drawn from all regions of the world. In the South Caucasus, hundreds of thousands of people remain displaced as a result of inter-ethnic, internal and international armed conflict rooted in unresolved territorial disputes following the dissolution of the Union of Soviet Socialist Republics (USSR) in the early 1990s. As of December 2017, there are approximately 393,000 IDPs in Azerbaijan and 289,000 IDPs in Georgia.<sup>46</sup> Displacement periods in Cyprus and in the Occupied Palestinian Territories (OPT) are now in excess of forty years,<sup>47</sup> and in Colombia, displacement associated with internal armed conflict has been an ongoing phenomenon for more than six decades.<sup>48</sup> In April 2015, the then UN IDP mandate-holder, Chaloka Beyani, reported that the average duration of conflict-induced displacement had reached seventeen years.<sup>49</sup> While situations of protracted displacement may commonly be associated with conflict and violence, the IDMC has nevertheless sought to raise awareness of protracted displacement in situations of disaster-induced displacement. Unlike conflict and violence-induced displacement, a chronic lack of information regarding ongoing disaster-induced displacement means

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<sup>40</sup> IDMC, ‘Global Overview 2015: People Internally Displaced by Conflict and Violence’ (IDMC May 2015) 11.

<sup>41</sup> Nadine Walicki, ‘Protracted Internal Displacement in Europe: Current Trends and Ways Forward’ (IDMC May 2009) 8.

<sup>42</sup> *ibid.*

<sup>43</sup> IDMC, ‘Global Overview 2014: People Internally Displaced by Conflict and Violence’ (IDMC May 2014) 8.

<sup>44</sup> IDMC, ‘Global Overview 2015: People Internally Displaced by Conflict and Violence’ (IDMC May 2015) 63.

<sup>45</sup> Roger Zetter, ‘Unlocking the Protracted Displacement of Refugees and Internally Displaced Persons’ (2012) 30(4) *Refugee Survey Quarterly* 1, 1.

<sup>46</sup> IDMC (2018) 94-95. Interestingly, Armenia does not feature in the GRID 2018 figures, this despite a consistent reporting of 8,400 IDPs for every year from 2009-2016 (inclusive) (see IDMC, ‘Global Internal Displacement Database: Displacement Data’ (2019)).

<sup>47</sup> As a result of the 1974 coup and invasion, and the 1967 occupation, respectively (see IDMC, ‘Global Overview 2015: People Internally Displaced by Conflict and Violence’ (IDMC May 2015) 8 and 42, respectively).

<sup>48</sup> *ibid.*, 20.

<sup>49</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of IDPs’ (1 April 2015) UN Doc A/HRC/29/34, para 20.



the IDMC is unable to compile yearly cumulative figures.<sup>50</sup> Nonetheless, based on scoping studies, it has been estimated by the IDMC that, in 2014, at least 715,000 were locked in protracted disaster-induced displacement.<sup>51</sup> This figure is, however, believed to be a gross underestimate given the lack of awareness, understanding and reporting of disaster-induced displacement.<sup>52</sup>

In such situations of protracted displacement, whether these be in the context of conflict and violence, or disasters, IDPs face major obstacles to returning to their homes or places of habitual residence, whether this be due to, *inter alia*, physical blockades to movement, risks to personal security and safety, or conditions of socio-economic deprivation at their place of origin.<sup>53</sup> This apparent intractability of displacement means that, for many millions of IDPs, the prospect of securing return at any time in the foreseeable future is rendered seemingly slim, if not 'impossible'.<sup>54</sup>

## **1.2 Introducing IDP Return**

### **1.2.1 Return as a means of achieving a durable solution to internal displacement**

The return of IDPs to their homes or places of habitual residence has long been seen as an obvious and logical solution to internal displacement, desired not only by IDPs themselves, but also by the international community and many national authorities.<sup>55</sup> In the 1993 Vienna Declaration and Programme of Action (Vienna Declaration),<sup>56</sup> the international community emphasised the importance of 'finding lasting solutions to questions related to internally displaced persons',<sup>57</sup> in particular, IDPs' 'voluntary and safe return and rehabilitation'.<sup>58</sup> This call was later reiterated and

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<sup>50</sup> IDMC (2016) 29.

<sup>51</sup> IDMC, 'Global Estimates 2015: People Displaced by Disasters' (IDMC July 2015) 47.

<sup>52</sup> *ibid.*

<sup>53</sup> See, for example, in respect to the situation in Georgia, in UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani: Addendum: Follow-up Mission to Georgia' (4 June 2014) UN Doc A/HRC/26/33/Add.1, para 3.

<sup>54</sup> IDMC, 'Global Overview 2015: People Internally Displaced by Conflict and Violence' (IDMC May 2015) 63.

<sup>55</sup> See, for example, Joakim Daun, 'Rethinking Durable Solutions for IDPs in West Darfur' (2011) 1(2) Oxford Monitor of Forced Migration 42.

<sup>56</sup> Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (12 July 1993) UN Doc A/CONF.157/23. The Vienna Declaration presented 'a common plan for the strengthening of human rights work around the world' (see UN OHCHR, 'World Conference on Human Rights, 14-25 June 1993, Vienna, Austria' <[www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx](http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx)> accessed 22 November 2016). The World Conference on Human Rights was convened pursuant to UNGA Res 45/155 (18 December 1990) UN Doc A/RES/45/155.

<sup>57</sup> Vienna Declaration, para 23.

<sup>58</sup> *ibid.* This statement in support of achieving solutions to internal displacement, including return, was at that time particularly powerful given that the Vienna Declaration was adopted by consensus by representatives of

expanded upon in the 2000 UN Millennium Declaration,<sup>59</sup> which was adopted at the close of the Millennium Summit of the UN,<sup>60</sup> the then ‘largest-ever gathering of world leaders’.<sup>61</sup> In the Millennium Declaration, the heads of State and government present resolved to ‘help all refugees and displaced persons to return voluntarily to their homes, in safety and dignity and to be smoothly reintegrated into their societies’.<sup>62</sup> Ten years later, in December 2009, the UN Inter-Agency Standing Committee (IASC) endorsed, through its Working Group,<sup>63</sup> the 2010 Framework on Durable Solutions for Internally Displaced Persons (IASC Durable Solutions Framework),<sup>64</sup> in which return became firmly framed within what is now the prevailing vision of displacement solutions as ‘durable solutions’.

The IASC Durable Solutions Framework is a practical guide,<sup>65</sup> intended for use by international, national and local actors and authorities ‘in their efforts to support durable solutions and help IDPs resume normal lives, in safety and dignity’.<sup>66</sup> It states that a durable solution is achieved ‘when IDPs no longer have any specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination on account of their displacement’.<sup>67</sup> For Beyani, ‘[f]reeing IDPs from the cycle of dependency is the key goal of durable solutions’.<sup>68</sup> It outlines three means by which a durable solution can be achieved. Sustainable reintegration of IDPs at the place of origin (i.e. return) is recognised as one of these three means, alongside sustainable local integration at the site of refuge (i.e. local integration) and sustainable integration in another part of the country (i.e. resettlement).<sup>69</sup> Since its endorsement, the Framework and its message of durable solutions has received strong international support. For instance, the UN General Assembly has in particular called upon the UN IDP mandate-holder and UN agencies to use the IASC Durable Solutions

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the 171 States present at the World Conference (see UN OHCHR, ‘World Conference on Human Rights, 14-25 June 1993, Vienna, Austria’

<[www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx](http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx)> accessed 22 November 2016).

<sup>59</sup> UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2.

<sup>60</sup> The Millennium Summit was held in New York on 6-8 September 2000.

<sup>61</sup> Millennium Project, ‘About MDGs: What They Are’ (2006) <[www.unmillenniumproject.org/goals/](http://www.unmillenniumproject.org/goals/)> accessed 22 November 2016.

<sup>62</sup> UN Millennium Declaration, para 26.

<sup>63</sup> IASC, ‘IASC Framework on Durable Solutions for Internally Displaced Persons’ (The Brookings Institution – University of Bern Project on Internal Displacement 2010) Foreword.

<sup>64</sup> IASC Durable Solutions Framework (cited above).

<sup>65</sup> UNGA, ‘Protection of and Assistance to Internally Displaced Persons’ (10 August 2012) UN Doc A/67/289, para 47.

<sup>66</sup> IASC Durable Solutions Framework, Foreword. Since its submission by the UN IDP mandate-holder to the UN Human Rights Council in February 2010, the Framework has received support from the UN General Assembly, which has called for its use by UN agencies, most recently in UNGA Res 70/165 (22 February 2016) UN Doc A/RES/70/165, para 29.

<sup>67</sup> IASC Durable Solutions Framework, 5.

<sup>68</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani’ (1 April 2015) UN Doc A/HRC/29/34, para 42.

<sup>69</sup> IASC Durable Solutions Framework, 5.

Framework in their activities,<sup>70</sup> and has itself adopted the Framework's position that a durable solution to internal displacement can be achieved through one of the three means of either return, local integration or resettlement.<sup>71</sup> A '[c]ommit[ment] to promote and support safe, dignified and durable solutions for internally displaced persons and refugees' features as one of the 32 Core Commitments agreed at the 2016 UN World Humanitarian Summit (WHS),<sup>72</sup> and the Secretary-General's Agenda for Humanity<sup>73</sup> expressly recognises that to reduce internal displacement by at least half by 2030 will require 'invest[ment]... in the return, integration or resettlement of the displaced'.<sup>74</sup>

In part, one of the overarching aims of the IASC Durable Solutions Framework in detailing these three means is to shift attention away from return being viewed as *the sole means* by which to achieve a durable solution. Indeed, as outlined above, at the time of the Vienna and Millennium Declarations, 'lasting solutions' to internal displacement were predominantly, if not exclusively, seen through the lens of return. In this respect, the IASC Durable Solutions Framework argues that 'durable solutions must not be exclusively understood as a return to one's former home and a re-establishment of the status quo before displacement'.<sup>75</sup> To this end, it is clear that the three means are complementary and non-hierarchical.<sup>76</sup> They are also not exclusionary, meaning that should a durable solution have been achieved through one of these three means, this does not then preclude access to either of the other two means; for example, the IASC Durable Solutions Framework states that if an IDP has secured a durable solution through means of local integration at the site of refuge, this does not then bar that individual from voluntarily choosing to return to their place of origin at a later time.<sup>77</sup> In addition to outlining the three means, the IASC Durable Solutions Framework also presents a series of rights-based principles to help guide and support the search for durable solutions.<sup>78</sup> Among these, it is asserted that 'The rights, needs and legitimate interests of IDPs should be the primary considerations guiding all principles and decisions relating to internal displacement and durable solutions'.<sup>79</sup> The IASC

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<sup>70</sup> UNGA Res 70/165 (22 February 2016) UN Doc A/RES/70/165, paras 3 and 29, respectively.

<sup>71</sup> *ibid*, preamble.

<sup>72</sup> Agenda for Humanity, 'Core Commitments' (2016) <[www.agendaforhumanity.org/core-commitments](http://www.agendaforhumanity.org/core-commitments)> accessed 10 February 2019. This Core Commitment falls under Core Responsibility 3, 'Leave no one behind'. This was included having received solid support from WHS stakeholders - with 76 stakeholders aligned, support for durable solutions was the second most supported Core Commitment under Core Responsibility 3.

<sup>73</sup> UNGA, 'One Humanity: Shared Responsibility: Report of the Secretary-General for the World Humanitarian Summit: Annex: Agenda for Humanity' (2 February 2016) UN Doc A/70/709.

<sup>74</sup> *ibid*, 54.

<sup>75</sup> IASC Durable Solutions Framework, 6.

<sup>76</sup> *ibid*, 12.

<sup>77</sup> *ibid*, 12.

<sup>78</sup> *ibid*, 11-26.

<sup>79</sup> *ibid*, 11.

Durable Solutions Framework then goes on to detail a set of criteria, eight in total, which can be used to assist in determining whether a durable solution has been achieved.<sup>80</sup>

It is apparent therefore that the IASC Durable Solutions Framework is underpinned by a series of critical conditions. If these conditions are not met, then any 'solution' reached cannot be considered 'truly durable'. First, IDPs must be in a position to make an informed, voluntary choice as to whether they wish to return, integrate locally, or resettle to another part of the country.<sup>81</sup> Such a choice must be meaningful,<sup>82</sup> and, in principle, based on an individual decision.<sup>83</sup> Second, any durable solution must be achieved in safety, and with security and dignity.<sup>84</sup> The Framework asserts the importance of long-term safety and security for IDPs,<sup>85</sup> which, it is noted, can be achieved in part by guarding against, *inter alia*, threats, intimidation and attacks.<sup>86</sup> That these two sets of conditions are requisites of any durable solution has since been unequivocally restated on numerous occasions by the UN IDP mandate-holder.<sup>87</sup> Yet, to these, a third critical condition must also be added, that of sustainable (re-)integration, express reference to which is given in the full formulation of each of the three means. Specifically, the Framework considers sustainable access to, *inter alia*, essential sustenance and medical services,<sup>88</sup> the availability of sustainable livelihood and employment opportunities,<sup>89</sup> and measures to promote the environmental sustainability of envisaged durable solutions.<sup>90</sup>

By applying these three sets of conditions specifically to return, it becomes clear that physical movement alone is insufficient to constitute a durable solution.<sup>91</sup> For return to result in a 'truly durable' solution demands much more. It first requires that IDPs have effective access to accurate, objective and comprehensible information that is sufficient for them to be able to make an informed choice as to whether they wish to return. This choice should be voluntarily decided, so therefore free

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<sup>80</sup> *ibid*, 27-46.

<sup>81</sup> *ibid*, see primarily, 12-13 and 15-19.

<sup>82</sup> *ibid*, 18.

<sup>83</sup> *ibid*, 17.

<sup>84</sup> *ibid*, see primarily, 12-13 and 27-31. Although 'dignity' is only explicitly mentioned on a few occasions, it is nonetheless a common theme throughout.

<sup>85</sup> *ibid*, 28. It is recognised on page 29 that 'absolute safety and security' may often prove unattainable.

<sup>86</sup> *ibid*, 27-29.

<sup>87</sup> See, for example, UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani: Addendum: Follow-up Mission to Georgia' (4 June 2014) UN Doc A/HRC/26/33/Add.1, para 54. Here, Beyani emphasised the need to achieve durable solutions for IDPs 'in safety and dignity, based on their [IDPs'] informed and voluntary choice'.

<sup>88</sup> IASC Durable Solutions Framework, 31-32.

<sup>89</sup> *ibid*, 18-19 and 30.

<sup>90</sup> *ibid*, 18 and 30.

<sup>91</sup> Erin Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005) 24(3) *Refugee Survey Quarterly* 9, 22.

from any form of overt or tacit coercion. Second, IDPs must be able to return safely, securely and with dignity, and once they have returned, be able to reside in an environment in which they are free from, *inter alia*, recriminations, threats, and targeted physical violence or danger to their person. Third, IDPs should have access to the support they need to successfully and sustainably re-integrate or re-establish themselves as an equal member of their community.

From this brief discussion, it is clear that IDP return has become firmly rooted in the idea of durable solutions to internal displacement. It is also clear that return should not, according to the IASC Durable Solutions Framework, be seen as the only way by which IDPs may seek to achieve a solution to their displacement. Yet, despite this policy shift towards viewing return as just one of three, non-hierarchical means by which a durable solution can be achieved, it is also apparent that, simultaneous to this shift, return, in particular, has continued to enjoy growing international support, not only as a durable solution but as a *right* in and of itself.

### 1.2.2 IDP return as a right

That a considerable number of IDPs are prevented from returning to their homes or places of habitual residence has led to numerous, and on occasion, repeated calls by the international community for IDPs to be assured their '*right to return*'. In this respect, the UN Security Council has been especially vocal,<sup>92</sup> notably in resolutions concerned with armed conflict in the South Caucasus. On the Abkhaz-Georgian conflict, the UN Security Council has stressed that 'they [refugees and IDPs] have the right to return to their homes in secure and dignified conditions',<sup>93</sup> and has on numerous occasions affirmed that this '*right to return*' is not only '*fundamentally important*',<sup>94</sup> but also '*inalienable*'.<sup>95</sup> The UN General Assembly has also recognised IDPs' '*right to return*', again in the Georgian context, by asserting '*the right of return of all internally displaced persons and refugees and their descendants, regardless of ethnicity, to their homes throughout Georgia, including in Abkhazia and the Tskhinvali region/South Ossetia*'.<sup>96</sup> Similarly, in its resolution 51/126, the UN General Assembly '[r]eaffirm[ed]

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<sup>92</sup> Sanjula Weerasinghe and Elizabeth Ferris, 'Security Council, Internal Displacement and Protection: Recommendations for Strengthening Action through Resolutions' (The Brookings Institution – London School of Economics Project on Internal Displacement 2011) 24.

<sup>93</sup> UNSC Res 1615 (29 July 2005) UN Doc S/RES/1615, para 18.

<sup>94</sup> UNSC Res 1808 (15 April 2008) UN Doc S/RES/1808, para 9.

<sup>95</sup> UNSC Res 1582 (28 January 2005) UN Doc S/RES/1582, para 17; UNSC Res 1554 (29 July 2004) UN Doc S/RES/1554, para 15; UNSC Res 1524 (30 January 2004) UN Doc S/RES/1524, para 16.

<sup>96</sup> UNGA Res 68/274 (5 June 2014) UN Doc A/RES/68/274, para 1. Note that Abkhazia and the Tskhinvali region/Republic of South Ossetia-the State of Alania, are the two disputed territories, which while recognised by the vast majority of the international community as constituting part of Georgian territory, are *de facto* administered by breakaway regimes.

the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967'.<sup>97</sup> In the context of the Nagorno-Karabakh dispute, the UN General Assembly has itself referred to the inalienability of the 'right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes'.<sup>98</sup> At the European level, the Council of Europe Recommendation of the Committee of Ministers on IDPs explicitly states, *inter alia*, that '[i]nternally displaced persons have the right to return voluntarily, in safety and in dignity, to their homes or places of habitual residence'.<sup>99</sup>

These statements, made in some of the very highest political fora, echo prominent references in a number of agreements, including modern peace agreements, to a 'right to return' of displaced persons, including IDPs.<sup>100</sup> The 1994 Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons (Quadripartite Agreement)<sup>101</sup> calls on Parties to the Abkhaz-Georgian conflict to respect that '[d]isplaced persons/refugees have the right to return voluntarily to their places of origin or residence irrespective of their ethnic, social or political affiliation under conditions of complete safety, freedom and dignity',<sup>102</sup> and 'without risk of arrest, detention, imprisonment or legal criminal proceedings'.<sup>103</sup> Specifically, the Quadripartite Agreement states that returnees shall enjoy 'the right to return to the areas where they lived prior to leaving the conflict zone or to the area of their choice'.<sup>104</sup> In Annex 7 of the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement),<sup>105</sup> Article 1(1) states that '[a]ll refugees and displaced persons have the right freely to return to their homes of origin'.<sup>106</sup> The 2007 Basic Principles for Settlement of the Nagorno-Karabakh Conflict (Madrid Principles),<sup>107</sup> contain a similar provision that protects 'the right of all

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<sup>97</sup> UNGA Res 51/126 (13 December 1996) UN Doc A/RES/51/126, para 1.

<sup>98</sup> UNGA Res 62/243 (25 April 2008) UN Doc A/RES/62/243, para 3.

<sup>99</sup> Council of Europe Committee of Ministers, 'Recommendation Rec (2006) 6' (adopted 5 April 2006) para 12.

<sup>100</sup> UN Human Rights Council, 'Report of the Representative of the Secretary-General on the Human Rights of IDPs, Walter Kälin' (5 January 2010) UN Doc A/HRC/13/21, para 77.

<sup>101</sup> UNSC, 'Letter Dated 5 April 1994 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council: Annex II: Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons Signed on 4 April 1994' (5 April 1994) UN Doc S/1994/397.

<sup>102</sup> Quadripartite Agreement, Provision 3(a).

<sup>103</sup> *ibid*, Provision 3(c).

<sup>104</sup> *ibid*, Provision 3(d).

<sup>105</sup> UNGA and UNSC, 'Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, Attachment: General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement)' (30 November 1995) UN Doc A/50/790 and UN Doc S/1995/999.

<sup>106</sup> Dayton Agreement: Annex 7, Article 1(1).

<sup>107</sup> OSCE, 'Statement by the OSCE Minsk Group Co-Chair Countries' (10 July 2009) <[www.osce.org/mg/51152](http://www.osce.org/mg/51152)> accessed 9 February 2016.

internally displaced persons and refugees to return to their former places of residence’,<sup>108</sup> as does the Comprehensive Peace Accord in Nepal, which expresses ‘commitment to respect the right of the people displaced by the conflict and their families to return back to their homes...’.<sup>109</sup> An explicit statement of, and commitment to, the right to return is also found in the 2005 Comprehensive Peace Agreement in Sudan.<sup>110</sup>

It is clear that these statements strongly support IDP return, and unequivocally assert that return is a right of IDPs. Yet, despite the strength of conviction expressed in these proclamations, it is nonetheless apparent that they are narrowly conceived, in the sense that they relate to only a small number of specific internal displacement contexts, all of which are conflict-induced. Such references cannot therefore be easily generalised to all IDP situations. However, there are clear indications that the lens through which the right to IDP return is viewed is now widening. In December 2015, the UN General Assembly for the first time asserted what may now be termed a ‘general right to return’ for IDPs. In its resolution 70/165, it stated that durable solutions for IDPs include ‘*the right of voluntary return in safety and with dignity*’, that is a right without any qualification as to displacement type, setting or location.<sup>111</sup> This statement comes after a similar assertion in 2010 by the then IDP mandate-holder, Walter Kälin, to a ‘right to return’, which is not limited to any particular displacement context.<sup>112</sup> These developments are encouraging, in the sense that the absence of any precise territorial or contextual reference means that such statements are applicable to all IDPs, as broadly understood by the Guiding Principles. This not only promotes equality amongst all IDPs, regardless of the cause of their displacement, but also more accurately reflects what is now understood to be the true breadth of the internal displacement phenomenon. This expansion, however, raises a number of questions and uncertainties around the precise *legal* nature of IDP return. These questions specifically concern the level of support that this proclaimed general IDP right to return enjoys in law, and to what extent the evidenced expansion in the scope of IDP return in international political fora has been accompanied by equivalent developments in the international legal framework for IDPs. In addition, uncertainty

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<sup>108</sup> *ibid.*

<sup>109</sup> Comprehensive Peace Accord Signed between Nepal Government and the Communist Party of Nepal (Maoist) 22 November 2006 (Peace Accord) para 7.3.3.

<sup>110</sup> The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army 2005: Annexure 1: Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices, para 1.10. For an overview of the process that led to the Comprehensive Peace Agreement, see Paul de Wit and Jeffrey Hatcher, ‘Sudan’s Comprehensive Peace Agreement: An Opportunity for Coherently Addressing Housing, Land, and Property Issues?’ in Scott Leckie (ed), *Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations: A Comparative Survey and Proposal for Reform* (CUP 2009) 270-273.

<sup>111</sup> UNGA Res 70/165 (22 February 2016) UN Doc A/RES/70/165, preamble (emphasis added).

<sup>112</sup> UN Human Rights Council, ‘Report of the Representative of the Secretary-General on the Human Rights of IDPs, Walter Kälin’ (5 January 2010) UN Doc A/HRC/13/21, para 76.

surrounds the precise legal nature of IDP rights expectations, as well as the obligations incumbent on relevant authorities and the international community in meeting the standards required for return to successfully deliver a ‘truly durable’ solution for IDPs. It is with these broad issues that this Thesis is concerned, the precise research questions of which will now be outlined.

### **1.3 Research Outline**

#### **1.3.1 Research Questions**

The overarching aim of this Thesis is to examine and elucidate return as a legal right of IDPs. In engaging with this overarching research aim, this Thesis will critically explore three particular questions:

1. to whom does the IDP right to return apply;
2. to what can IDPs expect to return; and
3. when can IDPs exercise their right to return, that is at what point is the right to return triggered and when might it cease.

At first glance, these three questions may appear somewhat elementary. However, upon further examination, it becomes clear that the issues that underpin them are far more complex than they may initially seem, and that as a consequence they remain unsettled. This complexity and uncertainty arises in part from the challenges posed by the reality of internal displacement, and in part from the treatment that matters of internal return have been accorded in international, regional and national law and policy. Yet, it is also true to say that these questions remain largely unexplored.

While much progress has been made in recent decades towards a greater understanding of internal displacement, it nonetheless remains ‘neglected’ as a political issue<sup>113</sup> and as a topic of academic study.<sup>114</sup> As Megan Bradley and Angela Sherwood have recently said, ‘soft law tools on internal displacement still generally do not provide ‘ultimate and authoritative’ responses to some of the

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<sup>113</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons’ (11 April 2018) UN Doc A/HRC/38/39, para 19.

<sup>114</sup> As Phuong says, ‘human rights academics have very rarely addressed this issue. Those concerned with forced migration have been reluctant to address it as part of their work, focusing instead on refugees’ (see Catherine Phuong, *The International Protection of Internally Displaced Persons* (CUP 2005) 241).



thorniest questions'.<sup>115</sup> One such thorny question they raise is how to define solutions such as return.<sup>116</sup> This Thesis takes up this challenge of providing greater clarity on matters central to IDP return, by examining the three questions of return for whom, to what, and when. Of course, the intention is not to offer *the* definitive solutions to these questions (assuming such a thing as a definitive solution were to exist). Indeed, as Phuong says, 'to set down a clearer situation of the situation and rights of internally displaced persons... is no easy task because of the very complexity of the subject whose many variations militate against a single model'.<sup>117</sup> But by providing concrete insights on these core questions, this Thesis does nonetheless positively contribute towards furthering clarity on, and it is hoped the viability of, return as an IDP right.

### 1.3.2 Research Approach

Exploring the above-outlined research aim and questions necessitates engaging in-depth with legal frameworks designed in response to internal displacement, as well as with established legal rules as applied to the internal displacement context. This research is therefore very much located within the law itself, and as such adheres to a doctrinal legal research approach.<sup>118</sup> As is characteristic of a doctrinal approach, reliance is placed on desk-based research methods. This involves engaging with a breadth of relevant international, regional and domestic legal authorities, as well as policy frameworks and supporting secondary literature.

A close textual analysis of primary legal sources will be of particular importance in guiding and informing the analysis throughout. The Guiding Principles provide the most authoritative statement specific to the issue of internal displacement at the international level,<sup>119</sup> and as such will be frequently drawn upon, as will the IASC Durable Solutions Framework, and the 2005 UN Principles on Housing

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<sup>115</sup> Megan Bradley and Angela Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law 'Success Story'' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 182.

<sup>116</sup> *ibid.*

<sup>117</sup> Phuong (2005) 235.

<sup>118</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 85. The word 'approach' has here been used in order to demonstrate appreciation for the contentious debate surrounding whether or not doctrinal legal research constitutes a 'methodology' as has been traditionally understood in the sciences. For further discussion, see Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 34.

<sup>119</sup> Andrew Solomon, 'Election-Related Rights and Political Participation of Internally Displaced Persons: Protection During and After Displacement in Georgia' (November 2009) <[www.brookings.edu/~media/research/files/papers/2009/11/voting%20rights%20solomon/11\\_voting\\_rights\\_solomon.pdf](http://www.brookings.edu/~media/research/files/papers/2009/11/voting%20rights%20solomon/11_voting_rights_solomon.pdf)> accessed 12 January 2016, 2.

and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles).<sup>120</sup> Close attention will also be given to numerous international human rights law treaties, as well as international humanitarian law and the law of the International Labour Organisation (ILO). At the regional level, insights will be drawn from the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)<sup>121</sup> and, as relevant, from the regional human rights regimes. The Thesis will also importantly engage with domestic legislation in selected key jurisdictions, particularly in respect to the ways in which such legislation reflects and relates to the international IDP regime.

Factual and contextual information and data in respect to worldwide IDP trends and individual internal displacement contexts will be sourced primarily from IDMC reports and online resources.<sup>122</sup> The IDMC is a world-leader in the monitoring and analysis of situations of internal displacement worldwide. The IDMC's findings are well-trusted, as evidenced by the its ongoing cooperation with the UN IDP mandate-holder,<sup>123</sup> use of IDMC research by UN agencies,<sup>124</sup> and repeated recognition by the UN General Assembly of the IDMC's role in 'the provision of reliable data on internal displacement situations', in particular, the relevance of its global IDP database.<sup>125</sup> Data will also be sourced from the UNHCR as and when needed to complement IDMC data.

In respect to academic commentary, literature from both academics and practitioners will be drawn upon. This will include the work of established figures in the IDP field, such as Chaloka Beyani, Roberta Cohen, Francis Deng, Elizabeth Ferris, Bill Frelick and Walter Kälin. In this respect, the work of experts at the former Brookings Institution's Project on Internal Displacement will be especially important. Also important will be the work of authors in law, the political sciences and sociology, including, *inter alia*, Megan Ballard, Scott Leckie and Catherine Phuong.

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<sup>120</sup> UN Commission on Human Rights, 'Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro: Annex: Principles on Housing and Property Restitution for Refugees and Displaced Persons' (Pinheiro Principles) (28 June 2005) UN Doc E/CN.4/Sub.2/2005/17.

<sup>121</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (23 October 2009) Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1.

<sup>122</sup> In addition to its annual reports, as of 2016, the IDMC also began releasing frequent monitoring updates, meaning it is a leading source for the most up-to-date data and on-the-ground information in respect to current internal displacement situations.

<sup>123</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani: Addendum: Follow-up Mission to Georgia' (4 June 2014) UN Doc A/HRC/26/33/Add.1, para 18.

<sup>124</sup> For example, see UNHCR, 'Internally Displaced People' <[www.unhcr.org/pages/49c3646c146.html](http://www.unhcr.org/pages/49c3646c146.html)> accessed 21 October 2018.

<sup>125</sup> See, for example, UNGA Res 70/165 (22 February 2016) UN Doc A/RES/70/165, paras 33-34; UNGA Res 68/180 (30 January 2014) UN Doc A/RES/68/180, paras 27-28.

Reference will be made to a range of internal displacement contexts at appropriate points throughout. The sheer scale of internal displacement means that there is a vast number of individual contexts. Indeed, in its 2016 report, the IDMC reported on situations of internal displacement occurring in over 130 countries.<sup>126</sup> The Thesis will not therefore attempt to engage with every single one of these IDP contexts, but will instead draw upon the most pertinent examples at the relevant times. The choice of examples will therefore be guided by the particular issue being discussed. As the focus of this Thesis is on return, instances of protracted internal displacement will be of particular relevance. A conscious effort will be made to engage with situations of internal displacement that involve a breadth of displacement causes, as appropriate, including coverage and consideration of conflict and violence-induced, and disaster-induced, displacement, as well as development-induced displacement. Indeed, to do so will be important in drawing out overarching, high-level insights that relate to the international IDP regime as a whole. It is though important to recognise at this point that the number of individual internal displacement contexts does decrease quite significantly when it is considered that relatively few legal and policy frameworks specific to internal displacement exist at the domestic level.<sup>127</sup> This therefore reduces the number of internal displacement contexts that it is possible to draw upon in any great legal detail. It is also important to note that this research is not intended to be a comparative study, and the approach taken is in no way meant to suggest that all IDP contexts are necessarily easily comparable, or that any two contexts are the same. To draw on a range of IDP contexts in this way is nevertheless advantageous as it helps to form more comprehensive findings that are better grounded within the IDP concept and the current realities of internal displacement around the world.

Although the precise focus of this Thesis is on return, this is by no means meant to negate the importance of either of the other two recognised means by which IDPs may achieve a durable solution – local integration and resettlement. While it may have traditionally been the case that, of the three durable solutions, return has most often been promulgated as *the* durable solution,<sup>128</sup> this Thesis does not seek to imply in any way that return is somehow the ‘only viable option for IDPs’.<sup>129</sup> Indeed, as

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<sup>126</sup> IDMC (2017) 113-116.

<sup>127</sup> As an indication, particularly important examples that will be drawn on throughout the Thesis include Azerbaijan, BiH, Colombia, Georgia, Kosovo and Ukraine.

<sup>128</sup> Chaloka Beyani, Natalia Krynsky Baal and Martina Caterina, ‘Conceptual Challenges and Practical Solutions in Situations of Internal Displacement’ (2016) 52 *Forced Migration Review* 39, 39.

<sup>129</sup> Yulia Gureyeva-Aliyeva and Tabib Huseynov, ‘“Can you be an IDP for Twenty Years?” A Comparative Field Study on the Protection Needs and Attitudes Towards Displacement among IDPs and Host Communities in Azerbaijan’ (The Brookings Institution-London School of Economics Project on Internal Displacement 2011) 41.

argued by Kälin,<sup>130</sup> the principle of voluntariness demands that steps be taken towards ensuring all three means are available, as this is the only way to ensure that any choice made by an IDP for a particular durable solution has any semblance of being voluntary. This point is also dealt with in the IASC Durable Solutions Framework when it states that ‘Exercising the right to choose a durable solution requires that different options (return, local integration, settlement elsewhere) are available’.<sup>131</sup> Moreover in this respect, as is stated by Beyani, Baal and Caterina, it is of course essential that durable solutions strategies take into consideration the preferences of IDPs themselves.<sup>132</sup> It is therefore critical to continue scholarly engagement with IDP return, but doing so conscious that it does not exist in isolation. Indeed, this Thesis is grounded in the belief that work on understanding and working towards realising return as a durable solution for IDPs is not yet complete, not only in a political but also in a legal sense. Furthermore, to engage separately with return, local integration and resettlement in any necessary depth is beyond the scope of this Thesis, limited as it is in terms of length and timeframe. As such, this Thesis will contribute to the broader literature on durable solutions to internal displacement, both by adding to the work on return, and complementing research on local integration and resettlement.

### 1.3.3 Thesis Plan

This Thesis is structured into four Parts. Part I, which consists of the current Chapter, provides the introduction to the Thesis. Its purpose has been to give the necessary background information relevant to the research topic and to provide a brief overview of key overarching issues. The areas covered in this Chapter will be drawn upon and explored further throughout the Thesis.

Part II of this Thesis will provide an in-depth exploration of the development and pertinent characteristics of what will here be termed the international IDP regime. It will also survey the current legal landscape in respect to IDP return by way of in-depth doctrinal analysis. In Chapter Two, the focus will be on tracing the response of the international community to the phenomenon of internal displacement since the mid-late-twentieth century to the present day. This will involve a consideration of political, institutional and legal developments specific to the internal displacement issue that have occurred both within and external to the UN system. In particular, this Chapter will examine the

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<sup>130</sup> Walter Kälin, ‘On the Record: Legal Aspects of Return of Internally Displaced Persons and Refugees to Abkhazia, Georgia’ (*Brookings*, 29 November 2007) <[www.brookings.edu/on-the-record/legal-aspects-of-return-of-internally-displaced-persons-and-refugees-to-abkhazia-georgia](http://www.brookings.edu/on-the-record/legal-aspects-of-return-of-internally-displaced-persons-and-refugees-to-abkhazia-georgia)> accessed 12 May 2015.

<sup>131</sup> IASC Durable Solutions Framework, 12.

<sup>132</sup> Beyani, Baal and Caterina (2016) 39, 39.

inception of an international IDP regime designed to respond to the ‘specific needs’ of IDPs,<sup>133</sup> and identify the core human rights principles that underpin this regime. In Chapter Three, the focus will shift to look solely at IDP return. Specifically, this Chapter will thoroughly examine the current legal basis for an IDP right to return. This analysis will comprise of a scoping and appraisal of provisions related to IDP return, primarily in international law, but also in selected domestic legislative frameworks. In doing so, this analysis will draw particularly on international and regional human rights law, international humanitarian law, and the law of the ILO. This analysis will reveal how, despite a relative abundance of references to a right to return in established international legal frameworks, none of these have comprehensive application when viewed through the lens of internal displacement. Even the Guiding Principles, which were designed to remedy existing gaps in international law, do not contain an explicit and unequivocal statement in support of IDP return. It will be concluded that, as a consequence of the current legal landscape, IDP return remains to be largely deduced from, and informed by, a patchwork of binding and non-binding legal provisions, found scattered throughout international, regional and domestic law.

In Part III, attention turns to the three main questions, or challenges, that have been selected for detailed exploration in this Thesis. These three questions are all fundamentally important in providing greater insight into the nature of the IDP right to return, and all have a critical bearing on the realisation of IDP return in practice. In Chapter Four, the focus will be on the question of ‘IDP return for whom?’ From an international law perspective, the answer to this question may appear *prima facie* somewhat self-evident. However, when this question is viewed through the framework that will have been established in Part II, it becomes apparent that numerous caveats apply that serve to restrict to whom the IDP right to return applies. In Chapter Five, the question that will be considered is that of ‘IDP return to what?’ Once again, the answer to this question may appear somewhat self-evident at first glance – return back to their homes or places of habitual residence, from which they were displaced. However, in practical terms, it becomes apparent that this question has a far from straightforward answer. This Chapter will trace and map current international standards and guidelines as to what IDPs can expect to return to, drawing on relevant authority at the international and domestic levels. In Chapter Six, the focus will be on issues of time, specifically the question of ‘IDP return when?’ In this Chapter, it will be considered whether the IDP right to return is time-bound, or, in other words, when might IDP return commence, and when might it come to an end or expire. This Chapter will also engage with the question of whether, and in what circumstances, return may be lawfully suspended.

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<sup>133</sup> Guiding Principles, introductory para 1.

Part IV will conclude the Thesis. Chapter Seven will draw together the key insights from the research. In doing so, it will present a clearer and more coherent picture as to the nature of the IDP right to return. This Chapter will also take the opportunity to use the findings from this research to reflect more broadly on the cogency of the wider international IDP regime.



## **PART II**

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## **INTRODUCTION TO PART II**

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As outlined in Chapter One, the focus of Part II of this Thesis is on setting the framework within which the three core questions of for whom, to what, and when, will be examined. Chapter Two begins by exploring the development and characteristics of what will here be termed the international IDP regime. This Chapter will trace the actions that have been taken by the international community over recent decades in response to internal displacement, and will closely examine the key rights-based components of this regime. Chapter Three will then focus in specifically on the legal basis for the IDP right to return. Drawing upon international, regional and domestic law, this Chapter will expose and critique existing provisions, and in doing so test the widely-held international political belief that IDPs do have a right to return to their homes or places of habitual residence.



### 2.1 Introduction

In recent decades, the international community has become increasingly cognisant of the escalating scale and impact of the deepening global internal displacement crisis. In response, the UN and other organisations and entities working at the international level have significantly enhanced their engagement with the issue.<sup>1</sup> Indeed, what was once considered an internal matter, and therefore strictly within the concern of national authorities only, is now firmly established as a matter that also legitimately lies within the purview of actors at both the international and regional levels. This enhanced international engagement has led to a series of critical legal, political and institutional developments. These include the establishment of the UN IDP mandate in 1992, the development of the legally non-binding international rights framework that is the Guiding Principles, and the work that has been undertaken to help improve the effectiveness of the institutional response to situations of internal displacement, especially through the cluster approach initiated by the UN in 2005. Together, these constitute the three core components of what will here be termed ‘the international IDP regime’.

It is now widely accepted that IDPs have specific needs that exist as a direct consequence of their displacement,<sup>2</sup> and that these needs are primarily of human rights concern.<sup>3</sup> Yet, this has not always been the case. Indeed, to reach this point has required some significant groundwork. In particular, the very concept of an IDP, that is of a distinct and definable group of persons of concern, remains a relatively recent construction, especially when compared to that of the refugee. This Chapter will therefore begin by first tracing the early steps taken to both raise the profile of IDPs as an identifiable group and to promote their cause as one deserving of international attention. These steps were crucial as they set the foundations for the development of the international IDP regime that exists today. Second, attention will be drawn to the definition of an IDP in international law, as most authoritatively found in the second introductory paragraph to the Guiding Principles. Exploring the international IDP definition, and the iterations it underwent before being finalised in the completed Guiding Principles,

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<sup>1</sup> Roberta Cohen, ‘On the Record: Key Policy Debates in the Internal Displacement Field’ (*Brookings*, 4 December 2006) <[www.brookings.edu/on-the-record/key-policy-debates-in-the-internal-displacement-field](http://www.brookings.edu/on-the-record/key-policy-debates-in-the-internal-displacement-field)> accessed 17 November 2017.

<sup>2</sup> Roberta Cohen, ‘Protection of Internally Displaced Persons: National and International Responsibilities’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 593.

<sup>3</sup> Phuong (2005) 237.

will help reveal the key characteristics and defining features of what could loosely be called the ‘IDP classification’, as conceptualised in international law. Third, focus will shift to look specifically at the Guiding Principles and their associated *travaux préparatoires*, with the aim of examining how the displacement-induced needs of IDPs have informed the development of a dedicated, bespoke international IDP regime that is underpinned by an evidenced injustice of inequality in the enjoyment of basic rights protections by IDPs vis-à-vis non-IDP populations. In taking these steps, this Chapter will provide a framework within which the precise issue of return will be discussed throughout the subsequent chapters of the Thesis.

## **2.2 Recognising IDPs as a Group of International Concern: A brief early history**

The final decade of the twentieth century saw a tremendous step-change in the international community’s response to internal displacement. Indeed, establishment of the UN IDP mandate marked the first concrete step towards the development of today’s international IDP regime. Yet, it was many decades earlier that forced migrants and their associated protection needs were officially recognised by the international community as being of collective concern. Specifically, in 1946, with the adoption of the Constitution of the International Refugee Organization (IRO),<sup>4</sup> and soon after, the 1951 UN Convention and 1967 UN Protocol Relating to the Status of Refugees (Refugee Convention).<sup>5</sup> However, while these instruments were targeted towards forced migrants, this new international legal regime was in fact concerned only with those who had been forced to flee their homes and had crossed international borders to seek safety,<sup>6</sup> meaning that so-called ‘internal refugees’ were beyond its scope and, as a consequence, excluded.<sup>7</sup> Indeed, it appears that only minimal attention was at this time given to those who had been displaced *within* national borders. For instance, throughout the entirety of Paul Weis’ extensive analysis and commentary on the *travaux préparatoires* to the Refugee Convention,<sup>8</sup> there is only one reference made to ‘internal refugees’. This comes in respect to a point raised by the delegation from France, who were concerned that ‘[i]f international assistance measures

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<sup>4</sup> Constitution of the International Refugee Organization (1946).

<sup>5</sup> Convention Relating to the Status of Refugees (Refugee Convention) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

<sup>6</sup> In accordance with Article 1(A)(2) of the 1951 Refugee Convention, for a person to be recognised as a refugee requires that person to be ‘outside of the country of his nationality’.

<sup>7</sup> As Cohen reports, doing so was ‘a deliberate decision’ (see Roberta Cohen, ‘Protection of Internally Displaced Persons: National and International Responsibilities’ in Vincent Chetail and Céline Bauhoz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 590).

<sup>8</sup> UNHCR, ‘The Refugee Convention, 1951: The travaux préparatoires analysed with a commentary by Dr Paul Weis’ (1990)

<[www.unhcr.org/uk/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html](http://www.unhcr.org/uk/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html)> accessed 16 August 2017.

were to apply to such persons [internal refugees], [then] a new problem would have to be considered’;<sup>9</sup> there could therefore be no question of supporting ‘internal refugees’. While it is not clear what was exactly meant here by this ‘new problem’, it is nonetheless apparent that, at this time, not only were those who had been displaced internally not considered to be part of the same ‘problem’ as refugees, but they were also not going to benefit from any protections afforded to refugees under this new regime.

It was not until towards the end of the 1980s that ‘internally displaced persons’ began to receive much more explicit and sustained attention as a group of persons of particular concern to the international community. In the intervening period, forced migrants had typically been referred to as either ‘refugees’ or ‘displaced persons’. In respect to the latter, while there was no reason in principle why this could not be interpreted as encompassing those who are today termed ‘internally displaced persons’, etymologically this did not prove to be the case. According to a 1961 UNHCR communication,<sup>10</sup> it was claimed that, while the term ‘displaced persons’, which had been coined at the end of World War II, had at that time no standard definition,<sup>11</sup> displaced persons were to be described as persons who had been displaced within Europe during the war, including for example, slave labourers who had been brought into Germany.<sup>12</sup> While it was expected that such persons would decide to return to their homes once the war had ended, the communication reports that approximately one million did not wish to do so due to regime changes in their home countries, under which they feared persecution should they return.<sup>13</sup> As a consequence, these persons became refugees and were in effect, to use the exact term from the communication, ‘ex-D.P.’s’.<sup>14</sup> This 1961 UNHCR account is supported by the wording of the 1946 IRO Constitution, which, in Annex 1, defined a ‘displaced person’ as ‘a person who... has been deported from, or has been obliged to leave, his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons’.<sup>15</sup> The ILO also used the term ‘displaced person’ in a similar manner in its 1949 Migration for Employment Convention

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<sup>9</sup> *ibid*, 15.

<sup>10</sup> Letter from V Tedesee to Willard Johnson (31 January 1961). Tedesee was at the time a UNHCR Information Officer, and Johnson was based at the CARE Mission in Berlin.

<sup>11</sup> *ibid*, 1.

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid*. In this respect, it is clear from the UNHCR communication that these so-called ‘ex-D.P.’s’ were a somewhat unexpected outcome of the war.

<sup>15</sup> Constitution of the International Refugee Organization (1946) Annex I Definitions – General Principles, Part I, Section B – Definition of Displaced Persons. It should also be noted that only those who were ‘[v]ictims of the nazi [sic] or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations’ were to be recognised as ‘displaced persons’ under the IRO Constitution (see Annex I, Part I, Section A(1)(a)).

(Revised) (No. 97)<sup>16</sup> and its associated Recommendation.<sup>17</sup> It is apparent, therefore, that the term ‘displaced person’, as understood at that time, envisaged only the international movement of persons, and as such was not amenable to the inclusion of IDPs.

One of the earliest UN initiatives at which ‘IDP’ was explicitly and consciously used to refer to those displaced within national borders was the 1988 International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED).<sup>18</sup> At SARRED, although IDPs were not explicitly identified as a group of concern in the official programme of the conference, both the Prime Minister of Norway, Her Excellency Mrs Gro Harlem Brundtland, and the President of Mali and Chairman of the Organisation of African Unity, His Excellency General Moussa Traoré, nevertheless took it upon themselves to highlight what they described as a dramatically deteriorating IDP situation in the Southern Africa region.<sup>19</sup> Both raised concerns about the absence of any international institutional or legal arrangements tailored to IDPs,<sup>20</sup> with Brundtland stating that ‘the co-ordination of the activities of existing agencies had to be looked into *so that internally displaced persons also became the responsibility of the world community*’.<sup>21</sup> Less than one year after SARRED, IDPs were again explicitly recognised in the Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons,<sup>22</sup> which was adopted at the close of the 1989 International Conference on Central American Refugees (CIREFCA).<sup>23</sup> Crucially, within the CIREFCA

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<sup>16</sup> Convention concerning Migration for Employment (Revised) (ILO No 97) 1 July 1949 (entered into force 22 January 1952) Article 11.

<sup>17</sup> Recommendation concerning Migration for Employment (Revised) 1949 (ILO No 86) 1 July 1949. In particular, the Annex titled a ‘Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons’.

<sup>18</sup> UN Commission on Human Rights, ‘Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, including the Question of the Programme and Methods of Work of the Commission: Annex: Comprehensive Study prepared by Mr Francis M Deng, Representative of the Secretary-General on the Human Rights Issues Related to Internally Displaced Persons, pursuant to Commission on Human Rights resolution 1992/73’ (Comprehensive Study) (21 January 1993) UN Doc E/CN.4/1993/35, para 4. SARRED was convened by the Organisation of African Unity (OAU) in August 1988. The convening of SARRED was welcomed in UNGA Res 42/106 (7 December 1987) UN Doc A/RES/42/106, para 1.

<sup>19</sup> UNGA, ‘International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED): Report of the Secretary-General: Annex: Report on the International Conference on the Plight of Refugees, Returnees and Displaced in South Africa’ (19 October 1988) UN Doc A/43/717, para 21.

<sup>20</sup> *ibid*, para 21, paras 18 and 21, respectively.

<sup>21</sup> *ibid*, para 18 (emphasis added).

<sup>22</sup> CIREFCA, ‘Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons’ (31 May 1989) UN Doc CIREFCA/89/14

<sup>23</sup> The CIREFCA Preparatory Committee was comprised of delegations of the Governments of Costa Rica, El Salvador, Guatemala, Honduras, Mexico and Nicaragua (see UNGA ‘Office of the UNHCR: Letter dated 5 October 1988’ (11 October 1988) UN Doc A/C.3/43/6, page 2). The convening of CIREFCA was expressly welcomed in UNGA Res 43/118 (8 December 1988) A/RES/43/118, para 1.

Concerted Plan of Action, IDPs were introduced as ‘an important third group of [displaced] persons’,<sup>24</sup> who it was stated are in ‘need [of] special assistance, even though they remain subject to the jurisdiction and protection of the authorities of their own countries’.<sup>25</sup> A number of programmes aimed at a proportion of IDPs in El Salvador, Guatemala and Nicaragua were outlined, reflecting what was identified as ‘the necessity to provide a humanitarian treatment to internally displaced persons’.<sup>26</sup>

By the turn of the decade, the substantial growth in IDP numbers had begun to raise particular concern within UN agencies.<sup>27</sup> While global refugee numbers were continuing to rise, reaching 19.6 million by the end of 1990,<sup>28</sup> global IDP numbers were rising at an even faster rate, with the number of conflict and violence-induced IDPs reaching 21.3 million in 1990, which was a 4.8 million increase on the previous year.<sup>29</sup> The year 1990 was also the first year that the total number of conflict and violence-induced IDPs outnumbered refugees, a trend that continues to the present day.<sup>30</sup> It was in June 1990 that a formal call came for action to tackle the displacement issue, perhaps surprisingly, from the United Nations Development Programme (UNDP). By this time, the Governing Council of the UNDP had become particularly disturbed by the ‘developmental problems’ posed by the movement of displaced populations and the impact of this on the developmental prospects of already economically-fragile States.<sup>31</sup> As such, on 22 June 1990, the Governing Council of the UNDP adopted decision 90/22 concerning refugees, displaced persons and returnees.<sup>32</sup> In this decision, the UN Economic and Social Council (ECOSOC) was invited to request the UN Secretary-General ‘initiate a United Nations system-wide review which [would], inter alia, assess the experience and capacity of various organisations in assisting all categories of refugees, displaced persons and returnees, and the whole spectrum of their needs, in supporting the efforts of the affected countries to address the problem’.<sup>33</sup> ECOSOC accepted

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<sup>24</sup> CIREFCA Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons (31 May 1989) UN Doc CIREFCA/89/14, para 6.

<sup>25</sup> *ibid*, para 6.

<sup>26</sup> *ibid*, paras 29-30.

<sup>27</sup> As Cohen says, it was at this time that IDPs ‘emerged as one of the more challenging humanitarian, human rights and security issues facing the international community’ (see Roberta Cohen, ‘Protection of Internally Displaced Persons: National and International Responsibilities’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 589).

<sup>28</sup> IDMC, ‘Global Internal Displacement Database: Displacement Data’ (2019).

<sup>29</sup> IDMC, ‘Global Figures’ <[www.internal-displacement.org/global-figures](http://www.internal-displacement.org/global-figures)> accessed 5 September 2016.

<sup>30</sup> *ibid*. In 1989, the total number of conflict and violence-induced IDPs and refugees was 16.5 million and 17.2 million, respectively. In 1990, the total number of conflict and violence-induced IDPs and refugees was 21.3 million and 19.6 million, respectively.

<sup>31</sup> UN ECOSOC, ‘Governing Council of the United Nations Development Programme: Report on the Organizational Meeting for 1990, the Special Session and the Thirty-Seventh Session: Annex 1: Decisions Adopted by the Governing Council During 1990: 90/22 Refugees, Displaced Persons and Returnees’ (22 June 1990) UN Doc E/1990/29, preamble.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid*, para 9.



this invitation, and in its resolution 1990/78<sup>34</sup> requested that the UN Secretary-General, who at that time was Javier Perez de Cuellar,<sup>35</sup> initiate the recommended 'system-wide review'.<sup>36</sup> It was at this point that the now-defunct UN Commission on Human Rights also became firmly involved. Following on from ECOSOC resolution 1990/78, the UN Commission on Human Rights, itself '[d]isturbed by the high numbers of internally displaced persons suffering throughout the world',<sup>37</sup> requested in its resolution 1991/25 on internally displaced persons<sup>38</sup> that the UN Secretary-General 'take into account the protection of human rights and the needs of *internally displaced persons* in his system-wide review',<sup>39</sup> and that, in addition, the UN Secretary-General submit 'an analytical report on internally displaced persons, taking into account the protection of human rights of internally displaced persons'.<sup>40</sup> This move by the UN Commission on Human Rights was a pivotal moment, as now the UN Secretary-General was being asked to focus direct attention on IDPs as a distinct, standalone group, rather than allowing them to be either disregarded or overlooked, or subsumed and forgotten beneath the broad banner of 'displaced persons'.

Pursuant to ECOSOC's request, the system-wide review was conducted. The results of this review were detailed in a report, prepared by a consultant, Jacques Cuénod (Cuénod Report), which was submitted to ECOSOC in June 1991.<sup>41</sup> In the Cuénod Report, IDPs were firmly recognised as a distinct category of persons, separate from refugees and externally displaced persons.<sup>42</sup> The report directed particular attention towards a series of contemporary IDP challenges, including institutional arrangements for IDP assistance and protection, the then absence of a clear IDP definition, and the potential difficulties and tensions that could arise out of international community involvement in the 'internal affairs' of States.<sup>43</sup> Subsequent to the Cuénod Report, in February 1992, the UN Secretary-General, who was then Boutros Boutros-Ghali, submitted to the UN Commission on Human Rights the requested

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<sup>34</sup> UN ECOSOC Res 1990/78 'Refugees, Displaced Persons and Returnees' (27 July 1990) UN Doc E/RES/1990/78.

<sup>35</sup> UN, 'Former Secretaries-General' <[www.un.org/sg/en/content/former-secretaries-general](http://www.un.org/sg/en/content/former-secretaries-general)> accessed 12 December 2018.

<sup>36</sup> UN ECOSOC Res 1990/78 'Refugees, Displaced Persons and Returnees' (27 July 1990) UN Doc E/RES/1990/78, para 1.

<sup>37</sup> UN Commission on Human Rights Res 1991/25 'Internally Displaced Persons' (5 March 1991) UN Doc E/CN.4/RES/1991/25, preamble.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*, para 2 (emphasis added).

<sup>40</sup> *ibid.*, para 4.

<sup>41</sup> UN ECOSOC, 'Note by the Secretary-General pursuant to ECOSOC resolution 1990/78: Addendum: Report on refugees, displaced persons and returnees, prepared by Mr Jacques Cuénod, Consultant' (the Cuénod Report) (27 June 1991) UN Doc E/1991/109/Add.1.

<sup>42</sup> *ibid.*, para 112. In respect to the latter two categories, the Cuénod Report distinguished between refugees as those 'defined by international or regional legal instruments' (para 112) and externally displaced persons as 'persons who were forced to leave their habitual place of residence, crossed an international border, found themselves in a refugee-like situation but remain under the protection of their Government' (para 114).

<sup>43</sup> *ibid.*, paras 116-125.

Analytical Report on Internally Displaced Persons (Analytical Report).<sup>44</sup> The Analytical Report placed particular emphasis on the causes<sup>45</sup> and the consequences of displacement,<sup>46</sup> especially in respect to IDP protection needs, and raised the prospect of developing new rights standards dedicated to IDPs.<sup>47</sup>

These early developments firmly set the scene for what would become a sustained period of work at the UN on internal displacement, work that was particularly focused on the protection and assistance needs of IDPs. Over the next fifteen years, this work would culminate in the establishment of the UN IDP mandate; the adoption of the Guiding Principles; and the explicit situating of IDPs within the UN cluster approach, as well as the development of what has become termed the ‘comprehensive approach’ to institutional arrangements for IDP assistance and protection. Yet, just simply *recognising* an indeterminate group of persons of concern, of IDPs however defined, would not provide the conceptual clarity needed in the long-term. To firmly establish IDPs as a group of concern would require the formulation of a definition of an IDP, and it is to this that this discussion will now turn.

### **2.3 Identifying IDPs: The international IDP definition<sup>48</sup>**

#### **2.3.1 Preliminary steps**

One of the earliest attempts by the UN to define IDPs came in 1989 in the UN Secretary-General’s follow-up report<sup>49</sup> to the Oslo Declaration and Plan of Action,<sup>50</sup> which had been adopted at the SARRED Conference the previous year. In this report, IDPs were identified as ‘persons who have been forced

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<sup>44</sup> UN Commission on Human Rights, ‘Analytical Report of the Secretary-General on Internally Displaced Persons’ (14 February 1992) UN Doc E/CN.4/1992/23 (Analytical Report). The Analytical Report was submitted pursuant to UN Commission on Human Rights Res 1991/25 ‘Internally Displaced Persons’ (5 March 1991) UN Doc E/CN.4/RES/1991/25, and was taken note of in UN Commission on Human Rights Res 1992/73 ‘Internally Displaced Persons’ (5 March 1992) UN Doc E/CN.4/RES/1992/73, para 1.

<sup>45</sup> Analytical Report, paras 18-39.

<sup>46</sup> *ibid*, paras 40-73.

<sup>47</sup> *ibid*, paras 74-105.

<sup>48</sup> Throughout this Thesis, reference is being made to the IDP ‘definition’. While cognisant that Walter Kälin has explicitly stated that the Guiding Principles second introductory paragraph provides ‘a description, but not a definition, of an internally displaced person’, the position advanced here is that this ‘description’ has now developed to a point at which it can confidently be referred to as a ‘definition’. Indeed, it is now explicitly articulated as such in Article 1(k) of the Kampala Convention. For discussion on this point, see Walter Kälin, ‘The Guiding Principles on Internal Displacement and the Search for a Universal Framework of Protection for Internally Displaced Persons’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 617.

<sup>49</sup> UNGA, ‘Office of the UNHCR: International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa: Report of the Secretary-General’ (28 September 1989) UN Doc A/44/520.

<sup>50</sup> UNGA (19 October 1988) UN Doc A/43/717. The Oslo Declaration and Plan of Action was later endorsed in UNGA Res 43/116 ‘International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa’ (8 December 1988) UN Doc A/RES/43/116, para 2.

to abandon their homes or their normal economic activities, while remaining inside their countries of origin, because their lives, security or freedom have been threatened by generalised violence, armed conflicts, internal upheavals, or similar events seriously disturbing the public order'.<sup>51</sup> Even at this early stage, the two core aspects of internal displacement, of forced, internal movement, featured prominently in the definition's formulation. However, this initial definition was to undergo numerous iterations and substantial alterations over the coming decade. Indeed, Cuénod raised a series of concerns in his 1991 report as to this initial formulation. In particular, he noted that explicit reference was made neither to the causes of displacement found in the 1951 Refugee Convention, nor to 'massive violation[s] of human rights' as a displacement cause,<sup>52</sup> as was already found in the 1984 Cartagena Declaration refugee definition.<sup>53</sup> It is here worth noting that the definition of a refugee found in the Cartagena Declaration is broader than that of the Refugee Convention.<sup>54</sup> In addition to those displaced on account of persecution for reasons of 'race, religion, nationality, membership of a particular social group or political opinion',<sup>55</sup> the Cartagena Declaration also encompasses 'persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.<sup>56</sup> While of course recognising that both of these definitions are concerned with refugees, Cuénod nonetheless asserted that 'The fact that an international border is crossed or not in order to reach safety is often circumstantial',<sup>57</sup> and as such, in his opinion, the proposed 1989 IDP definition was 'not sufficiently comprehensive'.<sup>58</sup> It is therefore apparent that Cuénod was advocating for an IDP definition that would closely correspond to that of a refugee, formed by essentially amalgamating the two leading refugee definitions, yet tailoring this so as to apply to an internal displacement setting.

Subsequent to Cuénod's observations, the UN Secretary-General proposed a significantly revised working definition. This re-formulation drew directly on the recommendations put forward by Cuénod, but also on the precise wording used by the UN Commission on Human Rights and ECOSOC in their earlier resolutions.<sup>59</sup> As noted by the UN Secretary-General,<sup>60</sup> the UN Commission on Human

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<sup>51</sup> UNGA (28 September 1989) UN Doc A/44/520, para 72.

<sup>52</sup> Cuénod Report, para 120.

<sup>53</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984).

<sup>54</sup> Comprehensive Study, para 39.

<sup>55</sup> 1951 Refugee Convention, Article 1(A)(2).

<sup>56</sup> Cartagena Declaration, Part III, Article 3.

<sup>57</sup> Cuénod Report, para 120.

<sup>58</sup> *ibid.*

<sup>59</sup> Analytical Report, paras 12, 15 and 17.

<sup>60</sup> *ibid.*, para 12.

Rights, in its resolution 1991/25, had expressed its concern for the ‘high numbers of internally displaced persons suffering throughout the world, who have been *forced to flee* their homes and seek shelter and safety in other parts of their *own country*’.<sup>61</sup> Seeking to clarify the meaning of the two phrases, ‘one’s own country’ and ‘forced to flee’, the UN Secretary-General proposed the following. In respect to the former, he decided that ‘country’ would be taken to mean any UN Member State and those with observer status,<sup>62</sup> and that the concept of ‘one’s own country’ would be ‘interpreted in a flexible and pragmatic fashion... to mean the country of nationality or, if nationality is uncertain, the country of usual residence’.<sup>63</sup> In respect to the latter phrase, ‘forced to flee’, the UN Secretary-General elected for the three causes of displacement that had been expressly mentioned in ECOSOC resolution 1990/78, those of conflict, war, and natural and man-made disasters.<sup>64</sup> The UN Secretary-General also took the wording of ‘mass population movements’ used in ECOSOC resolution 1990/78 as a direction to restrict the definition to ‘situations in which large numbers of persons are displaced’.<sup>65</sup> This was grounded in a belief that large scale movements, which necessarily involve ‘the involuntary displacement of tens or hundreds of thousands of persons’, pose different issues when compared to smaller scale movements, and so instances of ‘large-scale’ and ‘small-scale’ displacement should therefore be examined separately from each other, with the focus here being on the former.<sup>66</sup> As a consequence, the phrases, ‘suddenly or unexpectedly in large numbers’ and ‘systematic violations of human rights or natural or man-made disasters’ were added to the definition, and ‘[e]victions, relocations or man-made disasters which cause the displacement of a few hundred or thousands of persons’ were ruled out.<sup>67</sup>

The IDP working definition was therefore set. IDPs were defined as ‘persons who have been forced to flee their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country’.<sup>68</sup> This formulation was maintained and restated over the coming years throughout the work conducted by the then appointed UN IDP mandate-holder, Representative of the

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<sup>61</sup> UN Commission on Human Rights Res 1991/25 (5 March 1991) UN Doc E/CN.4/RES/1991/25, preamble (emphases added).

<sup>62</sup> Analytical Report, para 13.

<sup>63</sup> *ibid*, para 14.

<sup>64</sup> *ibid*, para 15.

<sup>65</sup> *ibid*, para 17.

<sup>66</sup> *ibid*, para 17.

<sup>67</sup> *ibid*, para 17.

<sup>68</sup> *ibid*, para 17.

Secretary-General on Internally Displaced Persons, Francis Deng.<sup>69</sup> Both Deng's 1993 Comprehensive Study,<sup>70</sup> and his 1995 Compilation and Analysis of Legal Norms,<sup>71</sup> raised the issue of the IDP definition,<sup>72</sup> although on neither occasion was it deemed necessary at that time to formulate a 'conclusive definition'.<sup>73</sup> It was therefore not until the completion of the Guiding Principles in 1998 that the final definition was set.

### 2.3.2 Unpacking the international IDP definition

The now-established international IDP definition is found in the introductory paragraphs to the Guiding Principles. For the purposes of the Guiding Principles, IDPs are defined 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 generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.<sup>74</sup>

The finalised version of the IDP definition maintains at its core what has since been termed internal displacement's 'distinctive feature',<sup>75</sup> that of involuntary movement inside one's 'own country',<sup>76</sup> with 'internal' here being precisely described as within the internationally recognised borders of one's home State or State of habitual residence.<sup>77</sup> In keeping with the 1992 working definition, the finalised version encompasses a breadth of displacement causes. These causes were confirmed by Deng through consultations with key stakeholders, including, *inter alia*, States, UN agencies and non-governmental organisations (NGOs), which he conducted as part of his 1993 Comprehensive Study.<sup>78</sup>

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<sup>69</sup> Francis Deng was appointed as the first UN IDP mandate-holder in July 1992. Deng's appointment came pursuant to a request to 'designate a representative' in UN Commission on Human Rights Res 1992/73 'Internally Displaced Persons' (5 March 1992) UN Doc E/CN.4/RES/1992/73, para 2.

<sup>70</sup> Comprehensive Study.

<sup>71</sup> UN Commission on Human Rights, 'Internally Displaced Persons: Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights resolution 1995/57: Compilation and Analysis of Legal Norms' (5 December 1995) UN Doc E/CN.4/1996/52/Add.2, para 2.

<sup>72</sup> Comprehensive Study, paras 25-54; Compilation and Analysis, para 8.

<sup>73</sup> Comprehensive Study, para 53.

<sup>74</sup> Guiding Principles, introductory para 2.

<sup>75</sup> The Brookings Institution Project on Internal Displacement, 'Handbook for Applying the Guiding Principles on Internal Displacement' (1999) 5.

<sup>76</sup> Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (The American Society of International Law and the Brookings Institution 2008) 5.

<sup>77</sup> Guiding Principles, introductory para 2.

<sup>78</sup> Comprehensive Study, paras 25-32.

In so doing, the international IDP definition departs substantially from the refugee definitions found in the 1951 Refugee Convention and the 1984 Cartagena Declaration, as it recognises displacement caused not only by forms of civil and political unrest, but also by disasters, both human-made and natural. The proposal to keep disaster-induced displacement within the scope of the IDP definition was not, however, without contention. During the consultations, some stakeholders expressed a desire, if not explicitly then at least impliedly, for any reference to disasters to be removed. Several NGOs, including the Instituto Interamericano de Derechos Humanos (IIDH), advocated, in a manner similar to Cuénod, for a definition that would be akin to that of an 'internal refugee'.<sup>79</sup> Deng acknowledged that there are important distinctions between disaster-induced displacement and displacement in the context of war, generalised violence and persecution. In particular, he noted that, especially in respect to natural causes,<sup>80</sup> it is neither necessarily the case that those displaced by disasters would face discrimination nor that there would be any 'a priori reason to presume that the authorities would be unwilling to respect their rights and provide needed assistance within the limits of available resources or with contributions from the international community'.<sup>81</sup> Nevertheless, it was ultimately decided that disasters would remain an explicit feature of the definition, recognised as both a cause and a consequence of displacement. In justifying the inclusion of disasters, Deng referred to instances in which displacement had resulted from 'a combination of natural causes and racial, social or political causes, in which serious and widespread human rights violations occurred'.<sup>82</sup> It is, however, important to note that although Deng here refers to natural causes *in combination with* other causes, the finalised IDP definition contains no such requirement that instances of disaster-induced displacement need occur in conjunction with racial, social or political causes in order to fall within its scope. Walter Kälin, who was to later be the second holder of the IDP mandate, also offered his support to the inclusion of disasters. Drawing on his experience in the field, he showed that disaster-induced IDPs can, as a result of their displacement, suffer violations of their human rights, whether this be in the form of, for example, discrimination,<sup>83</sup> a disregard for their property rights, or sexual and gender-based violence.<sup>84</sup>

While the inclusion of disaster-induced displacement was successfully retained, there were numerous crucial changes made to the earlier working definition. First of all, there is no quantitative aspect in

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<sup>79</sup> *ibid*, paras 38-40.

<sup>80</sup> *ibid*, para 32.

<sup>81</sup> *ibid*, para 51.

<sup>82</sup> *ibid*, para 51.

<sup>83</sup> In this respect, Kälin referred to discrimination that may occur when persons are internally displaced to an area in which they constitute an ethnic minority.

<sup>84</sup> Annotations, 4.

the finalised version. As mentioned earlier, the requirement that persons be displaced ‘in large numbers’ had been inserted by the UN Secretary-General in order to more closely reflect the wording used by ECOSOC in its resolution 1990/78 request. However, numerous stakeholders were opposed to this addition. The International Organization for Migration (IOM), the United States of America (USA), and the World Food Programme (WFP) argued against what they saw as an ‘unnecessarily narrow’ definition that would exclude those displaced in small numbers,<sup>85</sup> with the IOM re-emphasising that the rights affected by internal displacement are ‘largely individual rights’.<sup>86</sup> The UNHCR warned that use of the phrase ‘large numbers’ could lead to subjective, imprecise evaluations,<sup>87</sup> and brought attention to the fact that the 1951 Refugee Convention definition contains no such quantitative requirement.<sup>88</sup> For similar reasons, the requirement that displacement occur ‘suddenly or unexpectedly’ was also omitted from the final version of the definition. In addition to these amendments, a series of subtle but important additions were also made. These included inclusion of the phrases ‘or obliged’ alongside ‘forced’, ‘or to leave’ alongside ‘flee’, and ‘or in order to avoid the effects of’ alongside ‘as a result of’.<sup>89</sup> All have the effect of further widening the scope of the definition. They also emphasise that displacement is not immanently violent in nature, as could be construed from a restrictive interpretation of ‘forced’ and ‘flee’, and that it can be both pre-emptive and responsive.<sup>90</sup> Similarly, linguistic alterations and additions were made in respect to the internal nature of the movement, with ‘or places of habitual residence’ added alongside ‘homes’, and ‘within the territory of their own country’ replaced with ‘not crossed an internationally recognized State border’.<sup>91</sup> The inclusion of these latter two phrases helps to more closely align the definition with the UN Secretary-General’s earlier stated position that ‘one’s own country’ should be flexibly and pragmatically interpreted to mean either the country of nationality or usual residence,<sup>92</sup> and for ‘country’ to reflect UN membership status.<sup>93</sup> In his 2008 Annotations to the Guiding Principles (Annotations),<sup>94</sup> Kälin argues that the requirement of not having crossed an internationally recognised State border should be understood ‘in a broad sense’,<sup>95</sup> so as to encompass those who find themselves having to transit through a neighbouring State or States to access a safe part of their own country,<sup>96</sup>

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<sup>85</sup> Comprehensive Study, paras 35-36.

<sup>86</sup> *ibid*, para 35.

<sup>87</sup> *ibid*, para 35.

<sup>88</sup> *ibid*, para 35.

<sup>89</sup> Guiding Principles, introductory para 2.

<sup>90</sup> Annotations, 5.

<sup>91</sup> Guiding Principles, introductory para 2.

<sup>92</sup> Analytical Report, para 14.

<sup>93</sup> *ibid*, para 13.

<sup>94</sup> Annotations.

<sup>95</sup> *ibid*, 3.

<sup>96</sup> *ibid*.

and those who 'first go abroad and then return (voluntarily or involuntarily) to their own country but cannot go back to their place of origin/habitual residence'.<sup>97</sup> Kälin further states that the definition is also met if a person 'left voluntarily to another part of their country but cannot return to their homes because of events occurring during their absence that make return impossible or unreasonable'.<sup>98</sup>

It is therefore clear that the IDP definition was adapted in several ways between the 1989 draft version, the 1992 working version, and the finalised version as found in the 1998 Guiding Principles. The effect of these changes was to substantially widen the definition's scope and application, especially in respect to the range of recognised displacement causes, which stretches far beyond what has traditionally been seen in earlier forced migrant definitions, such as in the 1951 Refugee Convention and the 1984 Cartagena Declaration. For instance, to take climate change as a contemporary example of increasing importance. As has already been mentioned, the IDP definition includes explicit reference to 'natural or human-made disasters',<sup>99</sup> meaning that climate change-induced internal displacement clearly falls within its scope.<sup>100</sup> In contrast, the application of climate change-induced disasters to the refugee concept proves conceptually problematic, not only because environmental causes do not feature within the exhaustive list of displacement causes present in the 1951 definition, but also because the refugee concept is fundamentally underpinned by displacement that occurs in the context of persecution.<sup>101</sup> As such, while it would be perfectly appropriate to use the term 'climate change IDP', 'climate change refugee' remains a 'legal misnomer'.<sup>102</sup>

Yet, perhaps the most important characteristic of the international IDP definition, more important than its amenability to disasters and hazards, is its potential to in fact cover any and all causes of involuntary displacement. As has been confirmed by Kälin, the presence of the small but crucial qualifying term, 'in particular', which precedes the list of displacement causes, has the effect of rendering this list non-exhaustive.<sup>103</sup> As a consequence, while explicit reference is made to four particular causes, this is only by way of providing an indication as to some common causes of internal

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<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*, 3-4.

<sup>99</sup> Guiding Principles, introductory para 2.

<sup>100</sup> As confirmed by Roberta Cohen, 'On the Record: Key Policy Debates in the Internal Displacement Field' (*Brookings*, 4 December 2006).

<sup>101</sup> Jane McAdam, 'No "Climate Refugees" in New Zealand' (*Brookings*, 13 August 2014)

<[www.brookings.edu/blog/planetpolicy/2014/08/13/no-climate-refugees-in-new-zealand](http://www.brookings.edu/blog/planetpolicy/2014/08/13/no-climate-refugees-in-new-zealand)> accessed 15 July 2015.

<sup>102</sup> Fiona Flinton, 'Environmental Refugees - A Misnomer or a Reality?' (Wilton Park Conference Report on Environmental Security and Conflict Prevention, 2001); and David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 16(1) *Georgetown International Environmental Law Review*, 209.

<sup>103</sup> Annotations, 4.



displacement, and therefore does not exclude any other potential causes to which reference is not made in the definition.<sup>104</sup> This thereby permits the inclusion of, for instance, displacement in the context of development projects. In fact, despite not featuring explicitly in the definition, displacement related to ‘large-scale development projects’ is nevertheless expressly mentioned in Principle 6(2),<sup>105</sup> a point that has been emphasised by Cohen,<sup>106</sup> Mooney,<sup>107</sup> and Penz, Drydyk and Bose.<sup>108</sup> This is important as it means that not only is the definition explicitly broad in its scope, but is also malleable to future, and perhaps unforeseen, displacement causes. Yet, it also reveals something crucial about the very concept of an IDP. When it comes to recognition as an IDP, the exact cause of displacement is to an extent irrelevant. Subject to the movement being involuntary and occurring within one’s own country, then, whatever the cause, there would be strong grounds upon which to argue that this falls within the scope of the international IDP definition. As already mentioned, this conceptual approach is in stark contrast to that of the 1951 Refugee Convention definition, for which movement is required to fall within an exhaustive list of causes.<sup>109</sup>

In respect to the 1951 refugee definition, it is indeed not only crucial that to be eligible for protection an individual must establish a well-founded fear of persecution on the Convention grounds listed, but also that movement be of an international nature. To be recognised as a refugee requires being ‘outside the country of his former habitual residence’.<sup>110</sup> However, while this international dimension is crucial for recognition as a refugee, it is not *the defining characteristic* of the 1951 definition.<sup>111</sup> The international refugee definition, at its

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<sup>104</sup> Roberta Cohen, ‘The Development of International Strategies to Protect Internally Displaced Persons’ (*Brookings*, 7 May 1998) <[www.brookings.edu/research/the-development-of-international-strategies-to-protect-internally-displaced-persons/](http://www.brookings.edu/research/the-development-of-international-strategies-to-protect-internally-displaced-persons/)> accessed 17 November 2017, 5.

<sup>105</sup> Principle 6(2)c states that ‘[t]he prohibition of arbitrary displacement includes displacement... [i]n cases of large-scale development projects, which are not justified by compelling and overriding public interests’.

<sup>106</sup> Roberta Cohen, ‘Key Policy Debates in the Internal Displacement Field’ (Internal Displacement in Turkey and Abroad: International Principles, Examples and Policy Proposals, Istanbul, 4-5 December 2006) 4.

<sup>107</sup> Erin Mooney, ‘The Concept of Internal Displacement’ (*Brookings*, 1 September 2005) <[www.brookings.edu/articles/the-concept-of-internal-displacement-and-the-case-for-internally-displaced-persons-as-a-category-of-concern/](http://www.brookings.edu/articles/the-concept-of-internal-displacement-and-the-case-for-internally-displaced-persons-as-a-category-of-concern/)> accessed 17 November 2017, 12. Mooney confirms that displacement in the context of development projects falls within the scope of the Guiding Principles, this being despite some others having erroneously asserted otherwise on the basis that any explicit reference to development projects is absent from the definition.

<sup>108</sup> Peter Penz, Jay Drydyk and Pablo S Bose, *Displacement by Development: Ethics, Rights and Responsibilities* (CUP 2011) 91-94. In this connection, Penz, Drydyk and Bose emphasise the additional protections that the Guiding Principles offer the benefit of indigenous peoples.

<sup>109</sup> That is, under Article 1(A)(2), ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’.

<sup>110</sup> Article 1(A)(2) states ‘... *being outside the country of his former habitual residence as a result of such events...*’ (emphases added).

<sup>111</sup> Bill Frelick, ‘Displacement without End: Internally Displaced Who Can’t Go Home’ (2003) 17 *Forced Migration Review* 10.

core, is primarily grounded in movement caused by (a well-founded fear of) persecution.<sup>112</sup> That the movement be international in nature is but a secondary, albeit still essential, requirement. The consequence is that the possible list of causes under the 1951 definition is, by conceptual necessity, exhaustive and strictly limited to reasons traditionally understood as constituting persecution of the individual by the State. Yet, as has been shown, this is not the case in respect to the international IDP definition. Indeed, the IDP concept is in no way restricted to situations of persecution as traditionally understood.<sup>113</sup> Instead, the international IDP definition is, at its core, based on the involuntary movement of persons that, as *a primary requirement*, occurs internally. It is by conceptualising internal displacement primarily by its territorial component that the IDP concept can be open to an essentially unlimited range of displacement causes, subject of course to the other primary requirement of involuntariness. Furthermore, that internal displacement can occur in connection with any involuntary cause means that the cause of displacement alone does not help to distinguish internal displacement from any other form of forced migration. The central importance of the internal nature of the movement is thus reinforced, as it is this, which when taken in conjunction with movement that is involuntary, ultimately distinguishes the IDP concept from all other migrant groups.

To reflect momentarily on the broader international legal framework on forced migration. What this reveals is that, while the conceptual frameworks through which the IDP and the refugee are viewed do, to some extent, complement one another, they do not together form a coherent whole. For instance, if an individual were forced to flee their home due to a weather-related hazard (for example, flooding), and moved to another location within their own country, then recognition as an IDP under international law would follow. However, if the same individual were to move to another country, then they would not be recognised as a refugee under the 1951 Refugee Convention, and, of course, having crossed an internationally recognised State border, would no longer meet the criteria for recognition as an IDP. As such, in the absence of any international protection framework that clearly responds to those forcibly displaced internationally for reasons excluded from the 1951 definition,

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<sup>112</sup> Khalid Koser, 'The Global IDP Situation in a changing humanitarian context' (*Brookings*, 4 September 2007) <[www.brookings.edu/on-the-record/the-global-idp-situation-in-a-changing-humanitarian-context/](http://www.brookings.edu/on-the-record/the-global-idp-situation-in-a-changing-humanitarian-context/)> accessed 17 November 2017, 2.

<sup>113</sup> Mooney (2005) 12; and Bill Frelick, 'Displacement without End: Internally Displaced Who Can't Go Home' (2003) 17 *Forced Migration Review* 10. During the drafting of the Guiding Principles, some of the involved parties called for the IDP definition to be restricted to only those who are subject to persecution – in other words, only those who would be considered refugees if they had crossed an internationally recognised border (Cohen (2006) 3). However, advocacy for a broader definition, based on the argument that to limit the concept in this way would result in a definition that would not accurately depict the causes of internal displacement in reality was successful (Mooney (2005) 11-12). Indeed, there is not a single mention of 'persecution' in the Guiding Principles.

such persons are left to rely upon protection frameworks that may or may not exist at the domestic level in the receiving State. The result is an international legal framework on forced migration that suffers from gaps in coverage, which, depending on one's viewpoint, exist as a result of either the inherent restrictions of the 1951 refugee definition, or the previously unconceived extensions in coverage that have been brought about by the 1998 IDP definition.

In sum, the internal nature of internal displacement lies at the very core of the IDP concept. While this may not, *prima facie*, appear unsurprising, it is highly significant, as it permits inclusion of a true breadth of involuntary displacement causes, including current, past and perhaps unforeseen future causes. The result is that internal displacement is not strictly defined by any particular displacement cause. This contrasts sharply with the international refugee concept, as expressed in the 1951 Refugee Convention, which is far narrower in its scope and application. In other words, it is not just a matter of location that distinguishes the IDP concept from the refugee concept. Not only is this interesting in and of itself, but it is also crucial in distinguishing the IDP concept from the refugee concept, which in turn helps justify and cement the former's existence. However, the international IDP definition and the international refugee definition are not only distinguishable on this basis. They also differ in terms of legal status, with the latter imparting a legal status upon forced migrants, but the former, not. It is to this that this discussion now turns.

### 2.3.3 Legal status and acceptance

That the international IDP definition was born in the Guiding Principles is of great legal significance. It is widely accepted that the Guiding Principles provide the core, authoritative statement specific to the issue of internal displacement at the international level.<sup>114</sup> Yet, they are, as a single instrument, legally non-binding.<sup>115</sup> Indeed, from the very beginning, the Guiding Principles were intended as a 'persuasive statement'<sup>116</sup> of principles that States would be 'invit[ed] to apply',<sup>117</sup> and not as a binding document open for ratification. As such, the Guiding Principles are often characterised as 'soft law'.<sup>118</sup>

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<sup>114</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons' (11 April 2018) UN Doc A/HRC/38/39, paras 13 and 66.

<sup>115</sup> Annotations, vii.

<sup>116</sup> Introductory Note to the Guiding Principles, para 11.

<sup>117</sup> *ibid*, para 11.

<sup>118</sup> For a more detailed examination of the role of the Guiding Principles as a soft law document, see Megan Bradley and Angela Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law 'Success Story'' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 155-182. For discussion on the challenges posed when attempting to provide a definition of 'soft law' itself, see John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition' in

Interestingly, however, Kälin, as one of the chief architects of the Guiding Principles, has argued that, strictly speaking, the Guiding Principles do not actually constitute ‘typical’ soft law,<sup>119</sup> the reason being that they were prepared by a group of independent, non-governmental experts who were overseen by the IDP mandate-holder,<sup>120</sup> so, therefore, without any coordinated State representation.<sup>121</sup> Kälin instead asserts, in his own words, that the Guiding Principles are arguably ‘even softer than soft law’.<sup>122</sup>

Nonetheless, despite, or perhaps because of, their formal ‘softer than soft’ nature, the Guiding Principles have ‘quickly gained substantial international acceptance and authority’.<sup>123</sup> In addition to their development and submission being noted unanimously by the UN Commission on Human Rights in its resolution 1998/50,<sup>124</sup> both the now UN Human Rights Council<sup>125</sup> and the UN General Assembly<sup>126</sup> have repeatedly recognised the importance of the Guiding Principles as a ‘key’ international framework and standard for the protection of IDPs, and have encouraged their use when responding to situations of internal displacement. At the 2005 World Summit in New York, the Guiding Principles received unanimous recognition ‘as an important international framework for the protection of internally displaced persons’ from the Heads of State and Government of more than 190 States.<sup>127</sup> The IASC has also explicitly welcomed the Guiding Principles, with former Under-Secretary-General for

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Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 15-24.

<sup>119</sup> Walter Kälin, ‘How Hard is Soft law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework’ (*Brookings*, 19 December 2001)

<[www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf)> accessed 2 February 2016, 6.

<sup>120</sup> Roberta Cohen, ‘The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting’ (2004) 19(1) *Global Governance*, 460; Roberta Cohen and Francis Deng, ‘The Genesis and the Challenges’ (2010) *Forced Migration Review* (Special Issue: Ten Years of the Guiding Principles on Internal Displacement) 4. Kälin (2001) 6. As Phuong reports, only Norway and Austria were involved in the development of the Guiding Principles, having sponsored several legal expert meetings (see Phuong (2005) 71).

<sup>122</sup> Kälin (2001) 8.

<sup>123</sup> Roberta Cohen (2004) 459. As Phuong says, ‘Considering the current lack of enthusiasm for standard-setting at the United Nations, the Guiding Principles have been accepted in a remarkably short period of time’ (Phuong (2005) 239).

<sup>124</sup> UN Commission on Human Rights Res 1998/50 (17 April 1998) UN Doc E/CN.4/RES/1998/50, para 1.

<sup>125</sup> See, for example, UN Human Rights Council Res 23/8 (7 June 2013) UN Doc A/HRC/23/L.14, para 12.

<sup>126</sup> See, for example, UNGA Res 68/274 (5 June 2014) UN Doc A/RES/68/274, Preamble; UNGA Res 66/165 (22 March 2012) UN Doc A/RES/66/165, para 12. The General Assembly first noted the development of the UN Guiding Principles in December 1999, in UNGA Res 54/167 (17 December 1999) UN Doc A/RES/54/167, para 6, and ‘encourage[d] the further dissemination and application of the Guiding Principles’, para 8.

<sup>127</sup> UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 132. As Phuong (2005) says, that the Guiding Principles were drafted without State involvement, yet have since been so widely recognised by the international community, makes their legal status ‘confusing’ (73). In this connection, Kälin argues that the Guiding Principles’ ‘authority and legitimacy stem from their content and the subsequent reaction by States as well as international and regional organizations rather than from their process of elaboration’ (see Walter Kälin, ‘The Guiding Principles on Internal Displacement and the Search for a Universal Framework of Protection for Internally Displaced Persons’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 628).

Humanitarian Affairs,<sup>128</sup> Sergio Vieira de Mello, stating in his Foreword to the Guiding Principles that '[t]he IASC fully supports the Guiding Principles and has encouraged its members to share them with their Executive Boards and with their staff, especially those in the field, in order to ensure that the Principles are applied in their activities on behalf of internally displaced persons'.<sup>129</sup> Outside of the UN system, the Guiding Principles have also been cited by the International Conference of the Red Cross and Red Crescent, which, in its Plan of Action for the years 2000-2003, stated that the National Societies of the Red Cross, the International Federation of the Red Cross, and the International Committee of the Red Cross (ICRC) would take note of the Guiding Principles when 'offer[ing] their services on behalf of internally displaced persons'.<sup>130</sup>

However, it is nevertheless needless to say that, from the perspective of international law, the international IDP definition, having been first articulated in the Guiding Principles, is not a binding status akin to the 1951 refugee definition. Furthermore, the IDP definition does not actually confer a legal status upon IDPs.<sup>131</sup> As Kälin has confirmed, the IDP definition is instead a 'descriptive identification' of a factual state<sup>132</sup> that 'triggers certain legal consequences'.<sup>133</sup> This is further emphasised by the fact that the IDP definition is not included within the actual Guiding Principles themselves, but within a separate introductory section to the Guiding Principles.<sup>134</sup> It is for this reason that this Thesis avoids referring to an IDP 'status', and instead refers to the IDP 'classification'. The rationale behind having a definition that does not confer a legal status is essentially two-fold. First, as IDPs have not crossed an internationally recognised State border, there is no change in jurisdiction or residency status. This means that the domestic legal regime with which IDPs were associated prior to displacement therefore continues throughout their displacement. Second, if the IDP classification were to be a legally-conferred status, then this would erroneously suggest that the rights and guarantees contained within the Guiding Principles are only afforded to individuals upon the granting

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<sup>128</sup> The Under-Secretary-General for Humanitarian Affairs (USG) chairs the IASC in his/her dual capacity as Emergency Relief Coordinator (ERC).

<sup>129</sup> UN OCHA, 'Guiding Principles on Internal Displacement: Foreword to the Guiding Principles by Under-Secretary General for Humanitarian Affairs Mr Sergio Vieira de Mello' (31 October 2004) UN Doc E/CN.4/1998/53/Add.2, 1. The UN Commission on Human Rights noted with interest this 'decision of the Inter Agency Standing Committee welcoming the guiding principles and encouraging its members to share them with their Executive Boards' (UN Commission on Human Rights Res 1998/50 (17 April 1998) UN Doc E/CN.4/RES/1998/50, para 5).

<sup>130</sup> 27<sup>th</sup> International Conference of the Red Cross and Red Crescent Res 'Annex 2 of the resolution 2: Plan of Action for the years 2000-2003' (November 1999) para 9

<sup>131</sup> Phuong (2005) 57.

<sup>132</sup> Annotations, 3-5.

<sup>133</sup> Rhodri Williams, 'Protecting Internally Displaced Persons: A Manual for Law and Policymakers' (Brookings-Bern Project October 2008) 13.

<sup>134</sup> Annotations, 5.

of such a status, and that such rights could legitimately be removed upon refusal or revocation of this status.<sup>135</sup> Although it has been accepted that it may be necessary to establish administrative measures at the domestic level, for instance, for the purpose of registering those displaced and in need of special assistance, Kälin has nevertheless asserted that IDPs ‘need not and cannot be granted a special legal status under international law comparable to refugee status’.<sup>136</sup>

Yet, all this being said, the IDP definition, as formulated in the Guiding Principles, is now contained within legally-binding instruments elsewhere. This is most prominently the case in the Kampala Convention, which came into force on 6 December 2012.<sup>137</sup> The definition of an IDP found in Article 1(k) of the Kampala Convention is identical to that in the Guiding Principles,<sup>138</sup> meaning that the intentionally non-legally-binding definition of an IDP in international law has been transplanted verbatim to the regional level, but now within a legally-binding instrument. Instances of transplanting the international IDP definition into legally-binding instruments can also be seen at the domestic level. Legislation in Sudan<sup>139</sup> and Kenya,<sup>140</sup> and draft legislation in the Philippines,<sup>141</sup> contains IDP definitions that are identical to the international IDP definition, albeit that the latter two, unlike the international definition, also include explicit reference to development projects as a cause of displacement within the actual IDP definition itself. IDP definitions identical to the international IDP definition can also be

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<sup>135</sup> Williams (2008) 13.

<sup>136</sup> Annotations, 5.

<sup>137</sup> African Union ‘List of Countries which have Signed, Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)’ (15 June 2017) <[au.int/sites/default/files/treaties/7796-sl-african\\_union\\_convention\\_for\\_the\\_protection\\_and\\_assistance\\_of\\_internally.pdf](http://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf)> accessed 13 August 2018, 2. Of the 54 countries of the African Union, the Kampala Convention has been signed by a total of 39 states, now legally-binding on those 22 states that have ratified/acceded.

<sup>138</sup> Kampala Convention, Article 1(k); Moetsi Duchatellier and Catherine Phuong, ‘The African Contribution to the Protection of Internally Displaced Persons: A Commentary on the 2009 Kampala Convention’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 655).

<sup>139</sup> DDPD (Sudan) 6.

<sup>140</sup> The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012, Article 2(1).

<sup>141</sup> An Act Protecting the Rights of Internally Displaced Persons and Penalizing the Acts of Arbitrary Internal Displacement, Senate Bill No. 1142, s 3(h). This Bill was introduced to the Senate of the Philippines, the higher house of the bicameral Congress of the Philippines, on 16 September 2014, yet it remains pending in Committee as of 20 March 2019 <[www.senate.gov.ph/lis/bill\\_res.aspx?congress=17&q=SBN-1142](http://www.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-1142)> accessed 20 March 2018.

found in numerous domestic IDP policies and strategies, including in Afghanistan,<sup>142</sup> Iraq,<sup>143</sup> Nigeria,<sup>144</sup> Sierra Leone,<sup>145</sup> Turkey,<sup>146</sup> Uganda<sup>147</sup> and Zimbabwe.<sup>148</sup>

It is clear from this that the international IDP definition has therefore amassed significant purchase, and in so doing has become recognised as an international standard.<sup>149</sup> It is positioned within a leading international framework that has received, and continues to receive, substantial support from States, as well as numerous bodies within and external to the UN. In addition, it is, in its original formulation, relied upon in regional and national frameworks, including not only policies and strategies but also binding laws.

It would though be inaccurate to say that the international IDP definition, as formulated in the Guiding Principles, is identically replicated throughout all pertinent domestic legislation. In fact, there is evidence of some substantial inconsistencies. Indeed, there are many instances in which domestic IDP definitions are more restrictive, whether this is done so intentionally or as a consequence of a very different conceptualisation of what is meant by an IDP. The term 'IDP' itself is actually not used on all occasions. In some situations, the restrictions may be slight, albeit not inconsequential. For instance, in Colombia, Law 387 on Internal Displacement<sup>150</sup> recognises human rights violations as a cause of displacement but demands that these be 'massive' to meet the domestic definition.<sup>151</sup> As discussed above, while the 1992 IDP working definition did contain a quantitative element, this was removed for the final version in the Guiding Principles. In domestic legislation in both Azerbaijan and Peru, the listed causes of displacement are limited in comparison to those explicitly referred to in the international IDP definition. In Azerbaijan, a forcibly displaced person (FDP) can only be recognised as such if on account of 'military aggression, natural or technological disaster',<sup>152</sup> meaning that any other

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<sup>142</sup> The National Policy of the Islamic Republic of Afghanistan on Internal Displacement (approved on 25 November 2013) 3.1.

<sup>143</sup> National Policy on Displacement, Iraq, 5.

<sup>144</sup> National Policy on Internally Displaced Persons (IDPs) in Nigeria (2012) Article 1(k). This National Policy in fact explicitly draws this definition from the Kampala Convention.

<sup>145</sup> Sierra Leone Resettlement Strategy: Enabling the displaced to rebuild their lives back in their communities with safety and dignity (1 October 2001) footnote 3.

<sup>146</sup> Measures on the Issue of Internally Displaced Persons and the Return to Village and Rehabilitation Project in Turkey: Integrated strategy document (adopted on 17 August 2005) para 2.

<sup>147</sup> The National Policy for Internally Displaced Persons in Uganda (adopted on 31 August 2004) x.

<sup>148</sup> Framework for the Resettlement of Internally Displaced Persons (IDPs) in Zimbabwe (adopted in January 2011) 1.1.

<sup>149</sup> Khalid Koser, 'The Global IDP Situation in a changing humanitarian context' (*Brookings*, 4 September 2007) 2.

<sup>150</sup> Law 387 on Internal Displacement of 1997, Colombia. It is important here to note that the Colombian definition pre-dates the Guiding Principles definition by one year.

<sup>151</sup> *ibid*, Article 1.

<sup>152</sup> Law of the Republic of Azerbaijan, 'On Status of Refugees and Forcibly Displaced (Persons Displaced within the Country) Persons', 1999, Article 1.

form of conflict, generalised violence or human rights violations are insufficient. In Peru, while armed conflict, generalised violence and human rights violations are all explicitly recognised as causes of displacement, any reference to natural or human-made disasters is noticeably absent,<sup>153</sup> although, that being said, the definition does include the qualifier, ‘in particular’,<sup>154</sup> which may therefore permit inclusion of disaster-induced displacement despite the absence of any explicit reference to this. It is in addition noteworthy that, in Peru, IDP status is explicitly recognised as being of a ‘legal nature’.<sup>155</sup> Georgia also provides a particularly interesting case in point. Prior to 2014, the definition of an IDP in Georgian law was restricted by a clause stating that the acquiring of IDP status was dependent upon having been displaced from ‘an occupied area’.<sup>156</sup> In contrast, the Guiding Principles definition contains no such territorial limitation on IDP recognition, only that the individual must have been displaced from their home or place of habitual residence, and must not have crossed an internationally recognised State border.<sup>157</sup> Such a clause meant that those who had been displaced entirely within undisputed territory were ineligible for IDP status under domestic law. This clause has since been removed,<sup>158</sup> following a ruling by the Constitutional Court of Georgia that the refusal of IDP status to such persons was discriminatory.<sup>159</sup> However, while this amendment positively brought the domestic IDP definition closer to that of the international standard,<sup>160</sup> the revised 2014 definition remains narrower than the international standard, as it still requires an IDP to be ‘[a] citizen of Georgia or a stateless person with a status residing in Georgia’.<sup>161</sup> In addition, the revised definition continues to exclude natural or human-made disasters from its exhaustive list of causes.<sup>162</sup> In the cases of both Georgia and Azerbaijan, the formulation of the IDP concept has been very much influenced by the particular internal displacement context in the South Caucasus, with displacement in most instances having resulted from armed conflict in the context of territorial disputes. Yet, internal displacement in both Azerbaijan and Georgia does not occur solely because of armed conflict, but also as a result of causes not covered by their respective IDP laws, most notably development projects, such as dam

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<sup>153</sup> Law Concerning the Internally Displaced, 28 April 2004 (Law No 28223) Peru, Article 2.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*, Article 1.

<sup>156</sup> Public Defender’s Office of Georgia, ‘The Report of the Public Defender of Georgia on the Protection of Human Rights and Freedoms in Georgia: 2013’ (2013, Public Defender’s Office of Georgia) 9.

<sup>157</sup> Guiding Principles, introductory para 2.

<sup>158</sup> Law of 2014 on Internally Displaced Persons – Persecuted from the Occupied Territories of Georgia (adopted on 6 February 2014) Article 6.

<sup>159</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani: Addendum: Follow-up Mission to Georgia’ (4 June 2014) UN Doc A/HRC/26/33/Add.1, paras 42-43.

<sup>160</sup> UN Human Rights Committee, ‘Replies of Georgia to the List of Issues in Relation to the Fourth Periodic Report’ (23 May 2014) UN Doc CCPR/C/GEO/Q/4/Add.1, para 114.

<sup>161</sup> Law of 2014 on Internally Displaced Persons – Persecuted from the Occupied Territories of Georgia (adopted on 6 February 2014) Article 6.

<sup>162</sup> *ibid.*, 47.



construction and urban development. So, while these laws may have been drafted in the context of one predominant cause of displacement, the opportunity to, at a later date, revise the domestic definition so as to more accurately reflect the lived reality of internal displacement for many who are affected, and to bring this in line with the international IDP definition, has not been taken.

In sum, the drafting, dissemination and widespread acceptance of an international IDP definition has been crucial for the development of the IDP concept. It is immensely important to now have a final formulation established, as this helps to achieve greater conceptual clarity and consistency, at least at the international and regional levels. This is not only of practical use, for instance, for the purposes of identification, protection, and the provision of assistance to IDPs, but is also critical for affirming the general position that IDPs together form a coherent group of persons bound by a set of common characteristics;<sup>163</sup> a group that can not only be clearly delineated, but is also distinct from other similar groups, such as refugees.

Yet, in order to fully cement this distinction, it was not only necessary to more clearly identify IDPs through an accepted definition, but to also provide greater clarity as to why IDPs, as a distinct group of persons, should be considered particularly deserving of targeted attention. To reach this point, it would be necessary to achieve a general consensus that IDPs have specific needs on account of their displacement, needs acute enough to demand that concerted and sustained action be taken.

## **2.4 Establishing IDP Needs and Determining IDP Rights**

### **2.4.1 Specific needs as a direct consequence of displacement**

The question of IDP needs was explicitly raised by the UN Commission on Human Rights in its initial resolution 1991/25 request to the UN Secretary-General.<sup>164</sup> Indeed, while ECOSOC had invited the UN Secretary-General to assess the 'whole spectrum' of needs in broad relation to refugees, displaced persons and returnees,<sup>165</sup> it was the UN Commission on Human Rights that directly addressed the question of *IDP needs*, requesting the UN Secretary-General to approach this matter as a distinct consideration.<sup>166</sup> Pursuant to the UN Commission on Human Rights' request, and subsequent to

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<sup>163</sup> Walter Kälin, 'The Future of the Guiding Principles on Internal Displacement' (2006) Forced Migration Review (Special Issue) 5.

<sup>164</sup> UN Commission on Human Rights, Res 1991/25 (5 March 1991) UN Doc E/CN.4/RES/1991/25.

<sup>165</sup> UNDP Governing Council, 'Report on the Organizational Meeting for 1990, The Special Session and The Thirty-Seventh Session' 22 June 1990 UN Doc E/1990/29, para 9.

<sup>166</sup> UN Commission on Human Rights, Res 1991/25 (5 March 1991) UN Doc E/CN.4/RES/1991/25, para 2.

Cuénod's affirmation of IDPs as constituting a distinct group of concern,<sup>167</sup> the UN Secretary-General identified a number of IDP needs. These included what he termed 'basic' needs, such as food, shelter, water, education, clothing and medical care,<sup>168</sup> in addition to other needs, such as psychological care needs,<sup>169</sup> and needs stemming from a lack of employment opportunities.<sup>170</sup>

The precise pinpointing of specific IDP needs at this early stage of the international regime's development was of crucial importance. It helped evidence the negative impact of internal displacement, and provided a tangible justification for involvement of the international community with the internal displacement issue. It also contributed towards further distinguishing IDPs from the non-displaced population. In the Analytical Report, the UN Secretary-General concluded that while the non-displaced population of a particular State may also, at least to some extent, be affected by the same events that lead to the displacement of others, the needs of IDPs are nonetheless 'qualitatively different from those [needs] of other persons' on account of what he called the 'new situation' in which IDPs find themselves.<sup>171</sup> Yet, what was to prove especially influential, particularly for the development of the international IDP regime moving forward, was the direct link drawn by the UN Secretary-General between IDP needs and IDP rights, a link that would result in the foregrounding of human rights within the normative response to internal displacement.<sup>172</sup>

#### 2.4.2 IDP needs as inherently human rights concerns<sup>173</sup>

ECOSOC's initial resolution 1990/78 call for a system-wide review explicitly dealt with needs, not rights, and this was reflected in Cuénod's report, which, while drawing on human rights, was by no means centred around them.<sup>174</sup> However, involvement of the UN Commission on Human Rights in the discussion drew specific attention not only to IDPs as a distinct group but also to human rights,<sup>175</sup> and the UN Secretary-General duly responded, by zeroing in on 'the human rights dimension of the

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<sup>167</sup> Cuénod Report, paras 112 and 116-125.

<sup>168</sup> Analytical Report, para 62.

<sup>169</sup> *ibid*, paras 56-57.

<sup>170</sup> *ibid*, paras 60-61.

<sup>171</sup> *ibid*, para 91.

<sup>172</sup> As Phuong (2005) argues, IDPs should not be considered within the same frame as refugees, but as 'a special category of human rights victims' (235).

<sup>173</sup> *ibid*, 237.

<sup>174</sup> Cuénod's system-wide review did draw on human rights on occasion but largely in respect to possible future establishment of a mandate.

<sup>175</sup> UN Commission on Human Rights, Res 1991/25 (5 March 1991) UN Doc E/CN.4/RES/1991/25, para 2.

problem of internally displaced persons<sup>176</sup> by way of identifying the very serious violations of human rights suffered by many IDPs.<sup>177</sup>

In the Analytical Report, human rights considerations were identified as being of importance before, during and following flight.<sup>178</sup> They are, in other words, pertinent to both the causes and consequences of internal displacement. In respect to pre-flight considerations, 'systematic human rights violations' were recognised as a cause of displacement in their own right.<sup>179</sup> Indeed, this is seen in the international IDP definition today, which cites 'violations of human rights' as a cause.<sup>180</sup> Yet, in addition, the UN Secretary-General also concluded that, as well as being a cause in their own right, violations of human rights 'most often coincide and interact with other causes of massive displacement, in particular armed conflict'.<sup>181</sup> This reveals what could be termed the omnipresence of human rights infringements in the causes of displacement, that even if human rights violations may not be singled out as being the primary cause of displacement, they may often nonetheless play a secondary or underlying role. It is also worthwhile here noting that Deng, in his 1995 *Compilation and Analysis of Legal Norms*, recognised that 'apart from [in] situations of natural disasters, the strict observation and full realisation of all human rights for everyone is often the best method of *preventing* displacement'.<sup>182</sup> Most of the attention given to human rights considerations in the Analytical Report is, however, in respect to the consequences of displacement. Indeed, it is here that we see IDP needs being explicitly framed around, and categorised as, human rights concerns. The Analytical Report brought targeted attention to just 'some'<sup>183</sup> of the pertinent human rights concerns, including, *inter alia*, the right to food, the right to shelter and adequate living conditions, the right to life and personal integrity, and the right to education, as well as to rights concerned with freedom of residence and movement, and family unity.<sup>184</sup>

In 1992, the UN Secretary-General made an important observation. He recognised that many IDPs faced direct attacks on their human rights, 'whether at the hands of government or other forces'.<sup>185</sup> Today, we need only look to the situation in Myanmar, where there has been a widely-reported

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<sup>176</sup> Analytical Report, para 97.

<sup>177</sup> *ibid*, para 6.

<sup>178</sup> *ibid*, para 6.

<sup>179</sup> *ibid*, paras 37-39.

<sup>180</sup> *Guiding Principles*, introductory paragraph 2.

<sup>181</sup> Analytical Report, para 37.

<sup>182</sup> *Compilation and Analysis*, para 12 (emphasis added).

<sup>183</sup> Analytical Report, para 40.

<sup>184</sup> *ibid*, paras 41-47, 48-51, 58-59, 70-71, 64-66 and 67-69, respectively.

<sup>185</sup> *ibid*, para 6.

resurgence in the displacement of the Rohingya population, both internally and into Bangladesh,<sup>186</sup> on account of their being subjected to what the now former UN High Commissioner for Human Rights (UNHCHR), Zeid bin Ra'ad al-Hussein, has described as the 'devastating cruelty' of the Myanmar authorities.<sup>187</sup> Numerous reports have detailed extensive human rights violations, including torture, rape and summary executions, perpetrated by Myanmar's security forces against the Muslim Rohingya population in northern Rakhine State.<sup>188</sup> Indeed, for many years, the Myanmar Government has been accused of being 'directly and deliberately involved in the forced displacement of its own population', for means of suppressing political opposition and for 'questionable' development projects.<sup>189</sup> Yet, IDPs may also suffer rights violations as a result of State acquiescence, or as a consequence of an inability or unwillingness on the part of the relevant authorities to effectively prevent or respond to situations of internal displacement. For instance, in the South Caucasus, IDPs have often found themselves 'hostage to the political agendas of their governments',<sup>190</sup> as national authorities devote their attention to political, territorial and ethnic disputes, rather than to the legal protection of the individual rights of all persons within their jurisdiction, including IDPs. Further, domestic laws and policies that inadequately take into account the displacement context may result in the creation of seemingly insurmountable administrative, legal and practical obstacles that prevent IDPs from exercising their rights during displacement,<sup>191</sup> for instance, their right to access education and their right to vote.<sup>192</sup> Although perhaps at times unintended, such obstacles can render impossible the enjoyment by IDPs of their human rights.<sup>193</sup>

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<sup>186</sup> UN OCHA reported that, at the end of 2016, an estimated 23,000 people remained displaced inside the northern Rakhine State district of Maungdaw north (see UN OCHA, 'Humanitarian Bulletin: Myanmar' (Issue 4, 2016) 1).

<sup>187</sup> UN OCHA, 'Devastating Cruelty against Rohingya Children, Women and Men Detailed in UN Human Rights Report' (3 February 2017) <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21142&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21142&LangID=E)> accessed 19 February 2017.

<sup>188</sup> See, for example UN OCHA, 'Humanitarian Bulletin: Myanmar' (Issue 4, 2016); UN OCHR, 'Report of the OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: Flash Report' (3 February 2017).

<sup>189</sup> Roberta Cohen, 'Some Reflections on National and International Responsibility in Situations of Internal Displacement' (*Brookings*, 1 March 2004) <[www.brookings.edu/research/papers/2004/03/spring-humanrights-cohen](http://www.brookings.edu/research/papers/2004/03/spring-humanrights-cohen)> accessed 31 August 2014, 6.

<sup>190</sup> Francis Deng, 'The Plight of the Internally Displaced: A challenge to the International Community' (*Brookings*, June 2016) <[www.brookings.edu/wp-content/uploads/2016/06/20040408plight.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/20040408plight.pdf)> accessed 17 November 2017, 2; IDMC, 'Protracted Internal Displacement in Europe: Current Trends and Ways Forward' (IDMC, 2014) 8.

<sup>191</sup> Williams (2008) 27.

<sup>192</sup> Andrew Solomon, 'Election-Related Rights and Political Participation of Internally Displaced Persons' (Brookings-Bern Project November 2009) 4.

<sup>193</sup> Williams (2008) 4.

It would not, however, be true to say that the Analytical Report was concerned only with human rights, as humanitarian and development considerations did also feature. Indeed, it is today well-established that internal displacement is an inherently multi-faceted phenomenon that involves human rights, humanitarian, development, and, on occasion, peacebuilding dimensions.<sup>194</sup> This is clearly reflected in the international IDP regime, both institutionally and normatively. This is no more so the case than in respect to the international institutional response to internal displacement, which, in the absence of a single body solely mandated to protect and assist IDPs, consists of a large number of diverse UN and non-UN entities, organisations and individuals, acting within what is commonly-termed the ‘collaborative approach’.<sup>195</sup> This includes, for example, UN agencies such as the UNHCR and the UNDP; inter-agency coordination support provided by the IASC, which acts ‘as the primary mechanism for inter-agency coordination relating to humanitarian assistance in response to complex and major emergencies’;<sup>196</sup> and, *inter alia*, the Office of the United Nations High Commissioner for Human Rights (OHCHR), which acts in support of and in collaboration with the UN IDP mandate-holder.<sup>197</sup> Indeed, as discussed above, both the UNDP and the UN Commission on Human Rights played catalytic roles in initiating targeted UN involvement with the internal displacement issue. In respect to organisations external to the UN, the International Red Cross and Red Crescent Movement<sup>198</sup> has for many decades performed a critical role in IDP protection and assistance, often stepping in as ‘the residual institution where no other body is available, willing or competent to provide protection and assistance’.<sup>199</sup>

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<sup>194</sup> UNGA Res 70/165 ‘Protection of and Assistance to Internally Displaced Persons’ (22 February 2016) UN Doc A/RES/70/165, preamble para 7. In addition, see, for instance, the multi-faceted approach that permeates throughout the Cuénod Report, as well as Deng’s comment in the Compilation and Analysis that both ‘human rights and humanitarian standards play a paramount role when addressing the root causes of displacement’ (para 12).

<sup>195</sup> UN Commission on Human Rights, ‘Report of the Representative of the Secretary-General on internally displaced persons, Francis M. Deng’ (4 March 2004) UN Doc E/CN.4/2004/77, para 23; Roberta Cohen, ‘Protection of Internally Displaced Persons: National and International Responsibilities’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 602.

<sup>196</sup> IASC, ‘Concise Terms of Reference and Action Procedures’ (IASC February 2014) 3. Secretariat support is provided to the IASC by OCHA (see IASC, ‘Handbook for RCs and HCs on Emergency Preparedness and Response’ (IASC 2010) 2).

<sup>197</sup> UNGA Res 70/165 (22 February 2016) UN Doc A/RES/70/165, para 39.

<sup>198</sup> As comprised of the International Committee of the Red Cross (ICRC), the National Red Cross and Red Crescent Societies (National Societies), and the International Federation of Red Cross and Red Crescent Societies (IFRC) (source: Statutes of the International Red Cross and Red Crescent Movement (adopted in 1986, amended in 1995 and 2006) preamble).

<sup>199</sup> Cuénod Report, para 106. The Movement has itself recognised the importance of it filling this gap in IDP assistance and protection. In 1981, the International Conference of the Red Cross stated that ‘[t]he Red Cross should at all times be ready to assist and to protect refugees, displaced persons and returnees... especially when they cannot, in fact, benefit from any other protection or assistance, as in some cases of internally displaced persons’ (see 24<sup>th</sup> International Conference of the Red Cross, Res21 ‘International Red Cross Aid to Refugees: International Red Cross Aid to Refugees Statement of Policy’ (1981) para 1).

Yet, while humanitarian concerns and, to a lesser extent, developmental considerations,<sup>200</sup> did feature in the Analytical Report, when they did, this was through a dominant human rights framing. Such a framing is especially pronounced when humanitarian access is considered. Here, humanitarian activities are predominantly viewed through a human rights lens, specifically that the granting of humanitarian access ensures that IDPs ‘are not deprived of that which is essential to their survival’ (namely food, shelter, sanitation, and so on).<sup>201</sup> Essentially, humanitarian action is seen as a means by which to achieve human rights aims.<sup>202</sup> Although this may not appear especially unusual, what is more striking is the shift in the discussion towards considering the potential ‘[r]ecognition of a right of humanitarian access [itself] as a *human right*’.<sup>203</sup> While the UN Secretary-General recognised both the inherent humanitarian and human rights aspects of internal displacement, and therefore the importance of both humanitarian and human rights norms in this context, by bringing these together, he did so in a way that foregrounded the latter, with the result being that internal displacement was framed as an issue of primarily human rights concern. In so doing, the UN Secretary-General helped initiate what was to become a position of human rights dominance in the international internal displacement legal regime.

This framing of internal displacement through the lens of human rights protections has since continued throughout the UN’s subsequent work on the issue. This was clearly evident in the UN Commission on Human Rights’ March 1992 request to the UN Secretary-General ‘to designate a representative to seek again views and information from all Governments on *the human rights issues* related to internally displaced persons, including an examination of existing international human rights, humanitarian and refugee law and standards and their applicability to the protection of and relief assistance to internally displaced persons’,<sup>204</sup> as well as the addition of ‘human rights’ into the title of the UN IDP mandate. On this point, although ‘human rights’ did not explicitly feature within the original title of the mandate, the proposal to establish a dedicated UN IDP mandate was, from the outset, viewed through the lens of human rights. For instance, in the Cuénod Report, this was envisaged as a ‘mechanism for dealing with the *human rights aspects* of internally displaced persons’,<sup>205</sup> and in the Analytical Report, it was concluded that ‘[a]ssuming this responsibility to participate more actively in the response of the UN system to humanitarian crises involving displaced

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<sup>200</sup> Analytical Report, see, in particular, paras 3, 8 and 105.

<sup>201</sup> *ibid*, para 97.

<sup>202</sup> *ibid*, para 97.

<sup>203</sup> *ibid*, para 98 (emphasis added). See paras 93-102 for the full discussion.

<sup>204</sup> UN Commission on Human Rights Res 1992/73 (5 March 1992) UN Doc E/CN.4/RES/1992/73, para 2 (emphasis added).

<sup>205</sup> Cuénod Report, para 51 (emphasis added).

persons requires the creation of a focal point *within the human rights system*'.<sup>206</sup> The dominance of a human rights framing to internal displacement can also be seen in the normative framework that is the Guiding Principles, which is where express articulation of the rights of IDPs is to be found in international law.

#### 2.4.3 Rights protections in the UN Guiding Principles on Internal Displacement

The Guiding Principles provide international minimum standards for IDP rights protection.<sup>207</sup> They detail specific rights, guarantees and obligations that respond to identified IDP needs. This includes, yet extends beyond, those rights that were outlined by the UN Secretary-General in the Analytical Report, to cover rights also identified as pertinent in subsequent work conducted by Deng, as IDP mandate-holder. The Guiding Principles span a breadth of rights and guarantees, encompassing civil and political; and economic, social and cultural rights protections. These include, *inter alia*, the right to life,<sup>208</sup> the right to liberty and security,<sup>209</sup> the right to liberty of movement and freedom to choose one's own residence,<sup>210</sup> the right to an adequate standard of living,<sup>211</sup> and the right to education.<sup>212</sup> Such rights in respect to protection during displacement form the most substantial section of the Guiding Principles, constituting fourteen of the thirty Principles.<sup>213</sup> While this may not come as much of a surprise, such rights do comprise only one part of the Guiding Principles. This is because the Guiding Principles are designed to address protection needs, rights, guarantees and obligations during *all* phases of displacement, including, therefore, not only protection during displacement, but also protection during return or resettlement and reintegration, and protection from displacement in the first instance.<sup>214</sup> As a consequence, it is not in fact only IDPs who benefit from the Guiding Principles' provisions. Indeed, it is important here to remember that they are the Guiding Principles on *Internal Displacement*, and not the Guiding Principles on *Internally Displaced Persons*. This overarching framing, by phenomenon rather than by persons displaced, thereby permits the Guiding Principles a broader scope and reach.

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<sup>206</sup> Analytical Report, para 110 (emphasis added).

<sup>207</sup> UNGA, 'Protection of and assistance to internally displaced persons: Note by the Secretary-General' (10 August 2012) UN Doc A/67/289, para 33.

<sup>208</sup> Guiding Principles, Principle 10.

<sup>209</sup> *ibid*, Principle 12.

<sup>210</sup> *ibid*, Principle 14.

<sup>211</sup> *ibid*, Principle 18.

<sup>212</sup> *ibid*, Principle 23.

<sup>213</sup> *ibid*, Principles 1(1), 3(2) and 10-23.

<sup>214</sup> *ibid*, introductory para 3; Walter Kälin, 'The Guiding Principles on Internal Displacement and the Search for a Universal Framework of Protection for Internally Displaced Persons' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 617.

That the Guiding Principles deal with protection from displacement means that they are concerned with pre-displacement situations<sup>215</sup> and therefore with protections that in fact apply to all human beings. This is explicitly stated in the wording of Principle 6(1), which provides that ‘*Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence*’.<sup>216</sup> While pre-displacement concerns may not, at least on the face of it, necessarily have IDPs in mind, this is not to say that current IDPs are excluded from benefitting from such protections on account of their already being displaced, as such protections are vital for IDPs at risk of secondary or onward displacement. Protections from displacement constitute Section II of the Guiding Principles, that is, Principles 5-9. As Principle 6(1) reveals, the Guiding Principles do not in fact view all internal displacement as lawfully impermissible.<sup>217</sup> Its protection against being internally displaced is in fact a right to be protected against being *arbitrarily* internally displaced.<sup>218</sup> For the purposes of the Guiding Principles, Principle 6(2) details ‘an illustrative and non-exhaustive list of situations in which displacement would be arbitrary’.<sup>219</sup> This includes, *inter alia*, when displacement is based on policies or practices altering the ethnic, religious or racial composition of an affected population; when displacement is used as a collective punishment; and displacement in situations of armed conflict, disasters and large-scale development projects.<sup>220</sup> This is not, however, to say that the remainder of the Guiding Principles do not apply in situations of non-arbitrary internal displacement, but simply that there is no general protection against *all* forms of internal displacement (i.e. arbitrary *and non-arbitrary*) under the Guiding Principles. Principles 7 and 8 then go on to detail numerous safeguards in respect to the process by which a displacement decision is made, as well as arrangements to be put in place should such displacement occur. Specifically, Principle 7(1) asserts that displacement should be, in effect, a last resort, stating that all ‘feasible alternatives’ be explored in an attempt to avoid displacement altogether, and that when displacement is required, that ‘all measures shall be taken to minimize displacement and its adverse effects’. Principle 7(2) states that ‘proper accommodation’ be provided to those who have been displaced, and Principle 7(3) sets out

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<sup>215</sup> Phuong (2005) 57.

<sup>216</sup> Guiding Principles, Principle 6(1) (emphasis added).

<sup>217</sup> Annotations, 27.

<sup>218</sup> Guiding Principles, Principle 6(1).

<sup>219</sup> Annotations, 30.

<sup>220</sup> Guiding Principles, Principles 6(2)(a), 6(2)(e), 6(2)(b), 6(2)(d), and 6(2)(c) respectively. It is worth noting that while displacements in the context of armed conflict, large-scale development projects, and disasters may not constitute arbitrary displacement in certain exceptional circumstances, displacement based on altering the composition of the affected population and displacement when used as a collective punishment are absolutely prohibited.



several guarantees,<sup>221</sup> for instance, that '[t]he free and informed consent of those to be displaced shall be sought',<sup>222</sup> and that the right to an effective remedy by which a displacement decision can be reviewed be respected.<sup>223</sup>

Two further groups of persons with whom the Guiding Principles are concerned are persons who were IDPs, and persons during times of transition, which includes those who are in the process of being displaced<sup>224</sup> and those who are in the process of returning to their homes or places of habitual residence or resettling to another part of their country.<sup>225</sup> For those who have either returned to their homes or resettled in another part of the country, Principle 29(1) states that they 'shall not be discriminated against as a result of their having been displaced', in particular, in respect to participation in public affairs and access to public services. Principle 29(2) then asserts the 'duty and responsibility' of '[c]ompetent authorities' to assist in the recovery of property and possessions, or, if this is not possible, the obtaining of 'appropriate compensation or another form of just reparation'. During times of transition, Principle 8 asserts that 'Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected', and Principle 28(1) states that IDPs be allowed to return to their homes or places of habitual residence 'voluntarily, in safety and with dignity'. This latter point will of course be explored in greater detail during the course of this Thesis.

Finally, the Guiding Principles also detail rights and protections for persons engaged in humanitarian assistance. For example, Principle 25(2) gives international humanitarian organisations and other appropriate actors the 'right to offer their services in support of the internally displaced'.<sup>226</sup> Once consent is granted by the relevant authorities,<sup>227</sup> such humanitarian assistance and the relevant personnel are to be given 'rapid and unimpeded access' to IDPs,<sup>228</sup> and those persons 'engaged in

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<sup>221</sup> The guarantees set out in Principle 7(3) apply 'in situations other than during the emergency stages of armed conflicts and disasters'.

<sup>222</sup> Guiding Principles, Principle 7(3)(c).

<sup>223</sup> *ibid*, Principle 7(3)(f).

<sup>224</sup> For example, Principle 8 states that '[d]isplacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected'.

<sup>225</sup> For example, Principle 28(1) states that IDPs be allowed to return to their homes or places of habitual residence 'voluntarily, in safety and with dignity'.

<sup>226</sup> Guiding Principles, Principle 25(2).

<sup>227</sup> *ibid*, states that '[c]onsent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.'

<sup>228</sup> *ibid*, Principle 25(3) in respect to assistance during displacement, and Principle 30 in respect to assistance during return or resettlement and reintegration.

humanitarian assistance, their transport and supplies shall be respected and protected',<sup>229</sup> and 'shall not be the object of attack or other acts of violence'.<sup>230</sup>

Adoption of the Guiding Principles marked a crucial juncture in the international community's response to internal displacement, and they have since become a core element of the international IDP regime. Their existence has been crucial to cementing IDPs as a distinct group of persons of concern, bound together not only by their common factual state of being involuntarily displaced internally, but also by their specific needs and associated rights, which, as argued above, exist as a direct consequence of that factual state. Indeed, the headline purpose of the Guiding Principles is to 'address the specific needs of internally displaced persons worldwide'.<sup>231</sup> In this respect, Mooney has gone as far as to say that these needs, which the Guiding Principles seek to address, are the 'unique needs' of IDPs.<sup>232</sup> Yet, to say that IDP *needs* are 'unique', or, as stated by the UN Secretary-General, 'qualitatively different',<sup>233</sup> is not, however, to say that IDP *rights* are 'unique' or in any way fundamentally 'different' from already existing rights. As Cohen says, 'The purpose of course of identifying IDP vulnerabilities is not to confer a privileged status on them but to ensure that in a given situation their unique needs are addressed along with those of others'.<sup>234</sup>

As has already been alluded to, the needs and rights of IDPs have, from the time of the Analytical Report, been framed very much within the ambit of already-established rights, predominantly within the scope of existing human rights norms. Indeed, the UN Secretary-General's call for the development of an international IDP framework was a call precisely for '*fashioning from existing standards* one comprehensive, universally applicable body of principles which addresses the main needs and problems of such persons [IDPs]'.<sup>235</sup> This can be seen, perhaps most clearly, in the Compilation and Analysis, and in the Annotations. The Compilation and Analysis, in particular, went into great detail to firmly ground IDP needs within already existing international legal standards. The Guiding Principles therefore do not create any new rights, *per se*. In other words, the rights contained within the Guiding Principles are not rights to which IDPs, and IDPs alone, are entitled. The approach to developing the Guiding Principles has instead been described as one of 'compilation and

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<sup>229</sup> *ibid*, Principle 26.

<sup>230</sup> *ibid*.

<sup>231</sup> *ibid*, introductory para 1.

<sup>232</sup> Mooney (2005) 18.

<sup>233</sup> Analytical Report, para 91.

<sup>234</sup> Roberta Cohen, 'Protection of Internally Displaced Persons: National and International Responsibilities' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 594.

<sup>235</sup> Analytical Report, para 104 (emphasis added).

adaptation',<sup>236</sup> of restating and spelling out.<sup>237</sup> In practical terms, this approach plays out in the formulation of the Principles in three main ways, categorised by Kälin as, first, the reiteration of existing rights, second, the inference of specific rights from existing rights, and third, the analogising of IDP rights from existing legal provisions.<sup>238</sup>

The first, the reiteration of existing rights, needs no explanation. This involves the restatement, usually verbatim, of already-established human rights. Principle 12, which concerns the right to liberty and security of the person, can here be used by way of example. Principle 12 asserts the well-established human rights standard that 'Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'.<sup>239</sup> As Kälin has emphasised, this, and similar provisions, can be found in all major international and regional human rights instruments, for example, in the International Covenant on Civil and Political Rights (ICCPR), in Article 9(1).<sup>240</sup>

The second, the inference of specific rights from existing rights, flows directly from the first. This involves the deduction from existing rights of more specific rights that are designed to promote IDPs' enjoyment of the existing, general right. Again, taking Principle 12 by way of example. Principle 12 does not only reiterate an established standard, but goes further, by stating, first, that IDPs 'shall not be interned in or confined to a camp',<sup>241</sup> second, that IDPs 'shall be protected from discriminatory arrest and detention as a result of their displacement',<sup>242</sup> and third, that IDPs '[i]n no case... be taken hostage'.<sup>243</sup> Principle 12 thus restates an already-established human rights provision that applies to 'every human being', including of course IDPs, before then providing further precise detail, in the form of more specific rights, as to how this general legal norm can be made effective in an internal displacement context. In this way, Principle 12 offers an example of how the Guiding Principles seek to work towards the more effective implementation of already existing international law by directly responding to considerations that are of particular relevance in a displacement context.

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<sup>236</sup> UNGA, 'Protection of and assistance to internally displaced persons: Note by the Secretary-General' (10 August 2012) UN Doc A/67/289, para 24.

<sup>237</sup> Annotations, 6.

<sup>238</sup> Kälin (2001) 5.

<sup>239</sup> Guiding Principles, Principle 12(1).

<sup>240</sup> Annotations, 58.

<sup>241</sup> Guiding Principles, Principle 12(2).

<sup>242</sup> *ibid*, Principle 12(3).

<sup>243</sup> *ibid*, Principle 12(4).

The third, the analogising of IDP rights from existing legal provisions, is altogether more complex. In the Compilation and Analysis, Deng had identified a series of ‘grey areas and gaps’<sup>244</sup> that existed at that time in international law, when applied to the internal displacement context. The Guiding Principles sought to clarify these legal uncertainties and omissions,<sup>245</sup> but to do so required, in some instances, an even greater degree of extension of existing provisions than merely inferring specific rights from already well-established rights. Examining the content of the Guiding Principles, together with the Annotations, and the Compilation and Analysis, reveals that this greater degree of extension exists along a ‘variable scale’. At the lesser end of the scale are rights for which, at the time of drafting the Guiding Principles, there was shown to be some, albeit inconclusive, basis in international human rights law (IHRL), but which, with support from explicit provisions found in international humanitarian law (IHL), could together provide the evidence base needed for the express articulation of that right in the Guiding Principles. At the more extreme end of the scale are rights that enjoy, at best, only implicit support in IHRL. The express articulation of such rights in the Guiding Principles is therefore ultimately grounded in provisions of international law that exist outside of IHRL, these provisions themselves being either explicitly, or on the rarest of occasions, only implicitly found within wider international legal frameworks.

An example at the lesser end of this scale is Principle 16. In contrast to Principle 12, as mentioned above, Principle 16(1), rather than beginning with ‘Every human being...’, instead addresses IDPs only, by asserting that ‘All internally displaced persons have the right to know the fate and whereabouts of missing relatives’.<sup>246</sup> *Prima facie*, this appears to indicate the emergence of a new legal right specific to IDPs, and applicable to IDPs alone. Yet, this would be a somewhat superficial reading. In the Annotations, Kälin details what were already, at the time of drafting the Guiding Principles, the foundations of such a right in international law. In respect to IHRL, he identified particularly pertinent provisions contained in the ECHR,<sup>247</sup> albeit that these did not provide express articulation of this right. In IHL, however, fundamentally the same provision as is now stated in Principle 16(1) was already articulated, in Article 33 of Protocol I to the Geneva Conventions. The obstacle identified by Kälin in this instance was that the ICRC Commentary to Protocol I expressly states that Article 33 does not

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<sup>244</sup> UNGA, ‘Protection of and assistance to internally displaced persons: Note by the Secretary-General’ (10 August 2012) UN Doc A/67/289, para 24.

<sup>245</sup> Annotations, 6.

<sup>246</sup> Guiding Principles, Principle 16(1). The following sub-sections then go on to explore in greater depth the specific actions and assurances required to realise this right for IDPs, such as the protection and respect of grave sites (Principle 16(4)), and the responsibility of the authorities concerned to collect and identify the mortal remains of the deceased (Principle 16(2)).

<sup>247</sup> Specifically, ECHR Articles 3 and 8.

apply to IDPs.<sup>248</sup> Yet, Kälin was able to point to further statements in the ICRC Commentary that, in his view, provided the flexibility needed by which Article 33 can, at least to some degree, be extended to cover IDPs.<sup>249</sup> By combining these provisions of IHL and IHRL, Kälin was satisfied to conclude that this formed ‘a more solid basis for such an individual right’,<sup>250</sup> sufficient to justify express articulation of ‘the right to know the fate and whereabouts of missing relatives’ in the Guiding Principles. Similarly, the bringing together of existing legal provisions, predominantly from IHL, but with some support from IHRL, can be seen in Principle 21 in respect to arbitrary deprivation of property and possessions. Principles 21(2) and 21(3) state that the property and possessions of IDPs shall be protected against, *inter alia*, pillage<sup>251</sup> and direct or indiscriminate attack,<sup>252</sup> and that the property and possessions left behind by IDPs be ‘protected against destruction and arbitrary and illegal appropriation, occupation or use’.<sup>253</sup> Again, it can be observed from Kälin’s commentary that the source of these rights lies predominantly in IHL, albeit that support, once again, can also be deduced from general provisions of IHRL.<sup>254</sup>

At the more extreme end of the variable scale is Principle 6, introduced above, which concerns the ‘right to be protected against being arbitrarily displaced’.<sup>255</sup> This may be one of the foundational rights in the Guiding Principles, yet this does not mean that it enjoys the strongest basis in already-existing international law. During his preparatory research, Deng identified that such a right was not explicitly mentioned in any existing international legal instrument.<sup>256</sup> There did, however, exist an explicit prohibition of arbitrary displacement, albeit applicable only in some limited circumstances.<sup>257</sup> This prohibition of arbitrary displacement is expressed in IHL, in Geneva Convention IV and its associated Protocols, as well as in ILO Convention No 169 concerning the rights of indigenous peoples.<sup>258</sup> In IHRL, any such prohibition was found to be far less apparent, although Deng did deem this to be closely connected to the right to liberty of movement and freedom to choose one’s own residence, as

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<sup>248</sup> Annotations, 71-72.

<sup>249</sup> *ibid*, 72-73.

<sup>250</sup> *ibid*, 73-74.

<sup>251</sup> Guiding Principles, Principle 21(2)(a).

<sup>252</sup> *ibid*, Principle 21(2)(b).

<sup>253</sup> *ibid*, Principle 21(3).

<sup>254</sup> Annotations, 95-100.

<sup>255</sup> Guiding Principles, Principle 6.

<sup>256</sup> Kälin (2001) 6.

<sup>257</sup> *ibid*.

<sup>258</sup> Annotations, 27-30. In the Annotations, Kälin also refers to the possibility of the forced movement or the forcible transfer of a civilian population as amounting to a war crime or a crime against humanity under Article 8(2) and Article 7(1), respectively, of the Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010) 2187 UNTS 3. However, it is of course of note to highlight for present purposes that the adoption of the Rome Statute post-dated Deng’s work on the Compilation and Analysis in the mid-1990s.

provided for in, *inter alia*, ICCPR Article 12(1).<sup>259</sup> There therefore existed no explicit right to protection from arbitrary displacement anywhere in international law, and a prohibition of arbitrary displacement that was only applicable in limited circumstances. Yet, Deng concluded that to bring this all together would nonetheless be sufficient to provide the legal basis necessary to justify express articulation of a right to be protected against arbitrary displacement in the Guiding Principles. In the words of Kälin, the Guiding Principles thus gave explicit articulation to a right that, while expressly absent, was nonetheless considered to be 'already implicit in international law'.<sup>260</sup>

These three examples, of Principles 16, 21 and 6, collectively reveal what is an interesting extension of already-established rights. In each of these cases, what are primarily IHL provisions have been extended, through a process of inference and extrapolation, to cover all persons who are, have been, or may be, affected by internal displacement, whatever the cause of their displacement. Yet, IHL provisions do not, by definition, apply in all situations of internal displacement, this being because the application of IHL is limited to contexts of armed conflict, as this term is understood under IHL. Furthermore, IHL is also limited in that many of its provisions apply only in the context of international armed conflict, and so therefore have limited application to many situations of internal displacement.<sup>261</sup> But by seeking out and interpreting aspects of IHRL in a way that offers subsidiary support to existing IHL provisions, the latter have been recast, transformed, or simply transplanted into what are essentially human rights provisions, with the consequence being that they are now applicable in contexts in which they otherwise would not be engaged. Therefore, although the rights found in the Guiding Principles may not be new, *per se*, what is new is their now unequivocal application in all possible internal displacement contexts. Kälin has referred to this as simply a 'merging' of language,<sup>262</sup> yet, it does appear to add support to Phuong's argument that, despite the drafters saying they did not go beyond existing provisions, they in fact did, at least to this extent.<sup>263</sup>

In sum, none of this is therefore fundamentally new. While the Guiding Principles are a vital articulation of rights associated with internal displacement, and while, through extending established rights protections they go some way towards providing much needed clarity where before there were gaps and uncertainties, they are, in essence, no more than a restatement of already existing

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<sup>259</sup> Compilation and Analysis, para 243. See also Kälin (2001) 5.

<sup>260</sup> Kälin (2001) 6.

<sup>261</sup> The role of IHL, and its limitations, will be examined in greater detail in Chapter Three.

<sup>262</sup> Walter Kälin, 'The Guiding Principles on Internal Displacement and the Search for a Universal Framework of Protection for Internally Displaced Persons' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 620-621.

<sup>263</sup> Phuong (2005) 61.

international law adapted, to a greater or lesser extent, to the internal displacement context.<sup>264</sup> As Kälin has asserted quite conclusively, ‘Even where language was used [in the Guiding Principles] that was not to be found in existing treaty law, no new law in the strict sense of the word was created in most cases’.<sup>265</sup> It was realised by those involved in the drafting that it was simply not necessary to create any new law, as existing law could comprehensively respond to the identified needs of IDPs.<sup>266</sup> In this sense, the Guiding Principles exemplify what Koser has called ‘an innovative “bottom-up” approach’ to standard-setting.<sup>267</sup> Yet, what this discussion has shown is that the Guiding Principles do not simply compile or codify existing provisions that already apply in situations of internal displacement. They in fact go some way further than this, by not only inferring specific rights from general rights, but by also transplanting and remoulding provisions from what is an array of existing sources of law, and extending these into the internal displacement domain. This discussion also reveals an interesting nuance in the legal standing of the Guiding Principles. While the Guiding Principles, as a single instrument, do not form a legally-binding instrument, it would be erroneous to suggest that the individual Principles themselves are without any binding legal force, given that each is ‘firmly grounded’ in already-established, predominantly ‘hard’, international law.<sup>268</sup> As such, in no way does the Guiding Principles’ ‘soft law’ status mean that IDP rights are ‘relegated’ to any supposed ‘lesser’ realm of soft law. Established binding international law standards provide the original source of the rights found in the Guiding Principles, with it being the function of the Guiding Principles to seek to support implementation and compliance with these standards.<sup>269</sup>

## **2.5 Conclusion**

The development of the international IDP regime over the past three decades has been nothing short of remarkable. While it is unequivocal that national authorities hold the ‘primary duty and responsibility’ for persons within their jurisdiction who are displaced internally,<sup>270</sup> IDPs have indeed

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<sup>264</sup> UNGA, ‘Protection of and assistance to internally displaced persons: Note by the Secretary-General’ (10 August 2012) UN Doc A/67/289, para 24.

<sup>265</sup> Kälin (2001) 6.

<sup>266</sup> UNGA (10 August 2012) UN Doc A/67/289, para 24.

<sup>267</sup> Khalid Koser, ‘The Global IDP Situation in a changing humanitarian context’ (*Brookings*, 4 September 2007) 6.

<sup>268</sup> Phuong (2005) 66; IDMC- Brookings-LSE, ‘National Instruments on Internal Displacement: A Guide to their Development’ (August 2013) available at <[www.brookings.edu/wp-content/uploads/2016/06/Lawandpolicymaking\\_Guide2013.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/Lawandpolicymaking_Guide2013.pdf)> accessed 1 September 2014, 15.

<sup>269</sup> Cordula Droege, ‘Developments in the Legal Protection of IDPs’ (2008) *Forced Migration Review* (Special Issue: Ten Years of the Guiding Principles on Internal Displacement) 9.

<sup>270</sup> Guiding Principles, Principle 3(1); UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons’ (11 April 2018) UN Doc A/HRC/38/39, para 13.

now become ‘the responsibility of the world community’.<sup>271</sup> The intention in this Chapter has been to trace and analyse this development towards IDPs, and IDP rights, being accepted as a central concern of international law, as it is within this framework that the IDP right to return exists.

This Chapter has shown that to reach this point has demanded foundational political, legal and, perhaps most crucially, conceptual developments. Specifically, it has required recognition that IDPs constitute a distinct and definable group of persons who are deserving of international attention on account of the wrongs they have suffered as a direct consequence of their being displaced. Moreover, it has been essential for the purpose of cementing and sustaining a dedicated international IDP regime that these needs and rights be accepted as primarily (albeit not exclusively) human rights concerns. Yet, it has also been revealed that the intention of the international IDP regime is not to proclaim or to promote any new rights to which IDPs, and IDPs alone, are entitled. Indeed, it has been argued clearly and consistently over recent decades that the rights of IDPs, as expressed in the Guiding Principles, are of fundamentally no substantive difference to the rights to which others (i.e. non-IDPs) are entitled, and to which IDPs were already entitled prior to their displacement. This raises a crucial question. That is the question of how the Guiding Principles, and the international IDP regime in its entirety, therefore seek to achieve their headline purpose of ‘address[ing] the specific needs of internally displaced persons worldwide’.<sup>272</sup> If this not be through the development of any new or substantively different rights, then it must instead be a question of degree, specifically, the degree to which already-established rights are, or, more accurately, are not, enjoyed by IDPs. Moreover, as a question of degree, it then becomes an issue of difference or inequality, specifically, in the relative enjoyment of basic rights by IDPs vis-à-vis non-IDPs.

UN Secretary-General Boutros Boutros-Ghali characterised difference in the ‘effective enjoyment’ of fundamental rights as ‘an injustice’, an injustice, which, when it occurs, justifies action.<sup>273</sup> In this case, this has been through ‘the creation of a more effective system for the protection of the rights of internally displaced persons’.<sup>274</sup> The injustice of inequality in rights enjoyment between IDPs and non-IDPs provided the rationale for the inception of a dedicated international IDP regime, and it is this same ongoing injustice of inequality that continues to underpin and justify the maintenance of this regime today. Inspired by the words of the former UN Secretary-General, it indeed becomes clear that the effective enjoyment of basic rights by all IDPs and non-IDPs, without discrimination, is the

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<sup>271</sup> Here recalling the words of Brundland at SARRED in 1988 (as mentioned earlier in this Chapter).

<sup>272</sup> Guiding Principles, introductory para 1.

<sup>273</sup> Analytical Report, para 9.

<sup>274</sup> *ibid*, para 9.



'ultimate concern' of the international IDP regime. It is this that underpins the international IDP regime, and it is this key finding that will now be taken forward in this Thesis as the attention shifts to focus precisely on the IDP right to return.

### 3.1 Introduction

Over recent years, there has been a demonstrable shift in international politics towards greater recognition of the right of all IDPs to return to their homes or places of habitual residence. As introduced in Chapter One, calls for IDPs to be able to enjoy their right to return have notably come from the UN General Assembly and the UN Security Council, and references to a right to return for IDPs have formed a critical component of high-profile peace agreements. However, it must be remembered that the vast majority of these references have been narrowly conceived, being directed to specific and limited contextual circumstances. Indeed, it was not until December 2015 that the UN General Assembly authoritatively asserted a general IDP ‘right of voluntary return in safety and dignity’, without qualification, restriction or any other form of distinction.<sup>1</sup>

The primary aim of this Chapter is to interrogate these proclamations of an IDP right to return from the position of international law. Specifically, the aim is to identify to what extent international law explicitly provides for a general IDP right to return. In pursuit of this aim, it will be necessary to draw upon a breadth of international law, including, but not limited to, IHRL, as well as the Guiding Principles and the Pinheiro Principles. In addition to UN legal frameworks, insights will also be drawn from the most pertinent legal frameworks and jurisprudence from the regional human rights treaty bodies. By viewing these legal instruments and jurisprudence through the lens of internal displacement, this Chapter will show that, despite the demonstrable shift over recent decades towards, first, recognising IDPs as a distinct group of concern, and second, towards asserting a general IDP right to return, little progress has been made towards realising in international law an equivalent comprehensive and unequivocal right to return for all IDPs. This is not to say that such a right does not exist, but it is to say that its most authoritative expression remains to be deduced from general IHRL standards that it has been claimed are inadequate for the purpose of effectively securing the enjoyment of IDP rights in reality.

This Chapter will also draw insights from selected domestic legal frameworks. The intention here is not to comprehensively survey all legal provisions in every country affected by internal displacement. Indeed, it would not be possible in this Thesis to do so with justice. The intention is to instead reveal

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<sup>1</sup> UNGA Res 70/165 ‘Protection of and Assistance to Internally Displaced Persons’ (22 February 2016) UN Doc A/RES/70/165, preamble.

further provisions and statements that will help in building a richer framework on IDP return, which will then help to inform discussions in Part III of this Thesis. This Chapter will conclude by setting out a clear position in respect to the current legal basis for the international IDP right to return.

### **3.2 Human Rights Treaty Law**

#### **3.2.1 Core IHRL treaties**

IHRL recognises as fundamental the right to return to one's own country. This right can be sourced from numerous core IHRL treaties, whether this be expressed through an explicit 'right to return to one's own country' or an associated 'right to enter one's own country'. The 'right... to return to one's own country' is notably articulated in Article 5(d)(ii) of the 1965 International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),<sup>2</sup> and the 'right to enter one's own country' is found in many core IHRL treaties, including in Article 12(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> Article 10(2) of the 1989 Convention on the Rights of the Child (CRC),<sup>4</sup> Article 18(1)(d) of the 2006 Convention on the Rights of Persons with Disabilities (CRPD),<sup>5</sup> and Article 8(2) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).<sup>6</sup> Despite the linguistic change from 'return' to 'enter', it can be accepted without too much conceptual difficulty that the 'right to enter' encompasses a 'right to return'. Indeed, the UN Human Rights Committee has affirmed in its General Comment No 27 that, despite the absence of the word 'return' in ICCPR Article 12(1), the right to enter one's own country does nevertheless include a 'right to return after having left one's own country'.<sup>7</sup>

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<sup>2</sup> International Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

<sup>3</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>4</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. In this respect, Article 10(2) specifically provides for 'the right of the child and his or her parents... to enter their own country'.

<sup>5</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106.

<sup>6</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158. In this respect, Article 8(2) specifically provides for the right of migrant workers and members of their families 'to enter and remain in their State of origin'.

<sup>7</sup> UN Human Rights Committee, 'General Comment No 27: Freedom of Movement (Article 12)' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 19.

When applied to the forced migration context, these right to return provisions are clearly applicable to refugees who, by definition, are outside of their home country (the country from which they were displaced).<sup>8</sup> Indeed, the right to return to one's own country, as provided for here in IHRL, has been recognised by the UN Human Rights Committee as being 'of the utmost importance for refugees seeking voluntary repatriation',<sup>9</sup> especially given that neither the 1951 UN Refugee Convention nor the 1967 Protocol contain any explicit right to return for refugees to their country of nationality. Yet, such a right self-evidently requires an individual to be located outside of their own country. As such, while it is clear that this right applies to refugees, it is equally clear that it does not apply to IDPs who, by definition, remain located in the same country within which they were displaced, this being their home country.<sup>10</sup> In fact, none of the general IHRL treaties include a direct and explicit 'right to return' that is applicable in the territorial circumstances of IDPs.<sup>11</sup> The closest that the core IHRL treaties come to such a right is not through any express articulation of a 'right to return', but through inference from liberty of movement provisions.<sup>12</sup>

The dual right to liberty of movement and freedom to choose one's own residence is authoritatively stated in ICCPR Article 12(1),<sup>13</sup> as well as elsewhere throughout international and regional human rights law.<sup>14</sup> Unlike ICCPR Article 12(4), ICCPR Article 12(1) does apply to IDPs given that it is specifically

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<sup>8</sup> Refugee Convention Article 1(A)(2) states the requirement that a refugee be 'outside of the country of his nationality'.

<sup>9</sup> UN Human Rights Committee, 'General Comment No 27: Freedom of Movement (Article 12)' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 19.

<sup>10</sup> Guiding Principles introductory para 2 states the requirement that IDPs 'have not crossed an internationally recognised State border'. This is contrary to the unsupported assertion made by Ojeda that 'the right to return applies to all persons who have been displaced... This obligation derives from the well-established human rights principle according to which everyone has the right to leave his country and return to it' (see Stephane Ojeda, 'International Humanitarian Law and the Protection of Internally Displaced Persons' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 642). Indeed, as will be shown throughout this Chapter, it has been consistently argued by those at the centre of the international IDP regime that the IDP right to return is to be deduced not from ICCPR Article 12(4) but from ICCPR Article 12(1).

<sup>11</sup> Moetsi Duchatellier and Catherine Phuong, 'The African Contribution to the Protection of Internally Displaced Persons: A Commentary on the 2009 Kampala Convention' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 661.

<sup>12</sup> *ibid.*

<sup>13</sup> ICCPR Article 12(1) states that '[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'.

<sup>14</sup> In addition to ICCPR Article 12(1), the right to liberty of movement and freedom to choose one's own residence can be found, in various linguistic variations, throughout international and regional human rights treaties. These include (in chronological order): ECHR Protocol IV Article 2(1), ICERD Article 5(d)(i), ACHR Article 22(1), CEDAW Article 15(4) (in respect to 'accord[ing] to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile'), ACHPR Article 12(1), ICRMW Article 39 (in respect to the territory of the State of employment), Arab Charter Article 26(1), and CRPD Article 18(1) (in respect to 'recogni[zing] the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others').

concerned with internal movement. The UN Human Rights Committee made some important statements in respect to the applicability of ICCPR Article 12(1) to situations of internal displacement in its General Comment No 27. In this, the UN Human Rights Committee stated that ‘the right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement’<sup>15</sup> and ‘precludes preventing the entry or stay of persons in a defined part of the territory’, albeit that these be subject, as ICCPR Article 12(1) is, to the qualifications outlined in ICCPR Article 12(3).<sup>16</sup> Moreover, the UN Human Rights Committee importantly affirmed that the right to move freely applies to ‘the whole territory of a State’.<sup>17</sup> In addition to General Comment No 27, some further, albeit limited, insights can also be gleaned from the UN Human Rights Committee’s communications on the matter.

### 3.2.2 UN Human Rights Committee communications

The UN Human Rights Committee has made a series of important pronouncements in respect to alleged violations of the right to liberty of movement and freedom to choose one’s own residence under Article 12(1). It has determined that refusal to issue a passport, or its confiscation, can result in unlawful restrictions of freedom of movement, both in respect to internal and international movement.<sup>18</sup> It has decided that reporting obligations placed on traveller communities in France constituted a restriction on liberty of movement in violation of Article 12(1).<sup>19</sup> Further, instances of unlawful and arbitrary house arrest,<sup>20</sup> and the use of internal banishment to one’s native village as an

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<sup>15</sup> UN Human Rights Committee, ‘General Comment No 27: Freedom of Movement (Article 12)’ (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 7.

<sup>16</sup> *ibid.* ICCPR Article 12(3) states that ‘[t]he above-mentioned rights [which includes ICCPR Article 12(1)] shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.’ ICCPR Article 12(3) will be discussed in far greater detail later in this Thesis, in particular, in Chapter Four.

<sup>17</sup> *ibid.*, para 5.

<sup>18</sup> UN Human Rights Committee, *Marques de Morais v Angola* Communication No 1128/2002 (2005) UN Doc CCPR/C/83/D/1128/2002, para 6.9; UN Human Rights Committee, *Angel N Oló Bahamonde v Equatorial Guinea* Communication No 468/1991 (1993) UN Doc CCPR/C/49/D/468/1991, para 9.3; UN Human Rights Committee, *Henry Kalenga v Zambia* Communication No 326/1988 (1993) UN Doc CCPR/C/48/D/326/1988, para 6.4; UN Human Rights Committee, *Chiiko Bwalya v Zambia* Communication No 314/1988 (1993) UN Doc CCPR/C/48/D/314/1988, para 6.5.

<sup>19</sup> UN Human Rights Committee, *Ory v France* Communication No 1960/2010 (2014) UN Doc CCPR/C/110/DR/1960/2010, para 8.5.

<sup>20</sup> UN Human Rights Committee, *Gorji-Dinka v Cameroon* Communication No 1134/2002 (2005) UN Doc CCPR/C/83/D/1134/2002, para 5.5; UN Human Rights Committee, *Maral Yklymova v Turkmenistan* Communication No 1460/2006 (2009) UN Doc CCPR/C/96/D/1460/2006, para 7.5.

administrative punishment,<sup>21</sup> have been considered to be unlawful deprivations of freedom of movement, and therefore in contravention of Article 12(1). Conversely, the UN Human Rights Committee has determined that restrictions placed on the freedom of movement of those to whom an expulsion order has been issued, but cannot be enforced, are compliant with Article 12(1) when reasons of national security are invoked to justify such restrictions, as is in accordance with Article 12(3).<sup>22</sup> Yet, while these communications may have dealt with restrictions on liberty of movement, none have explicitly involved internal displacement. The closest that the UN Human Rights Committee has come to explicit discussion of IDP concerns in respect to ICCPR Article 12(1) has been in the two communications of *El Hojoui Jum'a et al. v Libya*,<sup>23</sup> and *Jiménez Vaca v Colombia*.<sup>24</sup>

In *El Hojoui Jum'a*, a stateless family of Palestinian origin who had settled in Tarhuna, Libya,<sup>25</sup> claimed to have been forced to leave their home for fear of being killed.<sup>26</sup> The family first went into hiding in Tripoli before then being forced to leave Libya for the Netherlands, where they obtained refugee status.<sup>27</sup> The view of the UN Human Rights Committee was that the family, having been compelled to leave their home in Tarhuna to flee to Tripoli, had suffered a violation of their Article 12(1) right to freedom to choose their residence within the State party's territory.<sup>28</sup> Similarly, in *Jiménez Vaca*, the author, a practising trial lawyer and legal advisor to several trade unions and people's organisations,<sup>29</sup> and a member of a high-level government commission,<sup>30</sup> was forced to flee, first from Urabá to Medellín, and then on to Bogotá, due to death threats and harassment he was receiving in connection with his work.<sup>31</sup> Then, following a violent attack against him, the author fled to the UK where he was

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<sup>21</sup> UN Human Rights Committee, *Birindwa ci Bithashwiwa, Tshisekedi wa Mulumba v Zaire* Communication Nos 241/1987 and 242/1987 (1989) UN Doc CCPR/C/37/D/242/1987, para 13; UN Human Rights Committee, *Mpaka-Nsusu v Zaire* Communication No 157/1983 (1986) UN Doc CCPR/C/27/D/157/1983, para 10.

<sup>22</sup> UN Human Rights Committee, *Celepli v Sweden* Communication No 456/1991 (1994) UN Doc CCPR/C/51/D/456/1991, para 9.2; UN Human Rights Committee *Karker v France* Communication No 833/1998 (2000) UN Doc CCPR/C/70/D/833/1998, para 9.2.

<sup>23</sup> UN Human Rights Committee, *El Hojoui Jum'a et al. v Libya* Communication No 1958/2010 (2014) UN Doc CCPR/C/111/D/1958/2010.

<sup>24</sup> UN Human Rights Committee, *Jiménez Vaca v Colombia* Communication No 859/1999 (2002) UN Doc CCPR/C/74/D/859/1999.

<sup>25</sup> *El Hojoui Jum'a*, para 2.1.

<sup>26</sup> *ibid*, para 6.6.

<sup>27</sup> *ibid*, paras 2.1 and 3.4.

<sup>28</sup> *ibid*, paras 5.4 and 6.6. It is here important to note that the UN Human Rights Committee did not consider as substantiated for the purposes of admissibility the authors' claims that the Libyan State had interfered with their liberty of movement. However, the UN Human Rights Committee did consider sufficiently substantiated for the purposes of admissibility their claim of an interference with their freedom to choose their residence, which was therefore deemed to be admissible.

<sup>29</sup> *Jiménez Vaca*, para 2.1.

<sup>30</sup> *ibid*, para 2.11.

<sup>31</sup> *ibid*, paras 2.11-2.12.

granted refugee status.<sup>32</sup> The UN Human Rights Committee, having found that the author's right to security of person under ICCPR Article 9(1) had been violated, concluded that there had been 'no effective domestic remedies allowing the author to return from involuntary exile in safety',<sup>33</sup> and as such, 'the State party ha[d] not ensured to the author his right to remain in, return to and reside in his own country', in violation of Article 12(1) and Article 12(4).<sup>34</sup>

As was mentioned above, the UN Human Rights Committee did not explicitly use the term internal displacement in its decisions. It is though apparent that the authors of these two communications were internally displaced, on account of them having been forced to flee their homes due to generalised violence, and so thereby clearly falling within the scope of the international IDP definition. Moreover, the argument that the authors had been subject to arbitrary internal displacement is lent support by the fact that they were later granted refugee status in the Netherlands and the UK respectively.

Having ascertained their factual relevance to the present discussion, the next question is to what extent the UN Human Rights Committee engaged precisely with matters of return. In respect to *El Hojouj Jum'a*, the answer is very little. This could perhaps be explained by the fact that at the time of the pronouncement of the UN Human Rights Committee's views, the authors had left their home country. The UN Human Rights Committee perhaps did not consider it of sufficient importance to pronounce on the internal displacement that the authors experienced prior to their departure abroad.

In respect to *Jiménez Vaca*, the UN Human Rights Committee did go a little further. In its decision, the UN Human Rights Committee went beyond a simple reaffirmation of the right to liberty of movement and freedom of residence. It found that Colombia had not made available to the author any domestic remedies that would be effective in allowing him 'to return from involuntary exile in safety'.<sup>35</sup> While this does not explicitly refer to return as a right, it nevertheless takes us one step closer. However, the UN Human Rights Committee falls short in this respect, as, despite finding a violation of Article 12(1) and Article 12(4), in its concluding remarks, it states only that Colombia had failed to ensure to the author 'his right to remain in, return to and reside in his own country',<sup>36</sup> and does not therefore go as far as to say that the author had a right to return to his *original home location* within Colombia, from

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<sup>32</sup> *ibid*, para 2.13.

<sup>33</sup> *ibid*, para 7.4.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid*.

<sup>36</sup> *ibid*.

where he was first displaced. This conclusion is supported by the content of the remedies prescribed by the UN Human Rights Committee, which, while referring to return, only did so by instructing the State party 'to take appropriate measures to protect his [the author's] security of person and his life so as to allow him to *return to the country* [emphasis added]'.<sup>37</sup>

In sum, while these two communications are relevant and important, it is telling that neither take us much further in the search for an explicit right to return for IDPs. While they have provided examples of the concrete application of Article 12(1) rights to situations of internal displacement, and while the decision in *Jiménez Vaca* engages to some small degree with matters of return, ultimately, the UN Human Rights Committee does not deal with this in a way that unequivocally affirms an internal right for IDPs to return to their homes or places of habitual residence.

### 3.2.3 CERD General Recommendation XXII

While the UN Human Rights Committee may not have dealt head-on with the issue of IDP return in the context of the dual right to liberty of movement and freedom to choose one's residence, the UN Committee on the Elimination of Racial Discrimination (CERD) has been more emphatic in this respect. As mentioned above, ICERD Article 5(d)(ii) explicitly provides for a 'right... to return to one's own country', however, as already argued, this does not apply to IDPs given that, by definition, they remain within their own country. Yet, in 1996, CERD issued its General Recommendation XXII on ICERD Article 5. This states that 'all... refugees *and displaced persons* have the right freely to return to their homes of origin under conditions of safety'.<sup>38</sup> By stating 'displaced persons' as distinct from 'refugees', this opens up the clear possibility of IDPs being brought within the scope of ICERD Article 5(d)(ii), despite the territorial restriction of the original treaty provision. As discussed at some length in Chapter Two, caution must be taken in automatically assuming that 'displaced persons' encompasses IDPs within its scope, as the term has not, historically at least, been amenable to such inclusion. Yet, CERD General Recommendation XXII does not, when read in its entirety, indicate any territorial restriction that would prevent its application to IDPs. It is instead written in broad terms, referring in a rather open-ended manner in its preamble to 'massive flows of refugees and the displacement of persons on the basis of ethnic criteria in many parts of the world', and asserting, as stated above, that it provides for the right to return freely and in safety for '[a]ll such refugees and displaced persons'.<sup>39</sup>

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<sup>37</sup> *ibid*, para 9.

<sup>38</sup> UN CERD, 'General Recommendation XXII: Article 5 and refugees and displaced persons' (24 August 1996) UN Doc A/54/18, para 2(a) (emphasis added).

<sup>39</sup> *ibid* (emphasis added).



However, this proclaimed right is evidently not without limitation. First, in terms of its scope. As this right ‘freely to return’ extends from an ICERD treaty provision, this crucially dictates that any alleged violation of the right to return would need to exist in conjunction with some form of ‘distinction as to race, colour, or national or ethnic origin’.<sup>40</sup> This point is reaffirmed in the Preamble to General Recommendation XXII, which speaks only of displacement ‘on the basis of ethnic criteria’,<sup>41</sup> and in Boutros-Ghali’s letter of transmittal of the report on the fifty-first session of CERD, which specifies that General Recommendation XXII is concerned with ‘the rights of refugees and persons displaced *on the basis of ethnic criteria*’.<sup>42</sup> While many situations of internal displacement do of course involve an ethnic dimension, for example, in the protracted conflict-induced displacement situations in the South Caucasus, this is not a necessary requirement. Furthermore, the text of General Recommendation XXII reveals that this applies only in the context of ‘foreign military, non-military and or/ethnic conflicts’,<sup>43</sup> and therefore not the full breadth of internal displacement causes as is understood by the Guiding Principles and subsequent instruments. As such, this right to return expressed within the purview of ICERD is restricted to only certain situations of internal displacement, and only certain ‘such refugees and displaced persons’.<sup>44</sup> Second, in terms of its influence, while General Recommendation XXII is an important interpretation by a UN treaty body of a treaty provision, an interpretation to which States Parties are required to afford great weight and consideration, such recommendations and comments are not in and of themselves considered legally-binding.<sup>45</sup> While this does not necessarily undermine the normative value of this right ‘freely to return’, it is still nevertheless important to highlight as a crucial feature of this proclaimed right.<sup>46</sup>

While it is clear that general provisions of IHRL are of importance to the question of the IDP right to return, it is apparent that these provisions have not been used in a way which provides for an unequivocal IDP right to return for all IDPs. This is perhaps unsurprising. Indeed, it was as a result of the identified failings of general international law provisions that soft law documents specific to the

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<sup>40</sup> ICERD, Article 5.

<sup>41</sup> CERD General Recommendation XXII, preamble.

<sup>42</sup> UNGA, ‘UN Report of the Committee on the Elimination of Racial Discrimination’ (1996) UN Doc A/51/18, viii (emphasis added).

<sup>43</sup> CERD General Recommendation XXII, preamble.

<sup>44</sup> *ibid*, para 2(a).

<sup>45</sup> For discussion of the interpretative power and legal implications of general comments and recommendations, see Kasey L McCall-Smith, ‘Interpreting International Human Rights Standards: Treaty Body Comments as a Chisel or a Hammer’ in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 27-46.

<sup>46</sup> Turning to CERD communications offers no further insights. In fact, CERD has not had occasion to decide on any communications related to ICERD Article 5(d)(ii) (according to a search of the UN OHCHR Jurisprudence Database <[juris.ohchr.org/search/Documents](http://juris.ohchr.org/search/Documents)> accessed on 7 August 2017).

context of internal displacement were developed. It is to these bespoke soft law documents that this discussion on the IDP right to return now turns.

### **3.3 Soft Law Instruments Developed in Response to (Internal) Displacement**

#### **3.3.1 UN Guiding Principles on Internal Displacement**

As outlined in Chapter Two, the Guiding Principles form a core component of the international IDP regime. As already discussed, the Guiding Principles together form a normative, soft law instrument. Although as a single instrument, the Guiding Principles may not be legally binding, each of the Principles themselves are legally binding, at least to the extent to which they replicate or are drawn from already existing legally binding provisions in international law. Yet, the strategic decision to formulate the Guiding Principles as a non-legally binding instrument offered up the opportunity to not only repeat existing legal provisions but to also extend upon these as required by the internal displacement context, thereby offering up greater normative potential.

As was introduced in Chapter Two, the drafting of each of the Guiding Principles was reached through one of three means. Either existing rights were simply reiterated, more specific rights were inferred from general rights, or rights were drawn by analogy from existing legal provisions. Return, along with a series of other movement-related needs, was identified in the Compilation and Analysis as one of seventeen areas of ‘insufficient coverage’.<sup>47</sup> To remedy this insufficiency, it was argued by Deng that the second route should be advanced, that of articulating a specific right from an already-existing general norm. This approach promised to ‘ensure implementation of the general norm in [an] area of particular need to internally displaced persons’.<sup>48</sup> The general norm identified as relevant to IDP return was, as already discussed above, the dual right to liberty of movement and freedom to choose one’s residence.<sup>49</sup> To reiterate, this dual right is prolific throughout IHRL. Moreover, unlike ICCPR Article 12(4), ICCPR Article 12(1) does apply to IDPs as it concerns internal movement. Yet, while IDPs may benefit from ICCPR Article 12(1) in law, they do not enjoy these rights in practice, as, in many cases, IDPs are restricted from travel to their homes or places of habitual residence, and, in all cases, IDPs are prevented from sustainable, voluntary stay in areas of their home State. In the Compilation and Analysis, Deng concluded that IDPs do have ‘a[n international law] right to voluntary return to their

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<sup>47</sup> Compilation and Analysis of Legal Norms, para 415.

<sup>48</sup> *ibid*, para 411.

<sup>49</sup> *ibid*, para 243.

places of origin as inherent in the freedom of movement'.<sup>50</sup> Yet, to ensure effective implementation of this, he called for there to be a specific guarantee concerning 'the right to... return voluntarily and in safety to their [IDPs'] place of residence'.<sup>51</sup> In respect to other movement-related rights, the Compilation and Analysis similarly recommended additional guarantees be given concerning 'the right to go to a safe place inside their [IDPs'] country or to seek asylum abroad',<sup>52</sup> as well as a specific guarantee against 'forced return to places dangerous to their [IDPs'] health and/or safety'.<sup>53</sup>

In the Guiding Principles, there are multiple references to return. Those Principles most explicit in this respect are Principles 15, 20, 28 and 30. Principle 15(d) provides IDPs with the '[t]he right to be protected against forcible return to... any place where their life, safety, liberty and/or health would be at risk'<sup>54</sup> and Principle 20(2) states that IDPs shall not be required to return to their area of habitual residence in order to obtain 'documents necessary for the enjoyment and exercise of their legal rights'.<sup>55</sup> While both of these Principles concern protection against forced return, neither provide an actual right to return. Principle 28(1) asserts that '[c]ompetent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence...'.<sup>56</sup> Principle 28(2) then states that '[s]pecial efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return...',<sup>57</sup> and Principle 30 states that international humanitarian organisations and other appropriate actors shall be granted 'rapid and unimpeded access to internally displaced persons to assist in their return...'.<sup>58</sup> While these Principles welcomingly place positive obligations and duties on 'competent authorities' in respect to IDP return, and recognise the importance of the involvement of humanitarian organisations and IDPs themselves in this process, in contrast to Principle 15(d), these are not expressed in rights terms. In this respect, Principle 28(1) is most curious in its omission to assert an explicit right to return for IDPs. Despite a recognised need and the explicit recommendation given in the Compilation and Analysis,<sup>59</sup> as well as a specific comment in the Annotations stating that IDPs do have a right to return to their homes or places of habitual residence, any such explicit right to this

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<sup>50</sup> *ibid*, para 257.

<sup>51</sup> *ibid*, para 415(i).

<sup>52</sup> *ibid*.

<sup>53</sup> *ibid*.

<sup>54</sup> Guiding Principles, Principle 15(d).

<sup>55</sup> *ibid*, Principle 20(2).

<sup>56</sup> *ibid*, Principle 28(1).

<sup>57</sup> *ibid*, Principle 28(2).

<sup>58</sup> *ibid*, Principle 30.

<sup>59</sup> Compilation and Analysis, para 415(i).

effect remains crucially absent from the actual text itself. This absence of an explicit right appears even more peculiar in the light of the broader movement-related conclusions drawn in the Compilation and Analysis. As already stated above, Deng was explicit in the Compilation and Analysis as to the need for a specific guarantee concerning ‘*the right to... return voluntarily and in safety to their [IDPs’] place of residence*’.<sup>60</sup> However, he did not explicitly express a need for a *right* ‘against forced return to places dangerous to their health and/or safety’.<sup>61</sup> Yet, the Guiding Principles, by providing for a ‘*right to be protected against forcible return*’,<sup>62</sup> but not an actual *right* to return itself, in fact achieves the reverse.

From this, three key messages can be drawn. First, Deng’s statement in the Compilation and Analysis offers explicit support for an already-existing IDP right to return in international law, albeit that, second, this right is inferred from a general norm. Third, despite Deng’s call for this right to return to be given its own express articulation in the Guiding Principles, any explicit right to return is conspicuously absent. The result is that the leading international statement on the rights of IDPs falls short of unequivocally asserting the right to return, this being despite the findings of the Compilation and Analysis and the normative potential offered up by the Guiding Principles’ soft law status. Despite the Guiding Principles being a rights-based instrument, and despite the prolific use of the language of rights in the text, the final section of the Guiding Principles shifts the focus away from rights and duties, to duties alone. This is, of course, not to say that the focus on duties is not important, it is indeed paramount, but it is to say that this seems to have come at the expense of an express IDP right to return. Judged by the terms of the Compilation and Analysis, a gap therefore surely remains. Yet, while the Guiding Principles may have fallen short in filling this gap, developments that occurred down a parallel track have in fact resulted in the realisation of the unequivocal statement sought, this being instead expressed in the housing and property restitution provisions of the Pinheiro Principles.

### 3.3.2 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles)

The Pinheiro Principles are, similarly to the Guiding Principles, a set of soft law principles that were drafted and adopted through the UN human rights system. Their drafting was overseen by the then UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons, Paulo

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<sup>60</sup> *ibid* (emphasis added).

<sup>61</sup> *ibid*.

<sup>62</sup> Guiding Principles, Principle 15(d) (emphasis added).

Sérgio Pinheiro.<sup>63</sup> Pinheiro was appointed with a mandate to prepare ‘a comprehensive study on housing and property restitution in the context of the return of refugees and internally displaced persons’.<sup>64</sup> This request came subsequent to the Sub-Commission’s proclamation in its resolution 1998/26 of ‘the right of all refugees... and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish’,<sup>65</sup> and its ‘confirmation’ in its resolution 2002/30 that ‘all those displaced have the right to return voluntarily in safety and dignity, as established in international human rights law’.<sup>66</sup> To this end, Pinheiro worked closely with, *inter alia*, the Centre on Housing Rights and Evictions (COHRE), an independent INGO with Special Consultative status to ECOSOC.<sup>67</sup> Following ‘detailed inputs’ from the Sub-Commission, and ‘an intensive series of consultations with legal experts, UN agencies, States and civil society groups’,<sup>68</sup> the final version of the Pinheiro Principles was submitted to the Sub-Commission, which endorsed these on 11 August 2005 in its resolution 2005/21.<sup>69</sup> Moreover, the Sub-Commission ‘encourage[d] their application and implementation by States, intergovernmental organizations and other relevant actors’.<sup>70</sup>

Return finds explicit attention in the Pinheiro Principles. Yet, unlike the Guiding Principles, it is here expressly framed as a *right* to return. Principle 10.1 states that ‘All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity’. In Principle 10.2, it is stated that those who do wish to return be allowed to do so,<sup>71</sup> and in Principle 10.3 that refugees and displaced persons ‘shall not be forced, or otherwise coerced, either directly or indirectly, to return’.<sup>72</sup> The ‘right to voluntary return in safety and dignity’ is referred to on three further occasions within the Pinheiro Principles. Specifically, in Principle 4.1, States are required to ensure ‘the equal right of men and women, and the equal right of boys and girls, *inter alia*, to voluntary return in safety and dignity...’, and, in Principle 11.1, that this right be

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<sup>63</sup> Pinheiro was appointed as Special Rapporteur pursuant to Sub-Commission on Human Rights Res 2002/7 ‘Housing and property in the context of refugees and other displaced persons’ (14 August 2002) UN Doc E/CN.4/Sub.2/RES/2002/7, para 6.

<sup>64</sup> *ibid*, para 6.

<sup>65</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities Res 1998/26 ‘Housing and property restitution in the context of the return of refugees and internally displaced persons’ (26 August 1998) para 1.

<sup>66</sup> Sub-Commission on the Promotion and Protection of Human Rights Ref 2002/30 ‘The right to return of refugees and internally displaced persons’ (15 August 2002) UN Doc E/CN.4/Sub.2/RES/2002/30, para 1.

<sup>67</sup> Centre on Housing Rights and Evictions (COHRE), ‘The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons’ (1 December 2005) back cover.

<sup>68</sup> *ibid*, 4.

<sup>69</sup> Sub-Commission on the Promotion and Protection of Human Rights Res 2005/21 (2005) para 5.

<sup>70</sup> *ibid*.

<sup>71</sup> Pinheiro Principles, Principle 10.2.

<sup>72</sup> *ibid*, Principle 10.3.

recognised in ‘all housing, land and property restitution procedures, institutions, mechanisms and legal frameworks’. In Principle 22.1, responsibility is then placed on the international community to ‘promote and protect... the right to voluntary return in safety and dignity’. In addition to these references in the actual Principles, the ‘right to voluntary return, in safety and dignity’ also features in the first paragraph of the preamble.

The right to return here expressed in the Pinheiro Principles is clear, unequivocal and expansive. There are no qualifications listed, and there are no restrictions in terms of its scope, meaning it is not limited to only certain categories of forced migrants or to certain displacement contexts. The specific attention placed on the right to return in the Pinheiro Principles gives it not only a certain prominence but also a certain uniqueness, and newness. Yet, the manner in which it is then interspersed into other principles also gives it the air of being an established right. It is important therefore to consider the legal basis given here in support of this right, especially in the light of the difference in approach to that seen in the Guiding Principles.

In the same way in which the Guiding Principles are said to be drawn from established treaty-based and customary international law, the Pinheiro Principles it is claimed are ‘support[ed] and inform[ed]’ by established international human rights, humanitarian and refugee law, and related standards.<sup>73</sup> The connections between the Pinheiro Principles and these established laws and standards are expounded in Pinheiro’s 2005 Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles Explanatory Notes).<sup>74</sup> Similar comments are also made in the 2007 Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the ‘Pinheiro Principles’ (Pinheiro Principles Handbook),<sup>75</sup> the substantive draft of which was prepared by COHRE Executive Director, Scott Leckie.<sup>76</sup>

Beginning first with the Handbook, this states that Principle 10 ‘reaffirms the right to voluntary return in safety and dignity’, arguing that ‘[t]he right to return to one’s own country or one’s city or region for IDPs is *well established* under international law’.<sup>77</sup> A number of sources are cited in support,

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<sup>73</sup> UN Commission on Human Rights, ‘Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro: Addendum: Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons’ (11 July 2005) UN Doc E/CN.4/Sub.2/2005/17/Add.1, para 1.

<sup>74</sup> Pinheiro Principles Explanatory Notes (cited above).

<sup>75</sup> FAO, IDMC, OCHA, OHCHR, UN-Habitat and UNHCR, ‘Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the ‘Pinheiro Principles’’ (March 2007).

<sup>76</sup> *ibid*, 8.

<sup>77</sup> *ibid*, 54 (emphases added).

including the ICCPR.<sup>78</sup> Yet, the accuracy of this assertion must be questioned. As was revealed earlier in this Chapter, the ICCPR does not explicitly provide for a right to return applicable in the context of internal displacement. Such a right can only at best be inferred from ICCPR Article 12(1), and little to no guidance is given in this respect in the UN Human Rights Committee's communications. In addition, little to no legal evidence is given to support the statement made in the Handbook that 'the idea of voluntary repatriation/return has in recent years expanded into a concept involving not simply the return to one's country or region, but to one's *original home, land or property*'.<sup>79</sup> Indeed, the subsequent analysis is based entirely on statements pertaining to refugees.<sup>80</sup> The reference made in the Handbook to Conclusion No 40 (1985) of the Executive Committee of the UNHCR sums the position up well.<sup>81</sup> While, as the Handbook states, Conclusion No 40 may indeed reaffirm 'the basic rights of persons to return voluntarily to the country of origin', per ICCPR Article 12(4), it says only that return be 'preferably' to 'the place of residence of the refugee in his [or her] country of origin'.<sup>82</sup> Seeing return to one's home or place of habitual residence as simply desirable is far from expounding this as a right. Moreover, no evidence of any kind is given to support for the even more ambitious statements in Principle 10, such as that, under Principle 10.2, return 'cannot be abridged under conditions of State succession'. Turning to the Pinheiro Principles Explanatory Notes, in these it is similarly asserted that 'the right of refugees and displaced persons to return to their homes is recognized by the international community as a free-standing, autonomous right in and of itself'.<sup>83</sup> Yet, the evidence given to support this comes not from universal treaty law, but instead from the series of UN General Assembly and UN Security Council resolutions that were outlined in the introduction to this Thesis. Far from asserting a universal right to return, these statements proclaim a right to return that only applies narrowly to certain specific cases of displacement.<sup>84</sup> This latter point is indeed recognised in the Explanatory Notes.<sup>85</sup> As in the Handbook, the Explanatory Notes refer in the same manner to Conclusion No 40 of the Executive Committee of the UNHCR.<sup>86</sup> The only additional support that is given in the Explanatory Notes for a right to return applicable to IDPs is, first, to Sub-Commission resolution 1998/26,<sup>87</sup> and second, to CERD General Recommendation XXII.<sup>88</sup> It is unsurprising that reference should be made to the former given that it was this resolution that initiated the process that led to the Pinheiro Principles.

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<sup>78</sup> *ibid.*

<sup>79</sup> *ibid* (emphasis in original).

<sup>80</sup> *ibid*, 54-55.

<sup>81</sup> *ibid*, 54.

<sup>82</sup> *ibid.*

<sup>83</sup> Pinheiro Principles Explanatory Notes, para 42.

<sup>84</sup> *ibid*, paras 43-44.

<sup>85</sup> *ibid*, para 43.

<sup>86</sup> *ibid*, para 48.

<sup>87</sup> *ibid*, para 45.

<sup>88</sup> *ibid*, para 46.

It should though be borne in mind that the Sub-Commission consisted of a group of independent experts acting in their personal capacity and not as representatives of UN Member States.<sup>89</sup> In respect to the latter, as already discussed in this chapter, this is not only limited in that it applies only in the context of ‘foreign military, non-military and or/ethnic conflicts’,<sup>90</sup> but also that it speaks only of displacement ‘on the basis of ethnic criteria’.<sup>91</sup> Moreover, as a general recommendation, it does not enjoy the legal authority enjoyed by ICERD itself.

Perhaps most interestingly, in neither the Pinheiro Principles Explanatory Notes nor the Pinheiro Principles Handbook is reference made to ICCPR Article 12(1) in respect to the Principle 10 right to voluntary return in safety and dignity. It becomes apparent therefore that the right to return in the Pinheiro Principles developed along a different path to that envisaged by Deng’s Compilation and Analysis, which had cited ICCPR Article 12(1) as the legal source of an IDP right to return. In this connection, it is also interesting, and curious, to note that the Pinheiro Principles are devoid of any mention of the Guiding Principles, this being despite the Guiding Principles having been finalised some seven years earlier.<sup>92</sup> It becomes clear therefore, at least in respect to the Principle 10 right to return, that when looked at relative to the Guiding Principles, the Pinheiro Principles are a somewhat more politically-minded exposition or declaration of rights, rather than a set of guiding principles grounded in existing legal norms.

It is also worthwhile reflecting here on the standing of the Pinheiro Principles in comparison to the Guiding Principles. As mentioned in Chapter Two of this Thesis, the Guiding Principles have since their inception in 1998 to the present day enjoyed substantial and sustained international support. This support has come not only from the UN Human Rights Council, the UN General Assembly and the UN Security Council, but also from UN Member States. Having been drafted at its request,<sup>93</sup> the UN Commission on Human Rights had, prior to being disbanded, ‘repeatedly expressed its appreciation for the Guiding Principles as an important tool... and encouraged all relevant actors to make use of

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<sup>89</sup> UN Human Rights Council ‘Sub-Commission on the Promotion and Protection of Human Rights: About the Sub-Commission’ <[www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx](http://www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx)> accessed 16 July 2018.

<sup>90</sup> UN CERD, ‘General Recommendation XXII: Article 5 and refugees and displaced persons’ (24 August 1996) UN Doc A/54/18, preamble.

<sup>91</sup> *ibid.*

<sup>92</sup> The closest that the Pinheiro Principles come to mentioning the Guiding Principles is in an extremely broad statement in paragraph four of the preamble, ‘[w]elcoming... the many national and international laws, standards, policy statements, agreements and guidelines that have recognized and reaffirmed the right to housing, land and property restitution’. Moreover, the words ‘guiding principles’ feature nowhere in the Pinheiro Principles.

<sup>93</sup> UN Commission on Human Rights, ‘Report of the High Commissioner for Human Rights on human rights and mass exoduses: Addendum: Thematic compilation’ (31 January 2005) UN Doc E/CN.4/2005/80/Add.1, para 7.



them when dealing with situations of internal displacement'.<sup>94</sup> Yet, the same cannot be said of the Pinheiro Principles. As outlined above, upon their completion, the Pinheiro Principles were transmitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which endorsed them in August 2005.<sup>95</sup> However, since the Sub-Commission was formally disbanded in June 2006,<sup>96</sup> the Pinheiro Principles have been frequently overlooked.<sup>97</sup> The Pinheiro Principles have featured in none of the UN Human Rights Council's resolutions on internal displacement,<sup>98</sup> whereas the Guiding Principles have been consistently recognised as, *inter alia*, 'an important international framework for the protection of internally displaced persons'.<sup>99</sup> Indeed, there was no mention of the Pinheiro Principles in what was in effect the UN Commission on Human Rights' handover report to the UN Human Rights Council on the topic of internal displacement.<sup>100</sup> Granted, this document was focused on the performance and effectiveness of the IDP mandate, but reference at this point, either to the Pinheiro Principles or to the mandate of the Special Rapporteur on Housing and Property Restitution for Refugees and IDPs, could have prompted ongoing discussion of the Pinheiro Principles both during and after the reforms. Perhaps most tellingly, however, there is not a single mention of the Pinheiro Principles in General Assembly resolution 70/165, that is the December 2015 resolution in which the UN General Assembly first asserted a general 'right of voluntary return in safety and with dignity' applicable to the internal displacement context.<sup>101</sup> While the Pinheiro Principles are not mentioned in resolution 70/165, the Guiding Principles are repeatedly mentioned throughout, albeit,

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<sup>94</sup> *ibid*, para 8.

<sup>95</sup> Sub-Commission on the Promotion and Protection of Human Rights Res 2005/21 'Housing and property restitution of refugees and displaced persons' (11 August 2005) UN Doc E/CN.4/Sub.2/RES/2005/21, para 5.

<sup>96</sup> UN Human Rights Council 'Sub-Commission on the Promotion and Protection of Human Rights: About the Sub-Commission' <[www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx](http://www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx)> accessed 16 July 2018.

<sup>97</sup> It appears that, although the UN Commission on Human Rights noted and encouraged the work of the Sub-Commission on the topic of housing and property restitution in the context of the return of refugees and IDPs (see, for example, UN Commission on Human Rights Res 1999/47 'Internally Displaced Persons' (27 April 1999) UN Doc E/CN.4/1999/47, preamble), the Pinheiro Principles were in fact not actually endorsed by the UN Commission on Human Rights prior to it being disbanded. In the Handbook, which was published in March 2007, and therefore some months after the reforms to the human rights system had been initiated, there is no mention of approval from the UN Commission on Human Rights, only of approval being given by the Sub-Commission (page 11).

<sup>98</sup> UN Human Rights Council Res 6/32 'Mandate of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons' (14 December 2017) UN Doc A/HRC/RES/6/32; UN Human Rights Council Res 14/6 'Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons' (23 June 2010) UN Doc A/HRC/RES/14/6; UN Human Rights Council Res 23/8 'Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons' (20 June 2013) UN Doc A/HRC/RES/23/8; UN Human Rights Council Res 32/11 'Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons' (18 July 2017) UN Doc A/HRC/RES/32/11.

<sup>99</sup> UN Human Rights Council Res 6/32, para 5; UN Human Rights Council Res 14/6, para 9 UN Human Rights Council Res 23/8, para 12; UN Human Rights Council Res 32/11, para 14.

<sup>100</sup> UN Commission on Human Rights, 'Report of the Secretary-General on the performance and effectiveness of the new mechanism on internal displacement' (20 March 2006) UN Doc E/CN.4/2006/69.

<sup>101</sup> UNGA Res 70/165 (22 February 2016) UN Doc A/RES/70/165, preamble.

unsurprisingly, not in respect to return, but nevertheless as the standard to be used when dealing with situations of internal displacement.<sup>102</sup> Moreover, the absence of any reference to the Pinheiro Principles is quite remarkable given that the phrasing here used by the UN General Assembly is essentially exactly the same as that used in Principle 10 of the Pinheiro Principles. Also, the topic of restitution, which is the overarching focus of the Pinheiro Principles, is also expressly mentioned in resolution 70/165,<sup>103</sup> yet, there is no mention of the Pinheiro Principles in this respect either. It is again somewhat surprising that the Pinheiro Principles are only given the briefest of footnote references in the IASC Durable Solutions Framework.<sup>104</sup> All of this is not to say, however, that the Pinheiro Principles have been entirely forgotten. The European Court of Human Rights (ECtHR) has referred on more than one occasion to the Pinheiro Principles in its relevant jurisprudence. The Pinheiro Principles have also been referred to in some pertinent UN reports.<sup>105</sup> But the Pinheiro Principles' international standing cannot be equated with that of the Guiding Principles. While it is indeed true that the Pinheiro Principles have been endorsed by the UN, such endorsement has come solely from, as already stated above, a now disbanded sub-group of independent experts acting in a personal capacity. It is therefore important to bear this in mind in any analysis that involves the Pinheiro Principles, especially if this is combined with analysis of the Guiding Principles.

In sum, over the past two decades, the majority of attention that has been given to displacement has been through the means of soft law. Not only are the Guiding Principles, the international standard for internal displacement matters, a soft law instrument, but so are the Pinheiro Principles, another instrument of direct relevance and immense importance to situations of internal displacement. Prior detailed analyses conducted by the UN revealed substantial deficiencies in IHRL treaties when viewed through the lens of internal displacement, deficiencies that these soft law instruments have been designed to remedy. From the perspective of return, while the Guiding Principles have fallen short in asserting an unequivocal right to return that is applicable to all IDPs in all internal displacement contexts, the 2005 UN Pinheiro Principles have not. Indeed, it is interesting to observe how the Pinheiro Principles have approached the question of return with far more ambition than the Guiding Principles, which have, in contrast, approached return with restraint. Principle 10 of the Pinheiro Principles not only expressly recognises IDP return as a right, but also goes into some detail as to its

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<sup>102</sup> *ibid*, para 7.

<sup>103</sup> *ibid*, para 20.

<sup>104</sup> IASC Durable Solutions Framework, 35 (footnote 39).

<sup>105</sup> For example, in her 2010 report to the sixteenth UN Human Rights Council session, Rolnik cited the Pinheiro Principles as an 'important development' in the context of human rights in post-disaster and post-conflict situations (see UN Human Rights Council, 'Report of the Special Rapporteur on housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik' (20 December 2010) UN Doc A/HRC/16/42, para 11).

characteristics and associated conditions. Moreover, aside from Principle 10, return is unequivocally articulated as a right on further occasions within the Pinheiro Principles. However, it becomes clear from this analysis that the potential of Principle 10, far from being exploited, has instead, it seems, become lost. Whereas the Guiding Principles have benefitted, and continue to benefit, from sustained international support, the Pinheiro Principles, and along with it Principle 10, have, since the reform of the UN human rights system, dropped from view. It is therefore the more limited Principle 28 in the Guiding Principles, limited in the sense that it is formed only of a duty on competent authorities to support return rather than articulating an explicit right, that enjoys greater prominence and greater legal standing. IHRL is thus left with a leading international normative instrument on the rights of IDPs that fails to unequivocally assert IDP return as a right, and a comprehensive assertion of an IDP right to return that is located in a document that lies at its very outer fringes. While the Guiding Principles and the Pinheiro Principles may therefore have taken IHRL forward in its protection of IDP return, its treatment of IDP return as a right is still considerably lacking in conviction.

### **3.4 ILO Convention No 169 and CIHL Rule 132**

That internal displacement has been framed as a rights-based issue justifies the initial focus given in this Chapter to IHRL. Yet, the cross-cutting nature of internal displacement means that it is necessary, and fruitful, to step beyond the bounds of IHRL. As will be shown, to do so reveals further attempts to engage explicitly with the issue of IDP return as a right, and demonstrates therefore arguably a greater commitment than much of IHRL to respond to the issue.

In this section, attention turns to the ILO and to customary IHL (CIHL). However, while this will prove to be a fruitful step to take, there nevertheless remains a paucity of explicit references to a right to return applicable to IDPs, especially when this is contrasted with the prolificacy of the already-identified references to a right to return to one's own country in IHRL alone. Moreover, it must be borne in mind that to step outside of human rights law means encountering inherent limitations, the consequence of which is to narrow the applicability of such provisions when these are viewed through the lens of internal displacement.

First, in respect to the ILO. The 1989 ILO Convention on Indigenous and Tribal Peoples (ILO Convention No 169)<sup>106</sup> states in Article 16(3) that, following relocation,<sup>107</sup> '[w]henver possible, these [indigenous and tribal] peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist'.<sup>108</sup> ILO Convention No 169 Article 16(3) is limited neither to international nor internal movement, and as such is applicable to situations of internal displacement.<sup>109</sup> Second, in respect to CIHL. In the 2005 study on CIHL by Henckaerts and Doswald-Beck,<sup>110</sup> endorsed by and now maintained and updated on the ICRC CIHL Database,<sup>111</sup> the right of displaced persons to return to their homes was expressly identified as a rule of CIHL. CIHL Rule 132 states that '[d]isplaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist'.<sup>112</sup> It is expressly stated that this rule is applicable in times of both international armed conflicts (IACs)<sup>113</sup> and non-international armed conflicts (NIACs),<sup>114</sup> and as such is widely applicable to situations of internal displacement.<sup>115</sup> This recognition of the applicability of CIHL Rule 132 in NIACs as well as IACs is crucial given that international humanitarian treaty law contains no provisions regarding a right to return applicable in NIACs. While Article 49 of the Fourth Geneva Convention 1949<sup>116</sup> asserts that in times of IACs,<sup>117</sup> persons who, during

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<sup>106</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169) 27 June 1989 (entered into force 5 September 1991).

<sup>107</sup> Under ILO Convention No 169 Article 16(2), such relocation can only be justified as an exceptional measure, taken with the free and informed consent of those affected or, if it is not possible to gain such consent, following appropriate procedures established by law that provide the opportunity for effective representation of those concerned.

<sup>108</sup> *ibid*, Article 16(3). While ILO Convention No 169 contains an explicit reference to a right to return for indigenous and tribal peoples, an equivalent provision cannot be found in the subsequent UN Declaration on the Rights of Indigenous Peoples (2 October 2007) UN Doc A/RES/61/295.

<sup>109</sup> The direct relevance of ILO Convention No 169 to the present discussion justifies the prominence being accorded to it here. Yet, this is not meant to imply that it suffers no limitations in respect to the effectiveness of its implementation. As Isa emphasises, '[d]espite the current relevance of ILO Convention No 169, it faces significant problems in terms of scope..., content, and effective mechanisms for implementation' (see Felipe Gómez Isa, 'The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 185-211, 185).

<sup>110</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (first published 2005, CUP 2009).

<sup>111</sup> ICRC 'Customary IHL Database' <ihl-databases.icrc.org/customary-ihl/eng/docs/home> accessed 2 August 2018.

<sup>112</sup> Henckaerts and Doswald-Beck (2005) 468-472.

<sup>113</sup> *ibid*, 468.

<sup>114</sup> *ibid*.

<sup>115</sup> This is not to say that displacement in the context of an IAC cannot take place exclusively or predominantly within the territory of only one High Contracting State, for example, as in the case of the 2008 Georgian-Russian war. Also, it is worth highlighting that Rule 132 is not only applicable to those who have been forced to leave their homes or places of habitual residence. Indeed, it is clearly stated that Rule 132 'applies to those who have been displaced, *voluntarily* or involuntarily, on account of the conflict' (emphasis added).

<sup>116</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

<sup>117</sup> *ibid*, Article 2.

occupation, have been subject to evacuation 'shall be transferred back to their homes as soon as hostilities in the area in question have ceased',<sup>118</sup> Common Article 3 of the Geneva Conventions, which is exclusively applicable in times of NIACs, makes no reference at all to displacement.<sup>119</sup> Serving to fill this gap,<sup>120</sup> Article 17 of the 1977 Protocol II to the Geneva Conventions<sup>121</sup> deals with the displacement of civilian populations during times of NIACs. However, while Article 17 contains a prohibition of forced movement and includes guarantees should such displacement have to be carried out,<sup>122</sup> it makes no reference to the return of displaced persons. CIHL therefore goes further than Article 17 in filling this return gap in international humanitarian treaty law.

Both ILO Convention No 169 Article 16(3) and CIHL Rule 132 are of crucial importance, primarily on account of the manner with which they recognise and affirm return as a right that applies irrespective of whether or not an internationally-recognised border has been crossed. However, while these provisions do apply in situations of internal displacement, both are nevertheless inherently limited when viewed through the lens of internal displacement, as defined in the Guiding Principles. These limitations can be characterised in two ways. First, both provisions are limited to only some situations of internal displacement, and second, the applicability of both provisions is limited to only some IDPs.

As already discussed in detail in Chapter Two, the Guiding Principles are explicit in recognising that internal displacement can occur in situations of armed conflict, generalised violence, violations of human rights, or natural or human-made disasters.<sup>123</sup> Furthermore, this list is not exhaustive, as recognised by the qualifying term, 'in particular'.<sup>124</sup> However, in the case of CIHL Rule 132, being a rule of IHL, its material field of application is restricted to situations of 'armed conflict' only. The ICRC has stated that an armed conflict that is of an international character exists 'whenever there is *resort to*

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<sup>118</sup> *ibid*, Article 49.

<sup>119</sup> Common Article 3(1) is primarily concerned with the humane treatment of those who are taking no active part in hostilities (including those who have laid down their arms and those who have been placed 'hors de combat'), without any adverse distinction. Common Article 3(2) provides additional protections for the wounded and sick (Article 3(2)).

<sup>120</sup> ICRC 'Protocol II: Commentary - Prohibition of Forced Movement of Civilians'

<[www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09](http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09)> accessed 9 February 2016, para 4850.

<sup>121</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609

<sup>122</sup> Article 17(1) of Additional Protocol II states that '[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians or imperative military reasons so demand. Should such displacement 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'.

<sup>123</sup> Guiding Principles, introductory para 2.

<sup>124</sup> *ibid*.

*armed force between two or more States*' (emphasis in original).<sup>125</sup> In the case of armed conflicts not of an international character, however, the situation is somewhat more complex. Common Article 3 contains no definition of armed conflict,<sup>126</sup> the only stipulations being that the armed conflict be 'not of an international character', and that it occur 'in the territory of one of the High Contracting Parties'.<sup>127</sup> This position was later clarified by Additional Protocol II 1977 Article 1, which requires also that 'dissident armed forces or other organised armed groups' be 'under responsible command' and 'exercise such control over a part of its [the High Contracting Party's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.<sup>128</sup> In placing these additional criterion in respect to the characteristics of the Party or Parties that are not High Contracting Parties, Additional Protocol II places minimum thresholds on what constitutes a NIAC.<sup>129</sup> This position has been confirmed in an ICRC Opinion Paper, which states that in the case of NIACs, in addition to the stipulations outlined in Common Article 3, 'armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum degree of organisation*' (emphasis in original).<sup>130</sup> As such, not only does 'armed conflict' self-evidently exclude natural or human-made disasters, it also excludes from its field of application all situations of generalised violence that do not meet these requisite criteria, including internal disturbances and internal tensions.<sup>131</sup> The right to voluntary return in safety in CIHL Rule 132 is therefore limited to internal displacement that occurs during times of recognised armed conflict (as defined for the purposes of IHL) only. In the case of ILO Convention No 169, the right to return expressed in Article 16(3) is drafted in the context of planned relocations only (which are permitted as an exceptional measure under Article 16(2)). Once again, while planned relocations are a cause of internal displacement, they are only one of many possible causes.

Second, and partly although not entirely as a consequence of the first limitation, the applicability of both provisions is limited to only some IDPs. In the case of ILO Convention No 169, it is self-evident

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<sup>125</sup> ICRC 'How is the Term "Armed Conflict" Defined in International Humanitarian Law' (Opinion Paper, ICRC March 2008) 5.

<sup>126</sup> As confirmed in ICRC 'Protocol II: Commentary – Material Field of Application' para 4448.

<sup>127</sup> Geneva Convention, Common Article 3.

<sup>128</sup> Additional Protocol II of 1977, Article 1.

<sup>129</sup> Michael N Schmitt, Charles H B Garraway, and Yoram Dinstein 'The Manual on the Law of Non-International Armed Conflict (with Commentary)' (International Institute of Humanitarian Law 2006) 3.

<sup>130</sup> ICRC 'How is the Term "Armed Conflict" Defined in International Humanitarian Law' (Opinion Paper, ICRC March 2008) 5.

<sup>131</sup> As expressly stated in Additional Protocol II, Article 1(2).

that its application is restricted to indigenous<sup>132</sup> and tribal peoples.<sup>133</sup> While this is not to say that indigenous and tribal peoples would not be considered IDPs should they be subject to internal displacement - indeed, Principle 9 expresses a particular obligation on States 'to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on an attachment to their lands'<sup>134</sup> - such peoples form but only a small sub-section of all IDPs. As such, while the right to return in ILO Convention No 169 is applicable in situations of internal displacement, its application is limited, by the very scope of the Convention, to IDPs who would also be considered indigenous and/or tribal peoples. In the case of CIHL Rule 132, given that it applies only in situations of armed conflict (as defined for the purposes of IHL), it is as a consequence restricted to only those IDPs who have been subject to internal displacement in the context of such armed conflict situations. In addition to this, however, the principle of distinction is also a critical consideration in IHL. As articulated in CIHL Rule 1, the principle of distinction requires that in both IACs and NIACs '[t]he parties to the conflict must at all times distinguish between civilians and combatants'.<sup>135</sup> For the purposes of this Rule, 'combatant' is used in its 'generic meaning' to include 'persons who do not enjoy the protection against attack accorded to civilians'.<sup>136</sup> It is additionally stipulated that CIHL Rule 1 must be read in conjunction with CIHL Rule 47 and CIHL Rule 6, which, respectively, prohibit attacks against persons placed *hors de combat*,<sup>137</sup> and states that civilians be protected from attack 'unless and for such time as they take a direct part in hostilities'.<sup>138</sup> In respect to 'civilians', CIHL Rule 5 defines civilians as 'persons who are not members of the armed forces'.<sup>139</sup> This Rule again applies in both IACs and NIACs.<sup>140</sup> However, while CIHL Rule 3 confirms that for the purposes of the principle of distinction, 'members of State armed forces may be considered combatants in both international and non-international armed conflicts',<sup>141</sup> it is less certain whether members of armed opposition groups (that is members of non-State armed forces) are considered to be members of armed forces or civilians, as

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<sup>132</sup> For the purposes of ILO Convention No 169, while the Convention does not strictly define indigenous peoples, Article 1(1)b does provide a description of indigenous peoples. Further, Article 1(2) states that '[s]elf-identification as indigenous... shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

<sup>133</sup> For the purposes of ILO Convention No 169, while the Convention does not strictly define tribal peoples, Article 1(1)a does provide a description of tribal peoples. Further, Article 1(2) states that '[s]elf-identification as... tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

<sup>134</sup> Guiding Principles, Principle 9.

<sup>135</sup> Henckaerts and Doswald-Beck (2005) 3.

<sup>136</sup> *ibid*, 3.

<sup>137</sup> *ibid*, 164-170.

<sup>138</sup> *ibid*, 19-24.

<sup>139</sup> *ibid*, 17.

<sup>140</sup> *ibid*.

<sup>141</sup> *ibid*, 11.

practice in this regard is ambiguous.<sup>142</sup> This position is not helped by the fact that neither Common Article 3 nor Additional Protocol II contain a definition of ‘civilian’.<sup>143</sup> Nevertheless, that such a distinction exists, albeit without complete clarity, is important for the present discussion as it indicates a restriction of certain rights to only certain individuals in times of armed conflict. Indeed, not only is the principle of distinction important in distinguishing between those who it is and those who it is not lawful under IHL to direct attacks against, it also distinguishes between those who do and those who do not benefit from certain IHL rights and protections. Reflecting this distinction, CIHL Rule 132, being located in Part V Chapter 38 of the Rules, is restricted in its personal field of application to the ‘forced displacement of *civilians*’ (emphasis added).<sup>144</sup> As a result, in general, a person deemed to be taking an active part in hostilities who is subjected to forced movement would not benefit from the right to voluntary return in safety provided by CIHL Rule 132. While the principle of distinction may be an established part of IHL, any such restriction on the personal scope of application of the protections afforded under CIHL Rule 132 is at odds with the Guiding Principles, in which no such restriction can be found.

In summary, it is clear therefore that despite having application to situations of internal displacement, both ILO Convention No 169 and CIHL Rule 132 are limited in their scope. To avoid such limitations, one could look to IHRL,<sup>145</sup> however, as stated above, IHRL contains no explicit, legally-binding provision of a right to return that is applicable in situations of internal displacement.

Attention now turns from international law in the universal sense, to the regional human rights regimes. The discussion begins with what was the first,<sup>146</sup> and remains the only,<sup>147</sup> legally-binding regional instrument on internal displacement, the Kampala Convention.

### **3.5 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)**

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<sup>142</sup> *ibid*, 17.

<sup>143</sup> *ibid*, 19.

<sup>144</sup> *ibid*, 457. The title of Part V of the Rules reveals that it concerns the ‘treatment of civilians and persons hors de combat’ only.

<sup>145</sup> This is not to say that IHRL has no limitations. Depending on the right(s) in question, its provisions may still be subject to permitted reservations or derogation subject to the applicable treaty.

<sup>146</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani’ (4 April 2014) UN Doc A/HRC/26/33, para 27.

<sup>147</sup> Moetsi Duchatellier and Catherine Phuong, ‘The African Contribution to the Protection of Internally Displaced Persons: A Commentary on the 2009 Kampala Convention’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 650.



The Kampala Convention came into force on 6 December 2012.<sup>148</sup> This was a pinnacle moment in IDP protection and assistance, as it was the first time a legally-binding instrument dedicated to internal displacement had come into force at the regional level,<sup>149</sup> and moreover, on the continent most affected by internal displacement.<sup>150</sup> As of June 2017, the Kampala Convention has been ratified or acceded to by 27 countries, that is just under half of the 55 countries of the African Union, and has been signed by 40 countries.<sup>151</sup>

It is clear from even a cursory glance that the text of the Kampala Convention is heavily influenced by the Guiding Principles. In its preamble, the Kampala Convention recognises the Guiding Principles as ‘an important international framework for the protection of internally displaced persons’, and from thereon in is faithful to much of the content and structure of the Guiding Principles. For instance, like the Guiding Principles, the Kampala Convention follows the displacement life-cycle, moving between protection from displacement,<sup>152</sup> to protection and assistance during internal displacement,<sup>153</sup> to sustainable return, local integration or relocation.<sup>154</sup> However, with that being said, the provisions in the Kampala Convention do extend in a number of areas beyond those found in the Guiding Principles.<sup>155</sup> For instance, the Kampala Convention deals explicitly with compensation and other forms of reparation,<sup>156</sup> gives distinct attention to displacement induced by (development) projects,<sup>157</sup> and provides a clear definition of internal displacement.<sup>158</sup> Yet, one area that the Kampala Convention does not develop upon further is return.

In line with the Guiding Principles, the Kampala Convention deals explicitly with protection against forcible return, both in general<sup>159</sup> and specifically for the reason of obtaining documentation,<sup>160</sup> and places particular emphasis on the positive obligations of States Parties in promoting and supporting

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<sup>148</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (23 October 2009) Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1.

<sup>149</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of IDPs, Chaloka Beyani: Follow-up Mission to Georgia (10-14 June 2013)’ (4 June 2014) UN Doc A/HRC/26/33/Add.1, para 27.

<sup>150</sup> IDMC, ‘Global Overview 2014: People internally displaced by conflict and violence’ (IDMC May 2014) 11.

<sup>151</sup> African Union ‘List of Countries which have Signed, Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa’ (15 June 2017).

<sup>152</sup> Kampala Convention, Article 4.

<sup>153</sup> *ibid*, Article 9.

<sup>154</sup> *ibid*, Article 11.

<sup>155</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani’ (4 April 2014) UN Doc A/HRC/26/33, para 37.

<sup>156</sup> Kampala Convention, Article 12.

<sup>157</sup> *ibid*, Article 10.

<sup>158</sup> *ibid*, Article 1(I).

<sup>159</sup> *ibid*, Article 9(2)(e).

<sup>160</sup> *ibid*, Article 13(3).

voluntary return ‘on a sustainable basis and in circumstances of safety and dignity’.<sup>161</sup> It guarantees (subject to qualification) the freedom of movement and choice of residence of IDPs during displacement,<sup>162</sup> and prohibits members of armed groups from restricting IDPs’ freedom of movement ‘within and outside their areas of residence’.<sup>163</sup> Yet, once more, there is no unequivocal, standalone right to return. The focus in respect to return is solely on the obligations of States Parties, leaving absent any express rights-based provision. While it is true to say that the framing of the Kampala Convention is very much focused throughout on obligations of States Parties and others,<sup>164</sup> more so than the Guiding Principles, the Kampala Convention does nevertheless still speak explicitly of IDP rights, most notably in respect to rights during displacement.<sup>165</sup> The same is true in respect to the two Great Lakes Protocols that preceded the Kampala Convention, the Great Lakes Protocol on the Protection and Assistance to IDPs<sup>166</sup> and the Great Lakes Protocol on the Property Rights of Returning Persons,<sup>167</sup> neither of which deal explicitly with return as a right of IDPs. The conclusions drawn above in respect to the Guiding Principles (section 3.3.1) are therefore also applicable here in respect to the Kampala Convention, specifically that while explicit attention is given to return, this is not explicitly articulated as a right.

### **3.6 Judicial Decisions of the Regional Human Rights Treaty Bodies**

#### **3.6.1 Introduction**

As was the case at the international level, the right to return to one’s own country is protected as a fundamental right in all three primary regional human rights regimes. The 1981 African (Banjul) Charter on Human and Peoples’ Rights (Banjul Charter)<sup>168</sup> states in Article 12(2) that ‘Every individual shall have the right... to return to his country’. Article 22(5) of the 1969 American Convention on

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<sup>161</sup> *ibid*, Article 11.

<sup>162</sup> *ibid*, Article 9(2)(f).

<sup>163</sup> *ibid*, Article 7(5)(d).

<sup>164</sup> As Beyani says, the Kampala Convention is ‘unique in that... it provides for the obligations and responsibilities of States Parties, while also specifying the roles and responsibilities of non-State armed groups, private companies, humanitarian agencies and civil society organizations, the international community, internally displaced persons and communities affected by internal displacement’ (see UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani’ (4 April 2014) UN Doc A/HRC/26/33, para 28).

<sup>165</sup> See, for example, Kampala Convention, Article 9(1).

<sup>166</sup> International Conference on the Great Lakes Region ‘Protocol on the Protection and Assistance to Internally Displaced Persons’ (30 November 2006).

<sup>167</sup> Both of these Protocols form an integral part of the Great Lakes Pact, and for any Member State that has ratified the Pact, these Protocols automatically entered into force at the same time as the Pact.

<sup>168</sup> African Charter on Human and Peoples’ Rights (Banjul Charter) (adopted on 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

Human Rights (ACHR)<sup>169</sup> and Article 3(2) of Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR Protocol No 4)<sup>170</sup> both state, similarly, that ‘No one shall be deprived of the right to enter the territory of the state of which he is a national’.<sup>171</sup> All three of these regional human rights treaties also include explicit protection of the right to liberty of movement and freedom to choose one’s own residence, albeit with some linguistic variations and differences in permitted qualifications to the right.<sup>172</sup> Yet, as was the case at the international level, none of these core regional human rights treaties contain a right to return that is explicitly applicable to the situation of IDPs. Nonetheless, attention now turns to how some of these general human rights provisions have been interpreted and applied in the jurisprudence of the regional human rights bodies, focusing in specifically on Africa and Europe.<sup>173</sup>

### 3.6.2 Indigenous peoples in Africa

The African Court on Human and Peoples’ Rights (African Court) and the African Commission on Human and Peoples’ Rights (African Commission) have both had occasion to adjudicate on alleged violations of the Banjul Charter in the factual context of internal displacement. The most pertinent of these cases and communications have all concerned the rights protections of indigenous peoples.

In 2017, the African Court was called upon to deliberate on matters pertaining to internal displacement in the landmark case<sup>174</sup> of *African Commission on Human and Peoples’ Rights v Republic of Kenya* (the Ogiek case).<sup>175</sup> This case concerned the treatment of the Ogiek Community of the Mau

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<sup>169</sup> American Convention on Human Rights (ACHR), "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

<sup>170</sup> Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No 11 (16 September 1963) Strasbourg, 16.IX.1963.

<sup>171</sup> The wording here is taken directly from ECHR Protocol No 4, Article 3(2).

<sup>172</sup> Banjul Charter, Article 12(1); ACHR, Article 22(1); ECHR Protocol No 4, Article 2(1).

<sup>173</sup> The Inter-American human rights system will not here be dealt with in as much detail. This is for three main reasons. The first is language. Many of the judgments and decisions are in Spanish only, and it has not been possible to have these all translated (in large part because of their length). Second, of those judgments and decisions that are in English, none make explicit reference to a general IDP right to return. Third, space limitations have meant that a choice has had to be made in respect to which of these regional regimes greater attention should be afforded. Given their greater relevance to the topic at hand, preference has been given to the African and European regional human rights systems.

<sup>174</sup> As has been highlighted by Minority Rights Group International, this was the first occasion on which the African Court ruled on the rights of indigenous peoples (see Minority Rights Group International, ‘Huge victory for Kenya’s Ogiek as African Court sets major precedent for indigenous peoples’ land rights’ (26 May 2017) <[minorityrights.org/2017/05/26/huge-victory-kenyas-ogiek-african-court-sets-major-precedent-indigenous-peoples-land-rights](http://minorityrights.org/2017/05/26/huge-victory-kenyas-ogiek-african-court-sets-major-precedent-indigenous-peoples-land-rights)> accessed 2 January 2018).

<sup>175</sup> *African Commission on Human and Peoples’ Rights v Republic of Kenya* (Ogiek Case) App No 006/2012 (African Court, 26 May 2017).

Forest in south-west Kenya. The case was brought in respect to a 30-day eviction notice issued by the respondent Government against the Ogieks in October 2009.<sup>176</sup> The applicant submitted that the eviction notice demanded the Ogiek Community leave the Mau Forest 'on the grounds that the forest constitute[d] a reserved water catchment zone, and was in any event part of government land'.<sup>177</sup> For its part, the respondent Government claimed that the eviction had been for 'the preservation of the natural ecosystem'.<sup>178</sup> The applicant further argued that this was just one of several eviction measures that had been issued against the Ogieks, measures it was claimed reflected 'a perpetuation of the historical injustices suffered by the Ogieks'.<sup>179</sup> On 15 March 2013, the Court handed down an order of provisional measures 'to preserve the status *quo ante* pending the determination of the Court on the main application'.<sup>180</sup> At the time of the Order, the Court was of the view that there existed 'a situation of extreme gravity and urgency, as well as a risk of irreparable harm... and also prejudice to the substantive matter before the Court'.<sup>181</sup> While this particular eviction notice was suspended with immediate effect, matters of forced displacement were still before the Court on account of previous evictions and dispossessions of land.<sup>182</sup>

The applicant submitted that the Ogiek Community had suffered violations of a series of rights under the African Charter, specifically, the right to freedom from discrimination (Article 2), to life (Article 4), to freedom of conscience, the profession and free practice of religion (Article 8), to property (Article 14), to culture (Article 17), to the free disposal of wealth and natural resources (Article 21), and to development (Article 22). In its judgment, the Court found there to have been violations of all of these Articles, except Article 4.<sup>183</sup> In respect to the Ogieks' displacement, the Court found that to 'expel', or in other words forcibly displace, the Ogieks from their ancestral lands 'without prior consultation and without respecting the conditions of expulsion in the interest of public need' was to violate the Ogieks' rights to land under Article 14 read in the light of the 2007 UN Declaration on the Rights of Indigenous Peoples,<sup>184</sup> and that such evictions had, *inter alia*, 'adversely impacted on their [the Ogieks'] economic, social and cultural development' in violation of Article 22 of the Charter.<sup>185</sup> In coming to its finding

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<sup>176</sup> *ibid*, para 7.

<sup>177</sup> *ibid*, para 8.

<sup>178</sup> *ibid*, para 130.

<sup>179</sup> *ibid*, para 8.

<sup>180</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya* (Order of Provisional Measures) App No 006/2012 (African Court, 15 March 2013) para 23

<sup>181</sup> *ibid*, para 22

<sup>182</sup> Ogiek case, para 65.

<sup>183</sup> On this point, at para 155, the Court ruled that the applicant had 'not established the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result'.

<sup>184</sup> Ogiek case, para 131.

<sup>185</sup> *ibid*, para 211.

that there had been a violation of the right to free disposal under Article 21, the Court asserted that the Ogieks have ‘a number of rights to their ancestral land, namely, the right to use (*usus*) and the right to enjoy the produce of the land (*fructus*)’,<sup>186</sup> and that, crucially, the Court argued, these rights to use and to enjoy the produce of the land ‘presuppose the right of access to and occupation of the land’.<sup>187</sup> By here recognising a presupposed ‘right of access’, the Court impliedly identifies a right of the displaced Ogiek Community to return to their ancestral lands, for the purposes of using the land and enjoying the produce of that land. However, while the Court impliedly identifies what can be seen to be a right to return in connection to Article 21, it is nonetheless curious that the Court itself makes no explicit use of the word ‘return’,<sup>188</sup> and that there is no direct mention, neither in the prayers, pleadings nor the Court’s deliberations on the merits, to the Ogieks’ right to freedom of movement and residence under Article 12 of the Charter. Moreover, while the Court ordered the respondent State to ‘take all appropriate measures within a reasonable time frame to remedy all the violations established’,<sup>189</sup> it did so without giving any specific direction as to what would constitute ‘appropriate measures’ in the specific circumstances of the case. Further, the Court reserved its ruling on reparations.<sup>190</sup>

The African Commission has received a greater number of complaints pertaining to internal displacement and the treatment of IDPs.<sup>191</sup> The following three, high-profile communications are particularly illustrative of the manner in which the Commission has dealt with matters of internal displacement and return.

In October 2001, the Commission published its decision in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (the Ogoni communication).<sup>192</sup> The

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<sup>186</sup> *ibid*, para 201.

<sup>187</sup> *ibid*.

<sup>188</sup> The word ‘return’ is used on only one occasion in the entire judgment. This comes in the applicant’s prayers to the Court, in para 43(E)(i), specifically to have the ancestral lands returned to the Ogiek Community.

<sup>189</sup> Ogiek case, para 227.

<sup>190</sup> *ibid*, para 223.

<sup>191</sup> *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication No 368/09 (African Commission, 4 June 2014); *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (Ogoni communication) Communication No 155/96 (African Commission, 27 October 2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (Endorois communication) Communication No 276/03 (African Commission, 25 November 2009); *Sudan Human Rights Organisation (SHRO) & Centre on Housing Rights and Evictions (COHRE) v Sudan* (Darfur communication) Communication No 279/03-296/05 (African Commission, 27 May 2009); *Interights and World Organisation against Torture v Nigeria* Communication No 248/02 (African Commission, 4 June 2004); *Anuak Justice Council v Ethiopia* Communication No 299/05 (African Commission, 25 May 2006).

<sup>192</sup> Ogoni communication (cited above). The communication concerned the activities of the State oil company, the Nigerian Petroleum Company (NPC), which was in a consortium with Shell Petroleum Development Corporation (SPDC).

communication concerned oil extraction practices in Ogoniland, in southern Nigeria, and the effect of these practices on the Ogoni people. The Commission found the respondent State to be in violation of all Articles raised, specifically, of the right to freedom from discrimination (Article 2), to life (Article 4), to property (Article 14), to enjoy the best attainable state of physical and mental health (Article 16), to protection of the family (Article 18(1)), to the free disposal of wealth and natural resources (Article 21), and to a general satisfactory environment favourable to development (Article 24). In addition to the stated Articles, the Commission also found the respondent State to have violated both the right to shelter, also otherwise termed the right to (adequate) housing,<sup>193</sup> and the right to protection against forced evictions.<sup>194</sup> While neither of these latter two rights expressly feature in the African Charter, they have nonetheless been read into the Charter by the Commission. The right to shelter or housing is read into the Charter through a combination of the right to property, the right to enjoy the best attainable state of physical and mental health, and the protection of the family.<sup>195</sup> The right to protection against forced evictions is then encompassed within this right to adequate housing.<sup>196</sup> On the facts, the Commission found that '[t]he government ha[d] destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent civilians who ha[d] attempted to return to rebuild their ruined homes', in 'massive' violation of the right to shelter.<sup>197</sup> Further, the respondent Government had, through failing to ensure 'a degree of security of tenure which guarantees legal protections against forced eviction, harassment and other threats',<sup>198</sup> 'clearly' violated the Ogonis' collective right to protection against forced evictions.<sup>199</sup> However, while the Commission read into the Charter a 'right to protection against forced evictions',<sup>200</sup> and it found a violation of the right to shelter on account of the violence endured by those IDPs who had attempted to return to their homes (in other words, a violation in respect to return conditions), the Commission did not explicitly read into the Charter a right to return. Moreover, similarly to the Ogiek case before the African Court, the Commission did not here consider the Article 12 right to freedom of movement and residence.

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<sup>193</sup> *ibid*, para 62.

<sup>194</sup> *ibid*, para 63.

<sup>195</sup> *ibid*, para 60.

<sup>196</sup> *ibid*, para 63.

<sup>197</sup> *ibid*, para 62.

<sup>198</sup> As stated in UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 4: The Right to Adequate Housing (Article 11(1) of the Covenant' (13 December 1991) UN Doc E/1992/23.

<sup>199</sup> Ogoni communication, para 63.

<sup>200</sup> *ibid*, para 63.

In May 2009, the Commission gave its decision in *Sudan Human Rights Organisation (SHRO) & Centre on Housing Rights and Evictions (COHRE) v Sudan* (the Darfur communication).<sup>201</sup> In this communication, the Commission was called upon to rule on the treatment of indigenous Black African tribes in Darfur.<sup>202</sup> The complainants alleged that the respondent State, under the presidency of Omar Al-Bashir, was responsible for, *inter alia*, forcibly displacing or evicting populations, and totally or partially destroying public facilities and property, including homes.<sup>203</sup> On this occasion, the complainants did turn to Article 12. Among other alleged violations, the complainants argued that the forced evictions constituted a violation of the Article 12(1) right to freedom of movement and residence.<sup>204</sup> In its deliberations, the Commission emphasised the importance of freedom of movement as ‘a fundamental human right to all individuals within States’,<sup>205</sup> reasserting that it encompasses the right to ‘travel to, reside in, and/or work in, any part of the State the citizen wishes, without interference from the State’.<sup>206</sup> The Commission found there to have been a violation of Article 12 in respect to the respondent State’s failure ‘to prevent forced evictions or to take urgent steps to ensure displaced persons return to their homes’.<sup>207</sup> Although the Commission did not refer in its decision to Principle 28 of the UN Guiding Principles, its finding here is nevertheless of the same ilk as the Principle 28(1) requirement that ‘[c]ompetent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence...’, albeit that the Commission is rather more direct when it states ‘ensure... return’,<sup>208</sup> rather than ‘allow... return’.<sup>209</sup> Yet, it is also reminiscent of the Guiding Principles in the way in which, despite placing welcome focus on the duty of the respondent State to facilitate IDP return, nonetheless fails to express a right to return for those who have been internally displaced.

In both the Ogoni and the Darfur communications, despite the Commission’s (brief) examination of return matters, it did not unequivocally assert that the complainants had a right to return. Such a right remained to be at best implied from the Commission’s findings. Yet, just a few months after the decision in the Darfur communication, the Commission did go further in this respect. In November 2009, the Commission released its decision in *Centre for Minority Rights Development (Kenya) and*

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<sup>201</sup> Darfur communication (cited above).

<sup>202</sup> *ibid*, para 2.

<sup>203</sup> *ibid*, paras 3 and 14.

<sup>204</sup> *ibid*, para 186.

<sup>205</sup> *ibid*, para 187.

<sup>206</sup> *ibid*.

<sup>207</sup> *ibid*, para 190.

<sup>208</sup> *ibid*.

<sup>209</sup> Guiding Principle, Principle 28(1).

*Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (the Endorois communication).<sup>210</sup> The Endorois communication concerned the forced removal of the indigenous Endorois Community from their ancestral tribal lands, including from the sacred sites of Lake Bogoria and Monchongoi Forest,<sup>211</sup> for the purpose of creating a game reserve. The respondent State claimed that this was for the primary reason of conservation,<sup>212</sup> although this was contested by the complainants who alleged use of the land for ruby mining.<sup>213</sup> The complainants sought a declaration from the Commission that the respondent State had violated the rights of the Endorois Community to practice their religion (Article 8), to property (Article 14), to culture (Article 17), to the free disposal of their wealth and natural resources (Article 21), and to development (Article 22). Interestingly, there was once again no mention made to the right to freedom of movement and residence under Article 12. The Commission found in favour of the complainants in respect to all alleged violations. Despite no mention being made to Article 12, the matter of return did nevertheless arise, but on this occasion in respect to the collective right to development under Article 22 instead. Article 22(1) of the African Charter states that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'. Further, Article 22(2) asserts that it is States that 'have the duty, individually or collectively, to ensure the exercise of the right to development'. In its decision, the Commission spoke explicitly, albeit only in passing, of the Endorois Community being denied 'all *rights of return* to their land'.<sup>214</sup> This express reference to rights of return was here made in respect to the complainants' assertion that the evictions that took place were 'without proper prior consultations, [or] adequate and effective compensation'.<sup>215</sup> The Commission agreed. It stated that prior, informed consent of all members of the Endorois Community was not obtained, and further, that '[t]he respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle'.<sup>216</sup> Moreover, the Commission found that the Endorois Community 'had a *legitimate expectation* that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes'.<sup>217</sup> On this occasion, it therefore appears that the Commission has read a limited right to return (in other words, for specified purposes) into the Article 22 right to development. Taken together with the failure of the Respondent State 'to provide adequate

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<sup>210</sup> Endorois communication (cited above).

<sup>211</sup> *ibid*, para 6.

<sup>212</sup> *ibid*, para 275.

<sup>213</sup> *ibid*, para 14.

<sup>214</sup> *ibid*, para 290 (emphasis added).

<sup>215</sup> *ibid*, para 2.

<sup>216</sup> *ibid*, para 290.

<sup>217</sup> *ibid* (emphasis added).



compensation and benefits, or provide suitable land for grazing',<sup>218</sup> this restriction on return led to a violation of the Endorois community's right to development. Moreover, by not adequately providing for the Endorois community in the development process, Kenya had failed to fulfil its obligation under the African Charter to create conditions favourable to a people's development.<sup>219</sup> For the Endorois Community to enjoy the right to development presupposed their enjoyment of 'all rights of return to their land'.<sup>220</sup> To prevent return was therefore to prevent enjoyment of Article 22. In its recommendations, the Commission recommended, *inter alia*, that Kenya 'Recognise rights of ownership to the Endorois and Restitute [sic] Endorois ancestral land' and 'Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle'.<sup>221</sup>

In sum, what the Ogiek case and the three communications show is a somewhat restrained approach being taken by the Court and Commission in respect to matters of return. This is not to say that the pronouncements themselves are restrained, for these are some of the landmark decisions in respect to indigenous rights in Africa, but it is to say that the role of return in this regard is underplayed. Although return does expressly feature on brief occasions, it does not take centre-stage. Instead, questions of 'access' feature far more prominently than questions of 'return'. Moreover, to simply presuppose return for the purpose of the enjoyment of Charter rights is to fail to give it the attention it requires or needs to effect its realisation.

In contrast to the right to shelter and the right to protection against forced evictions, the Commission has not been as explicit as to read a right to return into the Charter. In this connection, it is particularly interesting to observe that both the Court and the Commission, and indeed the complainants, have not consistently drawn upon Article 12 as the basis for discussions in respect to return. While return was discussed in the context of Article 12 in the Darfur communication, matters of return have also been raised entirely apart from freedom of movement and residence, instead in connection to the Article 21 right to freely dispose of wealth and natural resources (in the Ogiek case), the right to shelter or (adequate) housing as read into the Charter (in the Ogoni communication), and the Article 22(1) right to economic, social and cultural development (in the Endorois communication). This clearly demonstrates the importance and cross-cutting nature of return in the enjoyment of human rights. It also reveals a significant degree of inconsistency in the jurisprudence of the Commission in particular.

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<sup>218</sup> *ibid*, para 298.

<sup>219</sup> *ibid*.

<sup>220</sup> *ibid*, para 290.

<sup>221</sup> *ibid*, recommendations.

Yet, most importantly, it brings to the fore another critical concern. In both the Ogiek case, that is the single directly relevant case that has been brought before the Court, and the Endorois communication, the decision in which the Commission has been most explicit in respect to return as a right, return was raised in relation to group rights, to Articles 21 and 22(1) respectively. This thereby raises the possibility that claims may only succeed, or be far more likely to succeed, when brought by certain categories of IDPs *as groups*. Indeed, the fact that all four of these disputes concerned indigenous peoples cannot be simply ignored, and the likely consequences of this cannot be overlooked. For instance, the wording used by the Commission in Endorois, that the Community were being denied ‘all rights of return to *their* land’,<sup>222</sup> further bolsters the conclusion that these here proclaimed ‘rights of return’ may only apply to those groups who have, on the basis of culture and religion, a particularly special connection to specific lands, that is special enough for that land to constitute ‘*their* land’ in law. This is a particular concern from an internal displacement perspective because, as with ILO Convention No 169, it risks limiting application to only those IDPs who also belong to a recognised indigenous people. Even if the Court and Commission were willing to extend such pronouncements to those not from indigenous groups, the likely consequence would nevertheless be that when it comes to *individual* IDPs, recourse may only be had to the right to shelter and (adequate) housing, in addition to the right to freedom of movement and residence.

In sum, suffice it to say that despite the importance of the pronouncements made in the African human rights system, these likely take us little further in the search for an unequivocal IDP right to return that applies to all IDPs, without discrimination.

### 3.6.3 The Turkey cases

Turning now to consider a series of high-profile cases that have come before the ECtHR. In the cases of *Loizidou v Turkey*<sup>223</sup> and *Cyprus v Turkey*,<sup>224</sup> the ECtHR was called upon to adjudicate on matters related to the ongoing protracted conflict involving the Republic of Cyprus, the Republic of Turkey and the self-proclaimed Turkish Republic of Northern Cyprus (TRNC). Military operations in the north of Cyprus in mid-1974 resulted in the displacement of over 200,000 Greek Cypriots<sup>225</sup> and the persistent division of the island of Cyprus.<sup>226</sup> In November 1983, the TRNC proclaimed its independence, a move

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<sup>222</sup> *ibid*, para 290 (emphasis added).

<sup>223</sup> [GC] App no 15318/89 (ECtHR, 18 December 1996).

<sup>224</sup> [GC] App no 25781/94 (ECtHR, 10 May 2001).

<sup>225</sup> *Cyprus v Turkey*, para 28.

<sup>226</sup> *ibid*, para 13.

roundly condemned by the international community,<sup>227</sup> with Turkey being the only UN Member State to today officially recognise its *de jure* existence.

The *Loizidou* case was lodged by a Cypriot national who, having grown up in Kyrenia, in northern Cyprus, moved to Nicosia with her husband in 1972.<sup>228</sup> While the applicant had not therefore been forced to flee Kyrenia, she was nevertheless prevented from returning subsequent to the events of July 1974. The applicant alleged that ‘continuous denial of access to her property in Northern Cyprus and the ensuing loss of control over it’<sup>229</sup> constituted a violation of the right to peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1) and a violation of the right to respect for one’s home (Article 8). The ECtHR found a violation of the former (by eleven votes to six), but not of the latter (unanimous). In respect to Article 1 of Protocol No 1, the ECtHR found that the consequence of the applicant being refused access to her land was that she ‘effectively lost all control over, as well as all possibilities to use and enjoy, her property’,<sup>230</sup> thereby resulting in an unjustified interference with ‘the peaceful enjoyment of her possessions’.<sup>231</sup> This, the ECtHR found, was imputable to Turkey on account of its ‘obvious’ exercise of ‘effective control’ over the northern part of the island.<sup>232</sup> However, no violation of Article 8 was found on account of the fact that, first, no physical home existed on the land, and second, the applicant no longer lived in Kyrenia, having moved to Nicosia over two decades prior to the lodging of the case.<sup>233</sup> To recognise in these circumstances an interference with Article 8 would, in the view of the Court, be to ‘strain the meaning of the notion “home” in Article 8’.<sup>234</sup>

In *Cyprus v Turkey*, the applicant Government alleged violations of a vast number of ECHR rights.<sup>235</sup> The reason for this, in part, was that these allegations were brought in respect not only to the rights of those who had been displaced, but also in respect to missing persons and their relatives, the living conditions of Greek Cypriots in northern Cyprus, and the rights of Turkish Cypriots living in northern Cyprus. In respect to displaced persons in the southern part of the island, the allegations brought concerned, as in *Loizidou*, Article 8, and Article 1 of Protocol No 1, as well as, *inter alia*, the right to an

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<sup>227</sup> *ibid*, para 14.

<sup>228</sup> *Loizidou*, para 11.

<sup>229</sup> *ibid*, para 48.

<sup>230</sup> *ibid*, para 63.

<sup>231</sup> *ibid*.

<sup>232</sup> *ibid*, paras 56-57.

<sup>233</sup> *ibid*, paras 65-66.

<sup>234</sup> *ibid*, para 66.

<sup>235</sup> *Cyprus v Turkey*, para 18. In total, the allegations raised before the ECtHR by the applicant Government pertained to Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17 and 18, and Articles 1 and 2 of Protocol No 1.

effective remedy under Article 13.<sup>236</sup> On this occasion, the ECtHR found violations of all three of these Articles (all by sixteen votes to one). The ECtHR found that the official TRNC policy of ‘deny[ing] the right of the displaced persons to return to their homes’<sup>237</sup> and ‘the very tight restrictions operated by the same authorities on visits to the north by Greek Cypriots living in the south’<sup>238</sup> constituted a continuing violation of Article 8.<sup>239</sup> Moreover, ‘[t]he continuing and total denial of access to their [displaced Greek Cypriots’] property’<sup>240</sup> was a clear interference with the peaceful enjoyment of possessions, for which no compensation had been paid,<sup>241</sup> in continuing violation of Article 1 of Protocol No 1.<sup>242</sup> In respect to Article 13, Turkey had ‘fail[ed] to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under Article 8 of the Convention and Article 1 of Protocol No. 1’.<sup>243</sup>

The *Loizidou* judgment lacks explicit references to return. There are only three instances in which return is used,<sup>244</sup> none of which form the words of the ECtHR, but all of the applicant. Of these three instances, only once is return used in connection with being a right, although this is only in the outline of the facts and not in respect to matters that form the main substance of the case.<sup>245</sup> Instead of return, the ECtHR predominantly spoke of ‘access’, and it is in this respect that the judgment is of particular interest. The word ‘access’ does not explicitly feature in the text of Article 1 of Protocol No 1, the first sentence of which states that ‘Every natural or legal person is entitled to the peaceful enjoyment of [one’s] possessions’. Yet, in respect to the applicant in *Loizidou*, the ECtHR found that ‘continuous denial of access must... be regarded as an interference with her rights under Article 1 of Protocol No. 1’.<sup>246</sup> The reason for this was that ‘continuous denial of access’ meant the applicant had ‘effectively lost all control over, as well as all possibilities to use and enjoy, her property’.<sup>247</sup> Here, therefore, the ECtHR brought the question of access within the ambit of Article 1 of Protocol No 1.

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<sup>236</sup> In respect to persons displaced by the conflict, the applicant Government had, in addition, alleged violations of Articles 3, 17 and 18, and Article 14 taken in conjunction with Articles 8, 13 and Article 1 of Protocol No 1. However, the ECtHR unanimously deemed it unnecessary to examine these particular allegations. Moreover, in its proceedings before the Commission, the applicant Government had also raised an alleged violation of Article 3 of Protocol No 1, however, as this was not continued by Cyprus before the ECtHR, the ECtHR did not pronounce on this issue.

<sup>237</sup> *Cyprus v Turkey*, para 172.

<sup>238</sup> *ibid.*

<sup>239</sup> *ibid*, para 175.

<sup>240</sup> *ibid*, para 187.

<sup>241</sup> *ibid.*

<sup>242</sup> *ibid*, para 189.

<sup>243</sup> *ibid*, para 194.

<sup>244</sup> *Loizidou*, paras 12, 13 and 65.

<sup>245</sup> Specifically, this was in respect to a march in which the applicant participated, the aim of which was ‘to assert the right of Greek Cypriot refugees to return to their homes’ (para 13).

<sup>246</sup> *Loizidou*, para 63 (emphasis added).

<sup>247</sup> *ibid.*

Yet, there was no explicit mention of 'return'. Such references to access, rather than return, were then carried forward by the ECtHR to its *Cyprus v Turkey* judgment. In this, the ECtHR asserted that '*The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1*'.<sup>248</sup> Again, the view of the ECtHR was that Greek Cypriots who own property in northern Cyprus are being denied 'access to and control, use and enjoyment of their property'.<sup>249</sup> While return as a term did appear more frequently in *Cyprus v Turkey* than it did in *Loizidou*, the ECtHR still did not enter into any discussion of this. The ECtHR simply observed that it was TRNC policy 'to deny the right of the displaced persons to return to their homes',<sup>250</sup> and it did not entertain Turkey's assertion that 'pending the elaboration of an agreed political solution to the overall Cyprus problem, there could be *no question of a right* of displaced persons either *to return* to their homes and properties which they had left in northern Cyprus or to lay claim to any of their immovable property vested in the "TRNC" authorities',<sup>251</sup> other than to say that 'inter-communal talks cannot be invoked in order to legitimate a violation of the Convention'.<sup>252</sup>

In 2004, Turkey was once again before the ECtHR on matters related to internal displacement, but this time not in an inter-State application. The case of *Doğan and others v Turkey*<sup>253</sup> is just one of many cases that have been taken against Turkey in respect to alleged unlawful internal displacement in the context of the ongoing violent conflict between the Workers' Party of Kurdistan (PKK) and Turkish security forces in the south-east of the country.<sup>254</sup> The applicants in *Doğan* all lived in Boydaş village in Tunceli province, which was at that time, in 1994, in a state of emergency.<sup>255</sup> As with the vast majority of these cases against Turkey, the facts were disputed by the parties. The applicants alleged to have been forcibly evicted by Turkish security forces,<sup>256</sup> and that, 'on account of the restrictions

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<sup>248</sup> *Cyprus v Turkey*, para 18 (emphasis added).

<sup>249</sup> *ibid*, para 189.

<sup>250</sup> *ibid*, para 172.

<sup>251</sup> *ibid*, para 193 (emphasis added).

<sup>252</sup> *ibid*, para 174.

<sup>253</sup> App nos 8803-8811/02, 8813/02 and 8815-8819/02 (ECtHR, 29 June 2004).

<sup>254</sup> See *Akdivar and others v Turkey* App no 21893/93 (ECtHR, 16 September 1996); *Bilgin v Turkey* App no 23819/94 (ECtHR, 16 November 2000); *Dulaş v Turkey* App no 25801/94 (ECtHR, 30 January 2001); *Yöyler v Turkey* App no 26973/95 (ECtHR, 24 July 2003); *Nuri Kurt v Turkey* App no 37038/97 (ECtHR, 29 November 2005); *Kumri Yılmaz and others v Turkey* App no 36211/97 (ECtHR, 2 February 2006); *Öztoprak and others v Turkey* App no 33247/96 (ECtHR, 2 February 2006); *Şaylı v Turkey* App no 33243/96 (ECtHR, 2 February 2006); *Ağtaş v Turkey* App no 33240/96 (ECtHR, 2 February 2006); *Artun and others v Turkey* App no 33239/96 (ECtHR, 2 February 2006); *Keser and others v Turkey* App nos 33238/96 and 32965/96 (ECtHR, 2 February 2006); *Soylu v Turkey* App no 43854/98 (ECtHR, 15 February 2007); *Aksakal v Turkey* App no 37850/97 (ECtHR, 15 February 2007); *Bedir and others v Turkey* App no 52644/09 (ECtHR, 12 April 2007).

<sup>255</sup> *Doğan*, para 9.

<sup>256</sup> *ibid*, para 14.

imposed by the authorities,' had been prevented from returning to their villages.<sup>257</sup> Turkey claimed that the inhabitants of Boydaş village were not forced to leave, but 'evacuated the village because of the PKK intimidation',<sup>258</sup> and that, as of July 2003, there was no obstacle to their return.<sup>259</sup> The applicants alleged admissible complaints under Articles 8 and 13, and Article 1 of Protocol No 1.<sup>260</sup> While the ECtHR was unable to ascertain the exact cause of displacement,<sup>261</sup> it was nevertheless of the view that denial of access for almost ten years 'must be regarded as an interference with the applicants' right to the peaceful enjoyment of their possessions'.<sup>262</sup> While this interference 'did not lack a basis', being as it was in the context of the PKK insurgency,<sup>263</sup> the ECtHR concluded that Turkey's efforts to remedy the situation in the interests of the IDPs were 'inadequate and ineffective'.<sup>264</sup> Moreover, the burden borne by the applicants was 'individual and excessive', and thereby the interference experienced was not proportionate to the requirements of the general interest,<sup>265</sup> and as such in violation of Article 1 of Protocol No 1.<sup>266</sup> For the same reasons, the ECtHR found there could be 'no doubt that the refusal of access to the applicants' homes and livelihood... constitute[d] at the same time a serious and unjustified interference with the right to respect for family lives and homes',<sup>267</sup> in violation of Article 8.<sup>268</sup> In respect to Article 13, the ECtHR found there to have been a violation on account of Turkey's failure to discharge its duty to prove the availability of appropriate remedies.<sup>269</sup>

The fact that the applicants had been unable to return to their homes for just short of a decade was at the centre of the case in *Doğan*. However, once again, the judgment was predominantly framed around 'access' as opposed to 'return'. Yet, the ECtHR did have some words on return. By taking verbatim the wording from Principle 28 of the Guiding Principles, the ECtHR stated that 'For the Court... the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their

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<sup>257</sup> *ibid*, para 115.

<sup>258</sup> *ibid*, para 22.

<sup>259</sup> *ibid*, para 141.

<sup>260</sup> *ibid*, paras 115-117. The applicants additionally alleged violations of Articles 1, 6, 7, 14 and 17, but these were all found inadmissible (see paras 118-133).

<sup>261</sup> *ibid*, para 143.

<sup>262</sup> *ibid*.

<sup>263</sup> *ibid*, para 153.

<sup>264</sup> *ibid*, para 154.

<sup>265</sup> *ibid*, para 155.

<sup>266</sup> *ibid*, para 156.

<sup>267</sup> *ibid*, para 159.

<sup>268</sup> *ibid*, para 160.

<sup>269</sup> *ibid*, paras 163-164.

homes or places of habitual residence, or to resettle voluntarily in another part of the country'.<sup>270</sup> In this connection, the ECtHR found that the authorities had 'fail[ed]... to facilitate return to Boydaş'.<sup>271</sup> In particular, the 'Return to the Village and Rehabilitation Project' that had been initiated by the South-eastern Anatolia Project Regional Development Directorate, had, despite its aims to facilitate the return and re-settlement of those who had been forcibly displaced,<sup>272</sup> 'not been converted into practical steps to facilitate the return of the applicants to their village'.<sup>273</sup> In the view of the ECtHR, Turkey had therefore fallen short in its duty and responsibility, as provided for by Principle 28, and as now transplanted into the ECHR.

#### 3.6.4 Sargsyan v Azerbaijan and Chiragov v Armenia

Turkey is not, however, the only Contracting State that has been brought before the ECtHR in respect to such matters. In 2015, the Grand Chamber simultaneously ruled on two cases pertaining to the ongoing territorial dispute involving Armenia, Azerbaijan and the self-proclaimed Republic of Artsakh (formerly known, until 2017, as the self-proclaimed Nagorno-Karabakh Republic) in the South Caucasus. The cases of *Sargsyan v Azerbaijan*<sup>274</sup> and *Chiragov and others v Armenia*<sup>275</sup> were both brought in respect to events that occurred within the internationally-recognised territory of Azerbaijan during active armed conflict and mass displacement in mid-1992.<sup>276</sup> The hostilities that formed the subject of these cases had developed in the later years of the USSR and had escalated by the time of its dissolution in December 1991.<sup>277</sup> In the years preceding dissolution, violent clashes had routinely occurred between Armenians and Azeris amid calls for the incorporation of the Nagorno-Karabakh Autonomous Oblast (NKAO) into the Armenian SSR.<sup>278</sup> Just a few months' prior to the dissolution of the USSR, Azerbaijan had declared its independence,<sup>279</sup> and soon after that, the Soviet of the NKAO declared the establishment of the Nagorno-Karabakh Republic and its secession from Azerbaijan.<sup>280</sup> The Nagorno-Karabakh Republic then reaffirmed its independence from the newly re-established Republic of Azerbaijan on 6 January 1992.<sup>281</sup>

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<sup>270</sup> *ibid*, para 154.

<sup>271</sup> *ibid*.

<sup>272</sup> *ibid*, para 17.

<sup>273</sup> *ibid*, para 154.

<sup>274</sup> [GC] App no 40167/06 (ECtHR, 16 June 2015).

<sup>275</sup> [GC] App no 13216/05 (ECtHR, 16 June 2015).

<sup>276</sup> *Chiragov*, paras 18-20; *Sargsyan*, paras 39-40.

<sup>277</sup> *Chiragov*, para 17.

<sup>278</sup> *ibid*, paras 14-16.

<sup>279</sup> *ibid*, para 17.

<sup>280</sup> *ibid*.

<sup>281</sup> *ibid*.

The applicants in *Chiragov* were ethnic Azerbaijani Kurds living in the district of Lachin in the south-west of the NKAO in western Azerbaijan, close to the border with Armenia.<sup>282</sup> While the NKAO had a majority Armenian population, the great majority of the population in the district of Lachin was Azeri and Kurdish.<sup>283</sup> Lachin had been the site of many violent clashes during 1988 that led to significant displacement.<sup>284</sup> In mid-May 1992, following sustained attacks, including aerial bombardment and the advance of ground troops, the applicants fled Lachin for Baku.<sup>285</sup> Since then, Lachin has remained under the *de facto* control of Artsakh.<sup>286</sup> The applicant in *Sargsyan* was an ethnic Armenian living in the village of Gulistan in western Azerbaijan.<sup>287</sup> Gulistan is located close to the northern boundary of the *de facto* Artsakh territory,<sup>288</sup> and although it has been claimed by the breakaway regime,<sup>289</sup> nonetheless remains under the control of Azerbaijan. Prior to the conflict, Gulistan had a majority Armenian population.<sup>290</sup> In mid-June 1992, the region came under attack from Azerbaijani forces,<sup>291</sup> with Gulistan being heavily bombed.<sup>292</sup> The applicant and his family fled to Yerevan.<sup>293</sup>

In both cases, return featured explicitly in the applicants' submissions. In *Chiragov*, the applicants claimed that since being displaced they had 'been unable to return to their homes and properties because of Armenian occupation'.<sup>294</sup> In *Sargsyan*, the applicant complained that he had been denied 'his right to return'.<sup>295</sup> In this connection, all applicants raised similar allegations in respect to the same Convention rights, and the Grand Chamber came to the same conclusions on its findings on the merits in both cases. It found, albeit not unanimously, that there were continuing violations of Articles 8 and 13, and Article 1 of Protocol No 1, and that there were no separate issues raised under the Article 14 right to the prohibition of discrimination in the enjoyment of Convention rights. Specifically, in *Sargsyan*, while the ECtHR 'accept[ed] that refusing civilians, including the applicant, access to Gulistan is justified by safety considerations',<sup>296</sup> it found that 'the impossibility for the applicant to

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<sup>282</sup> *ibid*, paras 12 and 32.

<sup>283</sup> *ibid*, para 13.

<sup>284</sup> *ibid*, para 15.

<sup>285</sup> *ibid*, paras 20 and 32.

<sup>286</sup> *ibid*, para 23.

<sup>287</sup> *Sargsyan*, para 29.

<sup>288</sup> *ibid*, para 30.

<sup>289</sup> *ibid*, para 19.

<sup>290</sup> *ibid*, para 30.

<sup>291</sup> *ibid*, para 32.

<sup>292</sup> *ibid*, para 39.

<sup>293</sup> *ibid*.

<sup>294</sup> *Chiragov*, para 32.

<sup>295</sup> *Sargsyan*, para 152.

<sup>296</sup> *ibid*, para 233.



have access to his property in Gulistan without the Government taking any alternative measures in order to restore his property rights or to provide him with compensation for his loss of their enjoyment, placed and continues to place an excessive burden on him'.<sup>297</sup> In *Chiragov*, the ECtHR found, per its judgment in *Loizidou*, that 'they [the applicants] have continuously been denied access to their property and have thereby lost the control over it and any possibility to use and enjoy it'.<sup>298</sup>

Although there are many factual similarities between the two cases, it must be borne in mind that there is one particularly important difference. While the applicants in *Chiragov* were IDPs,<sup>299</sup> the applicant in *Sargsyan* was a refugee,<sup>300</sup> that is up until he obtained Armenian citizenship in 2002.<sup>301</sup> That being said, the ECtHR's deliberations in *Sargsyan* were not exclusively confined to refugees. The ECtHR instead took a broad approach to categories of displaced persons in both cases, considering these in the round, thus meaning that its comments are in general inclusive of both refugees and IDPs. Moreover, its deliberations in the two cases were very similar, being as they were assigned to the same composition of the ECtHR<sup>302</sup> and, as mentioned earlier, the judgments being delivered on the same date.

The ECtHR here dealt more closely with issues of return than it had done in previous cases. Given the context of the claims, the ECtHR was able to draw on the Madrid Principles,<sup>303</sup> which, as discussed in Chapter One of this Thesis, call for 'the right of all internally displaced persons and refugees to return to their former places of residence' in Armenia and Azerbaijan.<sup>304</sup> In this respect, the ECtHR emphasised that the right of IDP return remains an unresolved issue in the protracted negotiations between the two States.<sup>305</sup> The ECtHR also referred to return expressed as a right in UN Security Council resolutions and recommendations of the EU and the Council of Europe,<sup>306</sup> and drew on the 'right to return' provision in CIHL Rule 132.<sup>307</sup> Moreover, the ECtHR recognised the place of the Pinheiro Principles in 'provid[ing] international standards and practical guidelines to States, UN agencies and the broader international community on how best to address the complex legal and

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<sup>297</sup> *ibid*, para 241.

<sup>298</sup> *Chiragov*, para 196.

<sup>299</sup> *ibid*, para 206.

<sup>300</sup> *Sargsyan*, para 118.

<sup>301</sup> *ibid*, para 40. The applicant in *Sargsyan* died on 13 April 2009 from a serious illness (para 40). The applicant's son and daughter continued the proceedings before the ECtHR (para 102).

<sup>302</sup> *ibid*, para 6.

<sup>303</sup> *Chiragov*, para 105; *Sargsyan*, para 207.

<sup>304</sup> *Chiragov*, para 29.

<sup>305</sup> *ibid*, para 105.

<sup>306</sup> *Chiragov*, para 105; *Sargsyan*, para 207.

<sup>307</sup> *Chiragov*, para 97; *Sargsyan*, paras 95 and 232.

technical issues surrounding housing and property restitution’,<sup>308</sup> albeit that in neither judgment did the ECtHR refer to the ‘right to return’ under Principle 10 of the Pinheiro Principles. However, despite drawing on this material, when it came to considering Convention rights, the ECtHR once again framed its examination primarily around questions of ‘access’ and property rights, rather than ‘return’ and movement rights.<sup>309</sup>

That being said, the ECtHR did make some targeted comments on the prospect of return. In its principal judgment in *Chiragov*, the ECtHR stated that in its view ‘it is not realistic, let alone possible, in practice for Azerbaijanis to return to these territories in the circumstances which have prevailed throughout this period.’<sup>310</sup> In this respect, the ECtHR cited, *inter alia*, ‘an overall hostile relationship between Armenia and Azerbaijan and no prospect of a political solution yet in sight.’<sup>311</sup> In its later judgments on just satisfaction in late-2017,<sup>312</sup> further similar comments were made. Again in *Chiragov*, the ECtHR stated that ‘the applicants’ return to their property and homes... and compensation for the loss sustained... would put them as far as possible in a situation equivalent to the one in which they would have found themselves had their rights under the Convention not been breached’.<sup>313</sup> However, the ECtHR nevertheless concluded that ‘an award of compensation is the appropriate just satisfaction’,<sup>314</sup> this being on account of there being ‘no realistic possibility for them [the applicants] to return in the prevailing circumstances’.<sup>315</sup> While the *Chiragov* applicants’ claims for just satisfaction were solely monetary,<sup>316</sup> in the principal hearing in *Sargsyan*, the applicant had requested ‘first and foremost restitution of his property, including the right to return to his property and home in Gulistan’, as well as monetary compensation.<sup>317</sup> However, the return aspect of the claim was dropped by the applicant prior to the award of just satisfaction being made, again due to ‘the impossibility of a return to the village on account of the prevailing security situation’.<sup>318</sup> Once more, the ECtHR therefore considered an award of compensation to be appropriate.<sup>319</sup> This removal of the ‘right to return’ aspect also meant the ECtHR was not required to pronounce on this so precisely in its judgment on just satisfaction.

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<sup>308</sup> *Chiragov*, para 98; *Sargsyan*, para 96.

<sup>309</sup> *Chiragov*, para 196; *Sargsyan*, paras 234 and 241.

<sup>310</sup> *Chiragov*, para 195.

<sup>311</sup> *ibid*, 195.

<sup>312</sup> *Chiragov and others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017); *Sargsyan v Azerbaijan* (just satisfaction) [GC] App no 40167/06 (ECtHR, 12 December 2017).

<sup>313</sup> *Chiragov* (just satisfaction) para 59.

<sup>314</sup> *ibid*, para 59.

<sup>315</sup> *ibid*, para 59.

<sup>316</sup> *Chiragov*, para 222.

<sup>317</sup> *Sargsyan*, para 281.

<sup>318</sup> *Sargsyan* (just satisfaction) para 42.

<sup>319</sup> *ibid*.

In sum, over the past twenty-five years, the ECtHR has been called upon to make judgments on some of the most intractable and politically-contentious matters. Yet, to date, the issues that have here come before the ECtHR remain unresolved. IDPs and refugees are still prevented from returning to their homes in Cyprus, Turkey, Armenia and Azerbaijan, on account of protracted disputes that continue to afflict the south-eastern reaches of Europe. In these cases, the ECtHR has been asked to make landmark decisions, in particular, in respect to matters of jurisdiction. This was essential in *Louzidou* and *Cyprus v Turkey*, as well as more recently in *Chiragov*, because for the applications to proceed required the Grand Chamber to take the position that the matters before it came within the jurisdiction of the respondent State, this being despite the events not occurring on the internationally-recognised territory of those States, based on the now-established principle of the ‘exercise of effective control’.<sup>320</sup> If the ECtHR had found differently on these jurisdictional questions, then these applications would have come to an early halt.

The judgments in *Chiragov* and *Sargsyan* continued a trend seen in the Turkey cases towards more explicit consideration of return by the ECtHR. Yet, the ECtHR has hesitated in its stance in respect to return. Specifically, it has shied away from making any proclamation that there exists a right to return for IDPs under the ECHR and its Protocols. For the ECtHR, return appears to be a factual matter that gives rise to related rights concerns, rather than return being a rights issue in and of itself. It is clear which rights return is associated with in such circumstances. The Article 8 right to respect for private and family life, alongside the Article 1 of Protocol No 1 right to respect for possessions, have been consistently relied upon in all related cases, as has, since *Cyprus v Turkey*, the Article 13 right to an effective remedy. Yet, in its deliberations on these matters, the ECtHR has preferred to speak of ‘access’ rather than ‘return’. Another interesting observation is that in none of these cases thus far considered has the right to liberty of movement and freedom to choose one’s residence under Article 2 of Protocol No 4 been raised. The reason for this appears, however, to be purely procedural. Specifically, in the three cases taken against Turkey, Article 2 of Protocol No 4 could not be raised as Turkey has not ratified Protocol No 4.<sup>321</sup> In respect to Armenia and Azerbaijan, both Contracting States have ratified Protocol No 4, but both after the events that formed the subject of the *Chiragov* and

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<sup>320</sup> In *Chiragov*, the ECtHR did just this, ruling that Armenia ‘exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin’, para 186.

<sup>321</sup> Turkey signed Protocol No 4 on 19 October 1992. Council of Europe Treaty Office, ‘Treaty list for a specific State: Turkey’ <[www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR?p\\_auth=0iTcoQBQ](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR?p_auth=0iTcoQBQ)> accessed 17 February 2019.

*Sargsyan* cases.<sup>322</sup> The Grand Chamber is, however, expected to pronounce on issues of return in direct connection with Article 2 of Protocol No 4 in its upcoming judgment in the inter-State case of *Georgia v Russia (II)*.<sup>323</sup> The ECtHR therefore now has its clearest opportunity yet to explicit state that there exists under the ECHR an explicit IDP right to return, in the same way that the Committee of Ministers did in its 2006 Recommendation to Member States.<sup>324</sup> Release of the ECtHR's judgment is, however, still pending.<sup>325</sup>

### **3.7 Insights from Domestic Legal Frameworks**

#### **3.7.1 Introduction**

Turning now finally to the domestic level. As was stated in the introduction to this Chapter, the aim of looking at the domestic frameworks is not to comprehensively survey all legal provisions in every country affected by internal displacement, but instead to reveal further provisions and statements that can help build richer insights into the IDP right to return in law. In this respect, the IDMC IDP Laws and Policies Database<sup>326</sup> has proven invaluable in sourcing those domestic frameworks that are either

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<sup>322</sup> Armenia signed Protocol No 4 on 25 January 2001, and ratified Protocol No 4 on 26 April 2002. The Protocol entered into force that same day. Council of Europe Treaty Office, 'Treaty list for a specific State: Armenia' <[www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/ARM?p\\_auth=0iTcoQBQ](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/ARM?p_auth=0iTcoQBQ)> accessed 17 February 2019. Azerbaijan signed Protocol No 4 also on 25 January 2001, and ratified Protocol No 4 on 15 April 2002. The Protocol entered into force that same day. Council of Europe Treaty Office, 'Treaty list for a specific State: Azerbaijan' <[www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/AZE?p\\_auth=0iTcoQBQ](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/AZE?p_auth=0iTcoQBQ)> accessed 17 February 2019.

<sup>323</sup> App no 38263/08 (judgment pending). It has been possible in this case to raise specific questions of IDP return in relation to liberty of movement and freedom to choose one's residence because Russia is, and was at the material time, a Contracting State Party to Protocol No 4. At the 23 May 2018 public hearing before the ECtHR Grand Chamber, Ben Emmerson QC for the applicant asserted that '[b]ased on all the evidence, Mr President, we say that the Russian Federation adopted and continues to adopt an administrative practice of *frustrating the right of ethnic Georgian IDPs to return to their homes in violation of Article 2 of the Fourth Protocol*' (see ECHR 'Webcasts of hearings: Public hearings: Georgia v Russia (II) (no 38263/08), Grand Chamber hearing – 23 May 2018' <[www.echr.coe.int/Pages/home.aspx?p=hearings&w=3826308\\_23052018&language=en&c=&py=2018](http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=3826308_23052018&language=en&c=&py=2018)> accessed 22 November 2018, Ben Emmerson QC for the applicant at 1:04:55-1:05:10 (emphases added)).

<sup>324</sup> Council of Europe Committee of Ministers, 'Recommendation Rec (2006) 6' (adopted 5 April 2006) para 12. To reiterate, in this, the Committee of Ministers explicitly stated that '[i]nternally displaced persons have the right to return voluntarily, in safety and in dignity, to their homes or places of habitual residence'.

<sup>325</sup> At the conclusion of the hearing, the President of the ECtHR stated that '[t]he Court will now deliberate on the merits. The judgment will be delivered later. The parties will be informed of the date of delivery' (ECHR 'Webcasts of hearings: Public hearings: Georgia v Russia (II) (no 38263/08), Grand Chamber hearing – 23 May 2018', Judge Raimondi at 3:01:55-3:02:14). As of 8 August 2018, no date had been given, this according to Matrix Chambers [personal communication].

<sup>326</sup> IDMC, 'IDP Laws and Policies: A mapping tool' <[www.internal-displacement.org/law-and-policy](http://www.internal-displacement.org/law-and-policy)> accessed 5 August 2017. As of 19 March 2019, this database appears to no longer be available.

dedicated to or nonetheless of direct relevance to IDPs.<sup>327</sup> It has also most crucially enabled identification of legal provisions that explicitly provide for an IDP right to return. The focus of this discussion now turns to these provisions.

### 3.7.2 IDP return as a right in domestic legal frameworks

Explicit and unequivocal references to a right to return applicable to IDPs can be found in a small number of domestic contexts.<sup>328</sup> This includes BiH, Sudan and Colombia; as well as in the 2006 tripartite agreement between the Government of Serbia, Kosovo's Provisional Institutions of Self-Government (PISG), and the United Nations Interim Administration Mission in Kosovo (UNMIK).<sup>329</sup> Of these, it is in BiH where the greatest number of explicit references to a right to return for IDPs are found. This is perhaps of little surprise given that the right to return for IDPs and refugees was a central element of the Dayton Peace Agreement that itself so prominently influenced the drafting of the Constitution of BiH.<sup>330</sup> Indeed, the right to return is explicitly guaranteed in the Constitution of BiH, with Article II(5) stating that 'All refugees and displaced persons have the right freely to return to their homes of origin'.<sup>331</sup> It is also evident that the text of the Dayton Peace Agreement has similarly influenced both the 1999 Law on Refugees from BiH and Displaced Persons in BiH,<sup>332</sup> and the 1999 Instruction on the Return of Bosnian Refugees and Displaced Persons to/within the Territory of Bosnia and Herzegovina,<sup>333</sup> with the former of the two reaffirming that '...displaced persons shall have the right freely to return to their former habitual residence',<sup>334</sup> and the latter then extending the provision by stating that 'displaced persons have the right freely to return to their homes of origin *in safety and*

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<sup>327</sup> Of the 76 countries listed in the IDMC Database, 51 were recorded as having at least one law, policy, process or another instrument pertaining to IDPs. The remainder, although not having any domestic frameworks, were either signatories or States Parties to the Kampala Convention.

<sup>328</sup> Here the focus is on explicit legal provisions. Yet, explicit references to an IDP right to return are also seen in a number of other domestic policy and strategy frameworks. This includes, *inter alia*, the National Policy for Internally Displaced Persons (2004) in Nigeria, which states in para 3.4(1) that '[t]he Government commits itself to promote the right of IDPs to return voluntarily, in safety and with dignity, to their homes or places of habitual residence'; and the 2008 National Policy on Displacement in Iraq, which in para 6.9, features the commonly seen right to liberty of movement and freedom to choose one's residence, before then extending this to explicitly include the right to return.

<sup>329</sup> 2006 Protocol on Voluntary and Sustainable Return (UNMIK Protocol).

<sup>330</sup> To reiterate, in Article I(1) of Annex 7 of the 1995 Dayton Peace Agreement, it is stated that '[a]ll refugees and displaced persons have the right freely to return to their homes of origin'.

<sup>331</sup> Constitution of BiH, Article II(5).

<sup>332</sup> Law on Refugees from Bosnia and Herzegovina and Displaced Persons in Bosnia and Herzegovina, BiH OG, nos 23/99, 21/03 and 33/03 (December 1999).

<sup>333</sup> Instruction on the Return of Bosnian Refugees and Displaced Persons to/within the Territory of Bosnia and Herzegovina Official Gazette BH No 22/9 of (15 December 1999) (BiH Instruction).

<sup>334</sup> Law on Refugees from Bosnia and Herzegovina and Displaced Persons in Bosnia and Herzegovina, Article 9.

*with dignity* [emphasis added]'.<sup>335</sup> At the domestic regional level, Article 3 of the Constitution of the Federation of Bosnia and Herzegovina states that 'All refugees and displaced persons have the right to freely return to their homes of origin',<sup>336</sup> and the 2005 Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina<sup>337</sup> also provides for the right to return, stating that displaced persons, returnees and refugees 'shall have the right to return freely to their former place of residence or to another place of their choice without any risk of intimidation, terrorizing, persecution or discrimination based on sex, violence based on sex, harassment and sexual and gender-related harassment'.<sup>338</sup> Interestingly, the 2010 Revised Strategy of Bosnia and Herzegovina for the Implementation of Annex VII of the Dayton Peace Agreement states that, aside from the 'right to return', displaced persons and refugees also have an 'individual right to opt for other available and preferred durable solutions'.<sup>339</sup>

The 2011 Doha Document for Peace in Darfur (DDPD),<sup>340</sup> which in Sudan enjoys constitutional status,<sup>341</sup> asserts in Article 49 that 'All IDPs and refugees have the right to return voluntarily, and in safety and dignity, to their homes or origin or places of habitual residence'.<sup>342</sup> As is the case in BiH, the IDP right to return therefore enjoys constitutional status in Sudan. Furthermore, the IDMC reports that 'On 14 July 2012, the Government of Sudan and the Liberation and Justice Movement (LJM) signed a protocol agreement committing themselves to the document'.<sup>343</sup> In Colombia, that 'The forcibly displaced have the right to return to their place of origin' has been recognised since Law 387 on Internal Displacement of 1997.<sup>344</sup>

Finally, turning now to the 2006 Protocol on Voluntary and Sustainable Return between Serbia, the PISG and UNMIK. This states in Article 2 that 'the right of the internally displaced to return to their homes as well as their right to freely choose their places of residence' will be 'duly respect[ed]' in the

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<sup>335</sup> BiH Instruction, Article I(1).

<sup>336</sup> Constitution of the Federation of Bosnia and Herzegovina (FBiH Official Gazette, Nos 1/94 and 13/97) (1994) Article 3.

<sup>337</sup> Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina, FBiH Official Gazette, No 15/05 (16 March 2005).

<sup>338</sup> *ibid*, Article 21. It is worth clarifying that for the purposes of the present Law, a displaced person is considered to be an individual who 'has been displaced in the territory of the Federation' (Article 4).

<sup>339</sup> Bosnia and Herzegovina Ministry of Human Rights and Refugees 'Revised Strategy of Bosnia and Herzegovina for the Implementation of Annex VII of the Dayton Peace Agreement' (June 2010) para 3.1.

<sup>340</sup> Doha Document for Peace in Darfur (DDPD) (Sudan) (2011)

<sup>341</sup> *ibid*, Article 78: Final Provisions, para 487.

<sup>342</sup> *ibid*, Article 49: Voluntary Return, para 241.

<sup>343</sup> IDMC, 'IDP Laws and Policies: A mapping tool'. As of 19 March 2019, this database appears to no longer be available.

<sup>344</sup> Law 387 on Internal Displacement of 1997, Article 2(6).

process of return.<sup>345</sup> The adoption of the Protocol in June 2006 led UNMIK to issue a Revised Manual for Sustainable Return in July 2006.<sup>346</sup> This was an updated version of UNMIK's original 2003 Manual for Sustainable Return, which had been developed alongside the United Nations High Commissioner for Refugees (UNHCR).<sup>347</sup> This original manual had itself drawn particularly on the 'right to return' that had been given express authority in the numerous UN Security Council resolutions adopted in respect to the dispute in Kosovo,<sup>348</sup> most notably resolution 1244,<sup>349</sup> as well as UNMIK's own 17 May 2002 Concept Paper on the Right to Sustainable Return.<sup>350</sup> In Kosovo itself, the Strategy for Communities and Returns 2009-2013<sup>351</sup> explicitly mentions the 'right to return' when it states that the 'Constitution and relevant legislation together with the Ahtisaari plan adopted by government, clearly states that all refugees and IDP [sic] from Kosovo have the right to return to their homes and repair their properties'.<sup>352</sup> However, this statement should be treated with some caution. The Ahtisaari Plan does indeed state that '[a]ll refugees and internally displaced persons from Kosovo shall have the right to return and reclaim their property and personal possessions'.<sup>353</sup> However, this was a proposal document, which while receiving approval from Pristina, fell far short of gaining universal acceptance, with notable rejections from Serbia and Russia.<sup>354</sup> Nevertheless, the Ahtisaari Plan was an important and influential document preceding the drafting of the Constitution of the Republic of Kosovo.<sup>355</sup> In this respect, it is important to highlight that the precise recommendation articulated in the Ahtisaari Plan was for the future Constitution of Kosovo to 'Affirm the responsibility of the Kosovo authorities to *promote and facilitate* the safe and dignified return of refugees and internally displaced persons from Kosovo, and to assist them in recovering their property and possessions [emphasis added]',<sup>356</sup> with any express recommendation for the inclusion of a 'right to return' in fact being noticeably

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<sup>345</sup> UNMIK Protocol, Article 2.

<sup>346</sup> UNMIK, 'Revised Manual for Sustainable Return' (July 2006).

<sup>347</sup> UNMIK and the UNHCR, 'Manual for Sustainable Return' (January 2003).

<sup>348</sup> *ibid*, 7.

<sup>349</sup> UNSC, Res 1244 (10 June 1999) UN Doc S/RES/1244.

<sup>350</sup> UNMIK, 'Concept Paper on the Right to Sustainable Return' (17 May 2002).

<sup>351</sup> Republic of Kosovo Strategy for Communities and Returns 2009-2013.

<sup>352</sup> *ibid*, 14.

<sup>353</sup> UNSC, 'Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council: Addendum: Comprehensive Proposal for the Kosovo Status Settlement' (26 March 2007) UN Doc S/2007/168/Add.1 (Ahtisaari Plan) Article 4.1.

<sup>354</sup> The primary reason for the rejection of the Ahtisaari Plan by key parties, such as Serbia and Russia, was the proposal in the Plan to give Kosovo substantial autonomy, effectively independence (even if this was not expressly stated as 'independence' in the Plan) (Article 1).

<sup>355</sup> Constitution of the Republic of Kosovo (signed 7 April 2008, ratified on 9 April 2008 and came into effect on 15 June 2008).

<sup>356</sup> Ahtisaari Plan, Annex I Article 1.5, read in conjunction with Article 1.3.

absent. The actual provision in the Constitution repeats this recommendation almost verbatim.<sup>357</sup> As such, although the Strategy for Communities and Returns refers to the Constitution as ‘clearly stat[ing] that all refugees and IDP [sic] from Kosovo have the right to return to their homes’,<sup>358</sup> the Constitution does not actually express such an explicit ‘right to return’, therefore, similarly to the UN Guiding Principles, falling short as a consequence of focusing solely on the positive obligations of the authorities rather than the rights of IDPs. In addition to this, although the Strategy for Communities and Returns refers also to ‘relevant legislation’,<sup>359</sup> having explored the approved laws listed in the Republic of Kosovo Assembly online database,<sup>360</sup> any references to the ‘right to return’ are notable for their absence.

In sum, what this survey has revealed is a small, concentrated grouping of explicit references to a right to return, or explicit references to a right to choose or decide upon return, within a relatively small number of the domestic frameworks surveyed. These domestic frameworks will now together be taken forward and drawn upon in the analysis of the IDP right to return in Part III of this Thesis.

### **3.8 Conclusion**

The aim of this Chapter has been to achieve a definitive answer to the question of whether, and in what form, a general IDP right to return finds expression in international law. This Chapter has explored the many relevant legal frameworks that exist at the international, regional and domestic levels. What this has revealed is that despite calls for a general IDP right to return to be given explicit expression in international law, any such explicit right remains absent. The consequence of this is that the general IDP right to return remains to be deduced from general international law provisions, most authoritatively from the dual right to liberty of movement and freedom to choose one’s residence, which itself is most authoritatively articulated in ICCPR Article 12(1).<sup>361</sup>

The position can be characterised as follows. While return to one’s own country is recognised as a fundamental human right, return in the context of internal displacement continues to receive relatively limited explicit support in international law. While a ‘special relationship’ between an

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<sup>357</sup> Article 156 of the Constitution of the Republic of Kosovo states that ‘[t]he Republic of Kosovo shall promote and facilitate the safe and dignified return of refugees and internally displaced persons and assist them in recovering their property and possession [sic]’.

<sup>358</sup> Strategy for Communities and Returns 2009-2013 in Kosovo, 14.

<sup>359</sup> *ibid.*

<sup>360</sup> Republic of Kosovo Assembly ‘Laws by Name’ <[www.kuvendikosoves.org/?cid=2,191](http://www.kuvendikosoves.org/?cid=2,191)> accessed 5 May 2017.

<sup>361</sup> Chaloka Beyani, *Human Rights Standards and the Free Movement of People Within States* (OUP 2000) 7.



individual and their own country is recognised and protected through an explicit right to return to one's own country, a right that is not only abundant but is also considered to be fundamental to the enjoyment of rights in general,<sup>362</sup> any comparable relationship between a person and a *particular part* of their own country is still not similarly protected by an equivalent internal right to return that applies in general, regardless of displacement cause.

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<sup>362</sup> UN Human Rights Committee 'General Comment No 27: Freedom of Movement (Article 12)' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 19.

## **PART III**

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## INTRODUCTION TO PART III

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Moving now into Part III of this Thesis, the focus shifts to addressing the three identified challenges that have been selected for further discussion, those of return for whom, return to what and return when.

In Part II, two primary insights were revealed. First, that there is a single, identifiable, normative aim that underpins the international IDP regime. That ultimate aim is to ensure that IDPs and non-IDPs within the same State enjoy the same rights and freedoms in full equality. In this respect, it can be said that all measures taken in the interests of promoting and securing IDP rights are done so in pursuance of this ultimate aim. Second, in respect to return specifically, it has been found that the general IDP right to return in international law is not a standalone right, but instead remains to be deduced from the dual right to liberty of movement and freedom to choose one's residence, as most authoritatively provided for in ICCPR Article 12(1). Both of these insights are of fundamental conceptual and legal importance, and both have implications for the nature of the IDP right to return. They together form a framework for analysis through which the IDP right to return will be viewed.

Part II, Chapter Three in particular, has also helped to narrow in on the most pertinent legal frameworks related to the IDP right to return. From hereon in, these will be referred to as the here surveyed frameworks. These include relevant general provisions of international law, as well as soft and hard law international instruments that have been crafted in direct response to internal displacement. In addition are those domestic legislative frameworks that have too been developed in response to the realities of internal displacement. Of particular importance in this latter respect are the DDPD (Sudan), the UNMIK Protocol, Law 387 (Colombia), and the Dayton Agreement and associated legal frameworks in BiH. All of these will be drawn upon in the discussions that follow.



### 4.1 Introduction

The focus of this chapter is on the question of to whom does the IDP right to return apply. At first glance, the answer to this question seems somewhat self-evident. The IDP right to return applies to IDPs. Moreover, the meaning and scope of the IDP term has been cemented by the definition found in the Guiding Principles. Yet, the observations that have been made so far, in particular from Chapter Three, raise some important questions and begin to expose tensions that require further interrogation. In particular, one question that arises concerns the extent to which it can really be said that international law provides a general right to return applicable to all IDPs equally. Here, what is of interest is whether there are any restrictions on return given who the person is, the cause of their displacement, or the specific internal displacement context within which they find themselves. As Beyani has said, ‘the extent to which freedom of movement can be protected depends in large measure on the legality of the restrictions placed upon it’.<sup>1</sup> Another question concerns the difficulties that arise in situations in which IDPs and non-IDPs alike do not enjoy their liberty of movement and freedom of residence rights under ICCPR Article 12(1).

Such questions are important because they raise the issue of eligibility for return, and with it brings discussion on the potential for conditions and/or restrictions being attached to the IDP right to return. This then by extension points towards the existence of categories of IDPs, some of whom are, and some of whom are not, eligible for return. Yet, the idea that IDPs be classified into sub-groups (however defined) for the purposes of rights enjoyment appears antithetical to the general approach taken by the international IDP regime. The international IDP regime is characterised not by difference, but by equality. As was introduced in Chapter Two, this is equality in primarily two main senses. First, equality between IDPs and non-IDPs within the same country, and second, equality between IDPs themselves, that is as a group of persons who are bound together by the common tie of having been forcibly displaced within their own country (with the second being a presupposition of the first).

This Chapter begins by first setting this discussion within the general position taken by the international IDP regime to matters of categorisation. Second, attention turns to consider eligibility for return, drawing upon the here surveyed frameworks.<sup>2</sup> In the light of the insights gleaned up to this

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<sup>1</sup> Chaloka Beyani, *Human Rights Standards and the Free Movement of People Within States* (OUP 2000) 145.

<sup>2</sup> As identified in Chapter Three.

point, this Chapter will third consider restrictions to eligibility that arise from the qualified nature of ICCPR Article 12(1). Fourth, this Chapter then considers circumstances in which it is not only IDPs but also non-IDPs who find themselves in situations in which they are unable to enjoy their foundational liberty of movement and freedom of residence rights, reflecting upon what this means for the IDP right to return and what this means for the equality of enjoyment of rights and freedoms between IDPs and non-IDPs within the same country.

## **4.2 IDP Categorisation and Eligibility for IDP Rights: The general position**

### **4.2.1 Context matters in IDP reporting**

As is apparent from the discussions so far in this Thesis, IDP categorisation is commonplace in the reporting of internal displacement. In respect to data collection and reporting, the IDMC explicitly distinguishes between, on the one hand, conflict and violence-induced displacement, and on the other, disaster-induced displacement. In respect to the latter, this is then sub-categorised into weather-related hazards and geophysical hazards. Somewhere here development-induced displacement also features. The methods of data collection, the source material relied upon, and the underpinning methodologies that are used to calculate IDP numbers differ depending on displacement cause.<sup>3</sup> This distinction made in respect to displacement cause in data collection is one reason why it is somewhat difficult to give a precise number of IDPs worldwide, and why reported IDP totals often only take into consideration internal displacement in the context of conflict and violence.

Such categorisation can also be seen in UN reports and related academic publications.<sup>4</sup> In this respect, distinctions are not solely made based on displacement cause, but also according to the magnitude of displacement and geographical region. In particular, UN Security Council reports related to internal displacement are typically focused on a single country or region. This is of course because the UN Security Council's framing is not one of internal displacement alone, but on the wider issue of security, stability and peace. It is therefore understandable that its recommendations are targeted towards a particular context as opposed to making pronouncements on general IDP matters. Moreover, it would simply be unrealistic to seek to reflect all geographical regions in every single publication, plus, it is

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<sup>3</sup> It is for this reason that, while conflict and violence-induced displacement figures are presented as both annual figures and cumulative totals, disaster-induced displacement is reported only as yearly totals.

<sup>4</sup> For instance, in David Cantor, *Returns of Internally Displaced Persons during Armed Conflict* (Brill 2018), Cantor focuses precisely on return in the context of armed conflict, predominantly in the Colombian context. The distinction between that text and this Thesis therefore is that the latter is broader in its scope, most notably in that it deals not solely with returns in the context of armed conflict.

important to bear in mind that broad pronouncements risk essentialising and generalising the lived IDP experience. There are therefore many reasons for why such categorisation is not only understandable but also advantageous. But, the question that is asked here is to what extent such categorisation of IDPs, specifically, but not only by, displacement cause, is also reflected in the international IDP regime, and whether and how displacement cause impacts upon the applicability of and eligibility for IDP rights entitlements.

#### 4.2.2 IDP categorisation in the Guiding Principles and the Kampala Convention

A cursory glance at the Guiding Principles, and equally in this respect the Pinheiro Principles, reveals no apparent categorisation or distinction between different types or forms of IDP sub-groups. The Guiding Principles do not, for instance, contain any provisions that apply only to conflict-induced IDPs or to disaster-induced IDPs, or any variation of otherwise internationally-applicable rights on the basis of, for example, the cause of displacement. This reflects the rights-based approach to IDP protection and assistance that underpins the international regime, as is encapsulated by Principle 4(1), which states that '[t]hese Principles [the Guiding Principles] shall be applied without discrimination of any kind'.<sup>5</sup> As was discussed in Chapter Two, during the preparatory discussions leading to the Guiding Principles, distinctions were made between IDPs based on considerations including, primarily, the cause and magnitude of displacement. However, it is important to emphasise that any discussion of the various causes and magnitudes of internal displacement was directed not towards eligibility for specific rights, but was instead concerned with the foundational question of the IDP definition. There was in essence no concerted attempt to institute any different form or package of rights that depended upon the cause, magnitude or intensity of displacement.

Yet, the Guiding Principles do give specific attention to IDPs with certain demographic characteristics.<sup>6</sup> Principle 4(2) states that '[c]ertain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs'. As is argued in the Annotations, to give specific attention to what Kälin terms 'particularly vulnerable groups of internally displaced persons',<sup>7</sup> is coherent with a rights-based approach, as human rights law has through the

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<sup>5</sup> Guiding Principles, Principle 4(1).

<sup>6</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani' (4 April 2014) UN Doc A/HRC/26/33, paras 48 and 55.

<sup>7</sup> Annotations, 22.



drafting of distinct international instruments on, for example, the needs and rights of children, of women, and of persons with disabilities, accepted the giving of such dedicated attention to specific groups on the grounds that such ‘vulnerable categories of persons’ have ‘special needs’.<sup>8</sup> Later in the Guiding Principles, explicit reference is then made to a number of these characteristics. Frequent attention is in particular given to women, as well as to children and adolescents.<sup>9</sup> In addition, explicit attention is given to IDPs with disabilities and to IDPs who are wounded and sick,<sup>10</sup> and Principle 9 places States ‘under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands’.

However, that the Guiding Principles detail provisions that recognise the specific needs of particular sub-sections of IDPs does not mean to say that they categorise IDPs into different sub-groups for the purpose of rights eligibility. While all of these provisions bring particular attention to these groups and to certain categories of IDPs based on their personal characteristics and associated particular needs, it is not the case that these provisions provide any substantive rights for these categories of IDPs to which other IDPs who do not fall within this category are excluded. For instance, although Principle 9 places a ‘particular obligation’<sup>11</sup> on States to protect against the displacement of ‘groups with a special dependency on and attachment to their lands’,<sup>12</sup> for example, indigenous groups, this does not undermine or in any way remove the obligation of States to protect against the displacement of others who do not fall within such groups. Indeed, it is important to remember that Principle 5 calls on ‘[a]ll authorities and international actors... to prevent and avoid conditions that might lead to displacement of persons’,<sup>13</sup> and that Principle 6 expressly affirms 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.’<sup>14</sup>

Moreover, the Guiding Principles do not as a general rule restrict access to its Principles. There is indeed only one express restriction, which can be found in Principle 1(2). This states that ‘These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes’.<sup>15</sup> As Kälin explains, ‘The purport of this paragraph is that persons suspected of having committed serious offences such as

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<sup>8</sup> *ibid*, 23.

<sup>9</sup> See, in particular, Principles 7(3)(d), 17(3), 18(3), 19(2), and 23.

<sup>10</sup> Principle 19(1).

<sup>11</sup> Guiding Principles, Principle 9.

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid*, Principle 5.

<sup>14</sup> *ibid*, Principle 6.

<sup>15</sup> *ibid*, Principle 1(2).

genocide, crimes against humanity and war crimes cannot avoid prosecution and punishment under international law simply on account of their being internally displaced, or by otherwise invoking the Guiding Principles'.<sup>16</sup> Kälin does, however, explicitly warn against equating Principle 1(2) with the refugee law concept of exclusion. As explained in the Annotations, 'exclusion' means that 'a person is precluded from enjoying the benefits of refugee protection if there are serious reasons for considering that he or she has committed any one of certain specified offences'.<sup>17</sup> Article 1(F) of the Refugee Convention details broad grounds for exclusion concerned with, albeit not necessarily exclusively, criminal acts committed by an individual. However, this is not the same as the effect of Principle 1(2) in the Guiding Principles. As Kälin states, 'The effect of exclusion is to disqualify the excluded person from being recognized as a refugee, even though he or she meets the legal criteria. By contrast... [s]omeone who is displaced remains an internally displaced persons even if he or she has committed genocide, crimes against humanity and war crimes. However, such persons cannot use their situation as internally displaced persons to avoid the penal consequences of their criminal acts'.<sup>18</sup> It is this final sentence that is critical. It makes clear that the only reason for why enjoyment of the rights in the Guiding Principles can be restricted is if someone accused of such international criminal offences were to try to use the Guiding Principles as a means by which to avoid criminal punishment for those acts. This restriction is therefore very narrow. Unlike exclusion in refugee law, someone is not ineligible for rights enjoyment under the Guiding Principles on the basis of them having been accused, or even having been found guilty, of a proscribed offence. It is only should an individual use any such right as a means to evade criminal prosecution that they would then become ineligible, but again only in that precise connection.

In contrast to the Guiding Principles, the Kampala Convention does appear, at least on the face of it, to embody some form of distinction between IDPs based on displacement cause. Article 7 and Article 10 are important in this connection. Article 10 is concerned precisely with development-induced displacement. Yet, upon reviewing its provisions, it becomes clear that this does not involve a difference in rights enjoyment for those affected, or more precisely those prospectively affected, by development projects. While Article 10(2) implies a heightened right to 'full information and consultation', this is not an additional right, given that elsewhere in the Kampala Convention it is stated that States Parties are under a general obligation to consult with IDPs and to allow their participation in decision-making.<sup>19</sup> Similarly, while Article 10(1) places a specific duty on States Parties

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<sup>16</sup> Annotations, 13-14.

<sup>17</sup> *ibid*, 14.

<sup>18</sup> *ibid*, 15.

<sup>19</sup> Kampala Convention, Article 9(2)(k).

to prevent development-induced displacement, this is not to the exclusion of other causes, with Article 9(1) stating that ‘States Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing the following acts...’ Article 9(1) then goes on to detail a non-exhaustive list of acts that includes, *inter alia*, arbitrary killing, starvation, and discrimination on the grounds of being internally displaced.<sup>20</sup> The wording here in Article 9(1) indeed rejects the idea of differentiation when it states clearly that the rights of IDPs shall be protected ‘regardless of the cause of displacement’.

In respect to Article 7, the situation is very similar. Article 7 is titled ‘Protection and Assistance to Internally Displaced Persons in Situations of Armed Conflict’. Based on its title, Article 7 would be expected to deal with particular protection and assistance provisions that apply only in times of armed conflict. However, upon further inspection, this proves not to be the case. Article 7 is instead predominantly concerned with the prohibition of certain acts by armed groups,<sup>21</sup> and the criminal responsibility of armed groups for any acts that violate the rights of IDPs.<sup>22</sup> While explicit mention to protection and assistance is made in Article 7(3), this is only to state that this ‘be governed by international law and in particular international humanitarian law’. This is not to restrict IDP rights to protection and assistance, but simply to recognise in the Principles the restrictions that are inherent within IHL itself.

As such, while it is interesting to observe that the Kampala Convention does manifest some element of distinction based on displacement cause, for present purposes the effect of this should not be overstated. Despite how it may at first appear, the Kampala Convention does not itself articulate a difference or variation in rights or rights eligibility based on any such form of sub-group categorisation.

In sum, it can be said that the international IDP regime is characterised by a strong sense of consistency and homogeneity. Consistency in the sense that the same rights apply across the board, and homogeneity in the sense that the international IDP regime takes an approach that in general recognises all IDPs, no matter the diversity of their characteristics, their circumstances, their situations or their experiences, as the same. The international IDP regime considers all IDPs as equally entitled from the perspective of eligibility for rights enjoyment.<sup>23</sup> Although some degree of heterogeneity is

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<sup>20</sup> *ibid*, Article 9(1)(c), Article 9(1)(e) and Article 9(1)(a), respectively.

<sup>21</sup> *ibid*, Article 7(5).

<sup>22</sup> *ibid*, Article 7(4).

<sup>23</sup> This aligns with Phuong’s finding that the Guiding Principles ‘apply at all times and to all internally displaced persons’ (see Phuong (2005) 58).

recognised in some broad senses based on accepted demographic characteristics, for example, children and women, and there is a narrow exception in respect to preventing IDPs from evading criminal prosecution by invoking recognition of being an IDP, IDPs are otherwise viewed as a homogenous group when it comes to rights. Indeed, it is to be borne in mind that to recognise IDPs as otherwise would be to risk undermining the homogeneity required to accept that IDPs form a discrete and identifiable group of persons, the vital importance of which has been discussed in Chapter Two.

### **4.3 Eligibility for IDP Return: Insights from the frameworks**

The general position outlined above leads to the conclusion that the IDP right to return should be enjoyed by all IDPs equally, regardless of the cause or magnitude of displacement. While particular attention may need to be given to the enjoyment of the right to return by some IDPs with certain demographic characteristics, it should not be restricted or limited to only those with such characteristics or only to those who belong to any sub-group of IDPs of any kind. To say that only some IDPs are eligible for return would be to introduce a differentiation and a categorisation of IDP rights that is incongruous with the approach that has been taken by the international IDP regime.

It cannot, however, be ignored that many of the sources identified in Chapter Three do, at least to a degree, appear to indicate a somewhat different position. In contrast to the rights-based Guiding Principles and the Pinheiro Principles, limitation and differentiation are apparent in the relevant IHL and ILO right to return provisions. As has been observed, CIHL Rule 132 is limited to only those who have been displaced as a consequence of armed conflict (as defined by IHL), and ILO Convention No 169 Article 16(3) is limited to only IDPs who are also members of an indigenous group or tribal peoples. These are not, however, intentional restrictions placed upon return, but a consequence of the field of law within which these return provisions are situated. The conceptual importance of this for return should not therefore be overstated. That being said, an additional restriction does exist in respect to the application of ILO Convention No 169 Article 16(3), as this provision is envisaged as only applying in the context of (forced) evictions.

At the domestic level, such differentiation is once again apparent, albeit not universally. Looking first to the DDPD (Sudan). To reiterate, Article 49 explicitly states that all IDPs and refugees have the right to return.<sup>24</sup> In this connection, the DDPD (Sudan) adopts the international IDP definition, as found in

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<sup>24</sup> DDPD (Sudan) 51.

the introduction to the Guiding Principles, and an extended version of the refugee definition.<sup>25</sup> Similarly, the UNMIK Protocol explicitly recognises ‘the right of the internally displaced to return to their homes’.<sup>26</sup> IDP is not defined in the UNMIK Protocol, although it is explicitly stated in the Preamble that the Protocol takes into consideration the Guiding Principles.<sup>27</sup> Yet, turning to the relevant provisions in the domestic law of Colombia and BiH, here differentiation and restriction are apparent.

In Colombia, Law 387, Article 2(6), states that ‘The forcibly displaced have the right to return to their place of origin’. While Article 2(6) is a simple and emphatic provision that does not itself differentiate or restrict, such differentiation does become apparent when the applicable definition of ‘forcibly displaced’ is examined. ‘The Displaced’ are defined in Article 1.<sup>28</sup> This definition differs markedly from the international IDP definition. In one respect, it is more expansive, as it considers as displaced not only those who have been forced to abandon their place of residence, but also those who have been forced to abandon their ‘place of... customary economic activities’. Yet, in a number of other respects, it is far more restrictive. In particular, and perhaps most crucially, it contains an exhaustive list of displacement causes that is essentially restricted to only situations of armed conflict and violence. Absent therefore from this is any recognition of disaster-induced displacement, displacement in the context of development projects, or similar. Moreover, while a simple infringement of IHL is sufficient, violations to human rights must be ‘massive’, plus other qualifiers, such as ‘drastic’ disturbance and ‘direct’ threat, further restrict the scope of the definition. While it is the case that Law 387 pre-dates the Guiding Principles by a year, amendments have since been made to the text, but none have addressed this discrepancy between the domestic and international definitions.

A similar picture emerges with respect to the multiple right to return provisions in BiH. The BiH Constitution provides that ‘[a]ll refugees and displaced persons have the right freely to return to their homes of origin’.<sup>29</sup> Similarly, the 1999 BiH Instruction states that ‘all refugees and displaced persons have the right freely to return to their homes of origin in safety and with dignity’.<sup>30</sup> Both of these provisions make explicit reference to Annex 7 of the Dayton Agreement. Yet, neither define ‘displaced

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<sup>25</sup> *ibid*, 6.

<sup>26</sup> UNMIK Protocol, Article 2.

<sup>27</sup> *ibid*, preamble.

<sup>28</sup> This states that ‘[a] displaced person is any person who has been forced to migrate within the national territory, abandoning his place of residence or customary economic activities, because his life, physical integrity, personal freedom or safety have been violated or are directly threatened as a result of any of the following situations: internal armed conflict, civil tension and disturbances, general violence, massive Human Rights violations, infringement of International Humanitarian Law, or other circumstances arising from the foregoing situations that drastically disturb or could drastically disturb the public order’.

<sup>29</sup> Article II(5).

<sup>30</sup> Article I(1).

persons'. The definition of 'displaced persons' is found in the Law on Refugees from BiH and Displaced Persons in BiH. This too provides for 'the right freely to return'.<sup>31</sup> What is meant by displaced persons is then outlined in Article 4.<sup>32</sup>

Compared to the definition of a forcibly displaced person (FDP) under Colombian law, this definition of a displaced person under BiH law is even more restrictive when considered relative to the international IDP definition. For instance, a displaced person will only be recognised as such if they are a BiH citizen. In respect to displacement causes, the definition is explicitly directed towards the conflict in the region in the early 1990s, which of course was the trigger for much of this legislation. Yet, for anyone today to be considered a displaced person requires them essentially to be an internal refugee in a literal sense.<sup>33</sup> Also, and perhaps most interestingly, the definition appears to indicate that a displaced person who has voluntarily taken up permanent residence elsewhere will no longer be considered a displaced person under domestic law. The same is also reflected at the sub-national level in BiH.<sup>34</sup> Once again, when viewed through the lens of the international IDP definition, it restricts IDP recognition on the grounds of, *inter alia*, residency status and displacement cause.

It is clear therefore that restrictions do exist at the domestic level. However, such restrictions are not necessarily targeted either exclusively or even precisely towards return. Indeed, it seems common for domestic right to return provisions to provide, either implicitly or explicitly, that *all* IDPs have the right to return. The restriction instead originates from the different ways in which internal displacement is conceptualised, and as a consequence, how IDPs are defined, in these domestic frameworks. This therefore demonstrates the impact that variable understandings of the IDP concept can have on IDP rights enjoyment.<sup>35</sup> Indeed, even if not intended, these are still restrictions on access to the right to

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<sup>31</sup> Article 9.

<sup>32</sup> This states that '[a] displaced person is a citizen of Bosnia and Herzegovina, residing within Bosnia and Herzegovina, who has been expelled from his/her habitual residence as the consequence of the conflict, or left her/his habitual residence, after 30 April 1991, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a social group or political opinion, and who is neither able to return in safety and with dignity to his/her former habitual residence nor has voluntarily decided to take up permanent residence elsewhere'.

<sup>33</sup> I say in a literal sense because many refer to IDPs as internal refugees despite the inaccuracy of this term in the light of international law.

<sup>34</sup> Law on Refugees from Bosnia and Herzegovina and Displaced Persons in Bosnia and Herzegovina, BiH OG, nos 23/99, 21/03 and 33/03 (December 1999) Article 4.

<sup>35</sup> This finding aligns with that drawn by Megan Bradley and Angela Sherwood in respect to durable solutions more broadly, in 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law 'Success Story'' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 155-182, 168-172. For a comprehensive examination of the (in)consistencies between the Guiding Principles and subsequently-implemented domestic frameworks, see Phil Orchard, 'Implementing a Global Internally Displaced Persons Protection Regime' in Alexander Betts and Phil Orchard (eds) *Implementation and World Politics: How International Norms Change Practice* (OUP 2014) 105-123.

return. While an individual may be considered an IDP according to the Guiding Principles, if they are not considered an IDP under domestic law, then they will not be eligible for specific binding provisions, including return, that exist for the benefit of IDPs in that country.

The above discussion therefore tends towards a conclusion that return *is* restricted to only certain categories of IDPs. At the level of international law, this means limited to only those who are displaced in the context of armed conflict,<sup>36</sup> or those indigenous or tribal persons who are evicted from their homes;<sup>37</sup> and at the domestic level, limited to only those who have been displaced for reasons connected to conflict, violence or massive human rights violations,<sup>38</sup> or those who meet the requisite citizenship conditions.<sup>39</sup> But, of course, these explicit provisions cannot be viewed in isolation from what has already been established as the general IDP right to return that exists in IHRL. Indeed, none of these restrictions, whether they exist in CIHL, ILO law or domestic law, are fatal to the proposition that the right to return is applicable to all IDPs as defined in international law, because, as was established in Chapter Three, the ultimate authoritative source of the IDP right to return is to be found in ICCPR Article 12(1). What can be said, however, is that some IDPs, as identified above, enjoy *more explicit* protection of their right to return, and that, especially at the domestic level, might have access to full judicial consideration of alleged violations of such a right before domestic courts.

Yet, it is important to now consider whether this finding in respect to the explicit right to return provisions could be symptomatic of a similar trend within IHRL. Indeed, as the forthcoming analysis will show, any assumption that all IDPs are eligible for return must, at least to some degree, be revised in the light of the implications of the general IDP right to return being an inferred right.

#### **4.4 Eligibility for IDP Return: Lawful restrictions to ICCPR Article 12(1)**

As discussed in Chapter Three, that the general IDP right to return is located within IHRL has significant advantages. From an eligibility perspective, the most important of these advantages is that all IDPs are, in principle, eligible for return. This means that return avoids the eligibility barriers that exist in respect to the explicit right to return provisions in IHL and ILO law. Yet, it is trite IHRL that rights may be lawfully restricted in accordance with the permitted limitations found in an instrument's

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<sup>36</sup> In respect to CIHL Rule 132.

<sup>37</sup> In respect to ILO Convention No 169 Article 16(3).

<sup>38</sup> Law 387 (Colombia) Article 1.

<sup>39</sup> Law on Refugees from BiH and Displaced Persons in BiH, Article 4.

provisions.<sup>40</sup> For the present discussion, that ICCPR Article 12(1) is a qualified right is therefore of fundamental consequence. It is indeed a crucial consideration in respect to eligibility, one that is not purely theoretical, but as will be shown one of tangible and potentially significant impact in the displacement context.

#### 4.4.1 Introducing the ICCPR Article 12(3) limitations provision

Turning now to look specifically at ICCPR Article 12(1). An initial point that requires only brief mention is that Article 12(1) is only available to those who are ‘lawfully within the territory’. While this may in theory act as a barrier to eligibility, it is, first, unlikely that an individual who is not lawfully present within a particular territory would bring attention to themselves, and second, it has no bearing here given that IDPs, being as they are within their ‘home country’, are assumed to be lawfully within that territory. The more important consideration for this discussion are the specific limitations to which Article 12(1) might be subject under ICCPR Article 12(3).

The Article 12(3) limitations provision is similarly formulated to others found in the ICCPR,<sup>41</sup> as well as being similar in content to other such provisions found in other UN and regional human rights instruments. Indeed, it was noted in the *travaux préparatoires* that the drafters deemed this similarity desirable.<sup>42</sup> Its phrasing will therefore be familiar to many. Nonetheless, before applying this to the specific context of IDP return, it is necessary to examine its content in greater detail, and consider how it has been interpreted and operationalised by the UN Human Rights Committee.

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<sup>40</sup> Although not directly pertinent to a legal analysis such as this, it is nevertheless important to mention that, at an even more foundational level, human rights protections cannot of course be enjoyed unless the relevant State is a party to a particular instrument. In respect to ratification, the ICCPR enjoys broad support. At the time of writing, there were 172 States Parties to the ICCPR, with 25 eligible States not party to the Covenant (this according to the OHCHR online ratification dashboard). Yet, the fact that only a small minority of States have not ratified the Covenant cannot simply be brushed aside. Persons have been recorded as displaced in 21 of these 25 States within the past five years. Five States that particularly stand out are China, Cuba, Malaysia, Myanmar and South Sudan. In terms of displacement totals, the IDMC reported China, Cuba and Malaysia as having experienced 4.5 million, 1.7 million and 82,000 new disaster-induced displacements, respectively, in 2017. In 2017, the IDMC reported 351,000 new disaster-induced displacements in Myanmar; with 57,000 new conflict-induced displacements reported. In respect to South Sudan, in 2017, there were 75,000 new disaster-induced displacements reported, and 857,000 new conflict-induced displacements. The clear consequence of this is that a significant number of IDPs today do not enjoy the protection provided by ICCPR Article 12(1), and therefore do not benefit from the legal protection of the right to return as deduced from the dual right to liberty of movement and freedom to choose one’s own residence. These figures are indeed considerable. They evidence a substantial limitation on access to the right to return under IHRL, this despite IHRL’s theoretical universality.

<sup>41</sup> For example, the Article 18(3) limitations to the right to freedom to manifest one’s religion or beliefs, and the restrictions to the right of peaceful assembly under Article 21.

<sup>42</sup> UNGA, ‘Annotations on the Text of the Draft International Covenants on Human Rights’ (1 July 1995) UN Doc A/2929, 39 (in Chapter VI para 55 of the report).



It is foremost worth stressing that restrictions under Article 12(3) are expected to be the exception and not the norm. This point is emphasised in General Comment No 27 on Article 12,<sup>43</sup> which states that ‘the relation between right and restriction, between norm and exception, must not be reversed’.<sup>44</sup> In this connection, the UN Human Rights Committee has stated that ‘restrictions must not impair the essence of the right’.<sup>45</sup> Article 12(3) includes an exhaustive list of permissible limitations. In order for any restriction to Article 12(1) to be lawful, it must be justified in connection to one of these limitations.<sup>46</sup> These include restrictions on the grounds of ‘national security, public order (ordre public), public health or morals, or the rights and freedoms of others’.<sup>47</sup> In this respect, the UN Human Rights Committee has in its relevant communications been quick to find a violation of Article 12(1) when a State party has failed to adduce any pertinent explanation or argument for the restrictions imposed.<sup>48</sup> Yet, it is evident that recourse to the list of permissible limitations alone is insufficient. Any such restriction claimed under Article 12(3) will be lawful under the Covenant ‘only if’ it meets a series of further requirements,<sup>49</sup> some of which are explicit in the text of Article 12(3) and others that the UN Human Rights Committee has interpreted out of the text.

First, any restriction on the right to liberty of movement and freedom to choose one’s own residence must be ‘provided by law’.<sup>50</sup> As has been stated by the UN Human Rights Committee, ‘[t]he application of restrictions in any individual case must be based on clear legal grounds’,<sup>51</sup> and any laws that authorise the application of a relevant restriction ‘should use precise criteria and may not confer unfettered discretion on those charged with their execution’.<sup>52</sup> Moreover in this respect, any restriction must be reasonable. In the draft text of Article 12, the word ‘restrictions’ was preceded by the qualifying term ‘reasonable’.<sup>53</sup> As reported by Bossuyt in his guide to the ICCPR *travaux*

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<sup>43</sup> UN Human Rights Committee, ‘General Comment No 27: Article 12 (Freedom of Movement)’ (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add9.

<sup>44</sup> *ibid*, para 13.

<sup>45</sup> *ibid*.

<sup>46</sup> UN Human Rights Committee, *El Dernawi v Libyan Arab Jamahiriya* Communication No 1143/2002 (2007) UN Doc CCPR/C/90/D/1143/2002, para 6.2.

<sup>47</sup> ICCPR Article 12(3).

<sup>48</sup> See, for example, *El Hojoui Jum’a et al*, para 6.6; *Yklymova*, para 7.5; UN Human Rights Committee, *Ackla v Togo* Communication No 505/1992 (1996) UN Doc CCPR/C/51/D/505/1992, para 10.

<sup>49</sup> UN Human Rights Committee, *Zoolfia v Uzbekistan* Communication No 1585/2007 (2009) UN Doc CCPR/C/96/D/1585/2007, para 8.3.

<sup>50</sup> ICCPR Article 12(3).

<sup>51</sup> General Comment No 27, para 16.

<sup>52</sup> *ibid*, para 13.

<sup>53</sup> UNGA, ‘Annotations on the Text of the Draft International Covenants on Human Rights’ (1 July 1955) UN Doc No A/2929, 38 (in Chapter VI of the report).

*préparatoires*,<sup>54</sup> objections were raised in respect to the inclusion of the word 'reasonable'. It is apparent from Bossuyt's text that some members believed its inclusion to be unnecessary as 'restrictions prescribed by law must be presumed to be reasonable'.<sup>55</sup> It was not that the word 'reasonable' was inappropriate, merely that it was deemed superfluous. Therefore, despite the word 'reasonable' not explicitly featuring in the final version of the provision, on the basis of this, it still nonetheless persists, being a presupposition of the retained 'provided by law' phrase. Moreover, mention of 'reasonable restrictions' has on occasion crept back into the wording of the UN Human Rights Committee in its deliberations in its jurisprudence.<sup>56</sup> It is therefore averred that for any restriction to be 'provided by law', it must be not only clear, precise and fettered, but also reasonable.

Second is the requirement that any restrictions be 'necessary to protect' one of the permissible grounds.<sup>57</sup> On this point, the UN Human Rights Committee has been emphatic in stating that 'it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them'.<sup>58</sup> Any restrictions are therefore subject to a 'test of necessity'.<sup>59</sup> It is in this connection that the UN Human Rights Committee has stated that any restrictive measures must, first, 'be appropriate to achieve their protective function',<sup>60</sup> second, be proportionate, in the dual sense that they 'conform to the principle of proportionality'<sup>61</sup> and 'be proportionate to the interest to be protected';<sup>62</sup> and third, 'be the least intrusive instrument amongst those which might achieve the desired result'.<sup>63</sup>

It is interesting at this point to note the dual emphasis placed on proportionality and the particular attention that the UN Human Rights Committee has given to this in its General Comment No 27. Indeed, it does appear that the UN Human Rights Committee has, albeit without explicitly saying so, drawn out the principle of proportionality from the text of Article 12(1), elevating this to be a consideration independent of, albeit still closely related to, necessity. In this connection, General Comment No 27 states that 'The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.

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<sup>54</sup> Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987).

<sup>55</sup> *ibid*, 257.

<sup>56</sup> UN Human Rights Committee, *Peltonen v Finland* Communication No 492/1992 (1994) UN Doc CCPR/C/51/D/492/1992, para 8.3.

<sup>57</sup> ICCPR Article 12(3).

<sup>58</sup> General Comment No 27, para 14.

<sup>59</sup> *ibid*, para 16.

<sup>60</sup> *ibid*, para 14.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid*.

States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided'.<sup>64</sup> This important shift to seeing proportionality as a distinct, third, requirement can be seen in the subsequent communication of *Zoolfia*. In this decision, the UN Human Rights Committee considered the questions of necessity and proportionality as distinct, but related, requirements, when it stated that 'In the present case, however, the State party has not provided any such information that would point to the necessity of the restriction nor justify it in terms of its proportionality'.<sup>65</sup> It is therefore argued here that it is not only the necessity of the law and its application that is at issue, but also the proportionality of that law and any such application of it.

Fourth, and finally, any restrictions must be 'consistent with the other rights recognized in the present Covenant'.<sup>66</sup> In this respect, the UN Human Rights Committee has emphasised the need for consistency with 'the fundamental principles of equality and non-discrimination'.<sup>67</sup>

#### 4.4.2 Application to relevant communications

Turning now to consider in greater detail how Article 12(3) has been applied by the UN Human Rights Committee in its relevant communications. In all communications in which the UN Human Rights Committee has discussed Article 12(3),<sup>68</sup> the cited permissible ground has been national security, either mentioned alone or in connection with public order (*ordre public*). In *Celepli v Sweden*<sup>69</sup> and *Karker v France*,<sup>70</sup> the UN Human Rights Committee was called upon to adopt views on State-imposed restrictions on liberty of movement in the context of non-executed expulsion orders.<sup>71</sup> In both, expulsion orders could not be enforced on humanitarian grounds. In *Karker*, this was on account of

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<sup>64</sup> *ibid*, para 15.

<sup>65</sup> *Zoolfia*, para 8.3.

<sup>66</sup> ICCPR Article 12(3).

<sup>67</sup> General Comment No 27, para 18.

<sup>68</sup> A search of the OHCHR Jurisprudence Database (search conducted on 4 January 2019) returns a total of seven communications that concern ICCPR Article 12(3). Aside from the four communications that are discussed here, the other three communications are *Zoolfia*; *Yklymova*; *El Dernawi*. In each of these communications, the UN Human Rights Committee did not engage in a substantive discussion of the permissibility of restrictions under Article 12(3) in the light of the facts before the Committee, this being on account of each of the States Parties having not sought to explain or advance any justification for the restrictions found. As a consequence, in each, the UN Human Rights Committee found a violation of either Article 12(1) or Article 12(2) (see *Zoolfia* para 8.3, *Yklymova* para 7.5, and *El Dernawi* para 6.2). It is also worth noting that in the ICCPR communications discussed in Chapter Two of this Thesis, there was no discussion of Article 12(3).

<sup>69</sup> UN Human Rights Committee, *Celepli v Sweden* Communication No 456/1991 (1994 UN Doc CCPR/C51/D/456/1991).

<sup>70</sup> UN Human Rights Committee, *Karker v France* Communication No 833/1998 (2000) UN Doc CCPR/C/70/D/833/1998.

<sup>71</sup> *Celepli*, paras 2.1-2.3; *Karker*, paras 2.1-2.3.

the alleged victim's (the author's husband) refugee status in France,<sup>72</sup> and in *Celepli*, although the author had not been granted refugee status in Sweden, the domestic authorities nonetheless acknowledged that as a Turkish citizen of Kurdish origin he could be exposed to political persecution in Turkey should he be returned.<sup>73</sup> It was concluded that the restrictions that had been imposed by the domestic authorities were in both circumstances compatible with the requirements set by Article 12(3). In *Karker*, the UN Human Rights Committee based its finding on the domestic courts having examined the complained of restrictions and, in the light of evidence furnished by the domestic authorities, having reached the conclusion that the restrictions were necessary on national security grounds.<sup>74</sup> Moreover, it was noted that the restrictions imposed upon the author still nonetheless permitted his residence in 'a comparatively wide area'.<sup>75</sup> Based on this, the Human Rights Committee took the view that the State party had not misapplied the restrictions permitted under Article 12(3).<sup>76</sup> In *Celepli*, the UN Human Rights Committee delivered just a single brief paragraph finding on the matter. It is apparent from this that State invocation of reasons of national security was all that was required for the UN Human Rights Committee to find no violation of the ICCPR.<sup>77</sup>

In contrast to *Celepli* and *Karker*, in *Sayadi and Vinck v Belgium*,<sup>78</sup> the UN Human Rights Committee did find a violation of Article 12(1). *Sayadi and Vinck* concerned restrictions to freedom of movement as a consequence of the authors' inclusion on the Consolidated List of the UN Sanctions Committee. It was noted on the facts that the freezing of the authors' financial assets had prevented them from, *inter alia*, travelling.<sup>79</sup> Specifically in respect to Mr Sayadi, as a consequence of being unable to travel freely or leave Belgium, he could not accept a position working abroad for the Red Crescent.<sup>80</sup> The State party did not challenge the allegation that inclusion on the list prevented the authors from travelling freely,<sup>81</sup> and the UN Human Rights Committee accepted from the outset that there had been a restriction on their liberty of movement.<sup>82</sup> In respect to the permissible limitations under Article 12(3), the UN Human Rights Committee noted that 'the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a "restriction" covered by article

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<sup>72</sup> *Karker*, para 2.1.

<sup>73</sup> *Celepli*, para 2.1.

<sup>74</sup> *Karker*, para 9.2.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> *Celepli*, para 9.2.

<sup>78</sup> UN Human Rights Committee, *Sayadi and Vinck v Belgium* Communication No 1472/2006 (2008) UN Doc CCPR/C/94/D/1472/2006.

<sup>79</sup> *ibid*, para 2.3.

<sup>80</sup> *ibid*, para 3.10.

<sup>81</sup> *ibid*, paras 10.4-10.5.

<sup>82</sup> *ibid*, para 10.5.

12, paragraph 3, which is necessary to protect national security or public order'.<sup>83</sup> Yet, while the State party was itself unable to remove the authors' names from the list, it was the State party that had first transmitted the names to the UN Sanctions Committee.<sup>84</sup> It was therefore the State party that was responsible for the inclusion of the authors' names on the list and the consequent restrictions on travel.<sup>85</sup> In respect to the transmission of the names, the authors alleged that their listing appeared to have been 'premature and unjustified',<sup>86</sup> and the UN Human Rights Committee noted that 'the authors' names were transmitted to the [UN] Sanctions Committee even before the authors could be heard'.<sup>87</sup> Moreover, a subsequent domestic criminal investigation into the authors had been dismissed, and the State party itself had in fact twice requested that the UN Sanctions Committee remove the authors' names from the list.<sup>88</sup> In the light of all of this, the UN Human Rights Committee concluded that on these facts the restrictions did not fall within Article 12(3) and were not necessary to protect national security or public order.<sup>89</sup>

The final communication of relevance is *Peltonen v Finland*.<sup>90</sup> *Peltonen* concerned a refusal to issue a passport, which the author contended was, *inter alia*, a violation of his right to leave any country under Article 12(2).<sup>91</sup> Although *Peltonen* concerned Article 12(2), it is still relevant given that Article 12(3) applies equally to both Article 12(1) and Article 12(2). The reason for refusal of the passport was that the author had not completed obligatory military service, this being despite, as the State party submitted, numerous call-ups, all of which he disregarded.<sup>92</sup> In its submissions, the State party argued that such a refusal, which was in accordance with domestic law,<sup>93</sup> was also in accordance with Article 12(3), specifically under the permissible ground of public order (*ordre public*) and, indirectly, national security.<sup>94</sup> The UN Human Rights Committee agreed. Although there is no explicit reference to national service in Article 12(3), the UN Human Rights Committee stated unequivocally that reasonable restrictions may be lawfully imposed in such circumstances, provided that the conditions stipulated in Article 12(3) are met.<sup>95</sup> To support this, the UN Human Rights Committee drew explicitly on the ICCPR

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<sup>83</sup> *ibid*, para 10.7.

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid*.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid*.

<sup>88</sup> *ibid*, para 10.8.

<sup>89</sup> *ibid*.

<sup>90</sup> *Peltonen*.

<sup>91</sup> *ibid*, para 3.

<sup>92</sup> *ibid*, para 6.5.

<sup>93</sup> *ibid*, para 2.1. This provided that 'a passport may be denied to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport'.

<sup>94</sup> *ibid*, para 6.8.

<sup>95</sup> *ibid*, para 8.3.

*travaux préparatoires*, finding that, in the words of the UN Human Rights Committee, ‘it was agreed upon that the right to leave the country could not be claimed, *inter alia*, in order to avoid such obligations as national service’.<sup>96</sup> Moreover, the UN Human Rights Committee ‘observe[d] that restrictions of the freedom of movement of individuals who have not yet performed their military service are in principle to be considered necessary for the protection of national security and public order’.<sup>97</sup> The UN Human Rights Committee therefore found that this indirect interference upon the author’s Article 12(2) right to leave any country was in accordance with Article 12(3) and so was lawful under the Covenant.<sup>98</sup> In coming to its decision, the UN Human Rights Committee also noted two further points. First, that the passport was needed for holiday travel, and second, that the author ‘ha[d] not claimed that the authorities’ decision not to provide him with a passport was discriminatory or that it infringed any of his other rights under the Covenant’.<sup>99</sup>

#### 4.4.3 Reflections on ICCPR Article 12(3)

It is clear from these communications that the limitations in Article 12(3) are not merely academic. The UN Human Rights Committee is willing to accept as lawful restrictions that have been imposed on an individual’s right to liberty of movement and freedom of residence. On the basis of all that has been discussed above, there is no reason in principle to suppose that such similar restrictions would not be considered lawful in the context of IDP return. Indeed, while the UN Human Rights Committee has in its General Comment No 27 recognised ‘protection against all forms of forced internal displacement’ as emanating from Article 12(1), it has done so explicitly stating that this itself is ‘[s]ubject to the provisions of article 12, paragraph 3’.<sup>100</sup> If protection from internal displacement is qualified in this way, then there seems no immediate reason why the same should not apply to IDP return too.

To be lawful, a restriction must serve and be necessary to protect one of the permissible limitations. Yet, it is apparent that reference to one of these limitations is not in itself sufficient, as the UN Human Rights Committee will in principle subject to scrutiny any restrictions imposed. Indeed, as shown by *Sayadi and Vinck*, the UN Human Rights Committee has found such restrictions to be unlawful under the Covenant on account of a failure to sufficiently justify these in the light of the Article 12(3)

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<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*, para 8.4.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> General Comment No 27, para 7.

requirements. *Sayadi and Vinck* also shows how the UN Human Rights Committee is willing to hold a State party responsible for ongoing restrictions to Article 12 even if it is not within the State's competence to bring such restrictions to an end. Although the State party had called upon the UN Sanctions Committee to remove the authors names from the sanctions list, with removal being a decision to be made by the UN Sanctions Committee and not the State party, this did not obviate the responsibility that nevertheless rested on the State party on account of it having called for the listing of the authors' names in the first instance.<sup>101</sup> In this connection also, General Comment No 27 explicitly states that a State party 'must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference'.<sup>102</sup> Moreover, *Sayadi and Vinck* also reveals that the UN Human Rights Committee will hold a State party liable for indirect interferences with Article 12 rights.

In respect to the requirements, these are multiple. Any restrictive measure must, first, be provided by law. In this connection, it must be on clear legal grounds, be precise, be fettered and be reasonable. Assuming that this first condition is met, then such a law and its application will be subjected to, second, a test of necessity and, third, a test of proportionality. Fourth, the restrictive measure must be consistent with other ICCPR rights, and, in particular, the principles of equality and non-discrimination. This finding of these four conditions supports, but also develops upon, Beyani's assessment of the permissibility of restrictions under Article 12(3).<sup>103</sup> It specifically develops upon this by inserting proportionality as an additional and, importantly, distinct condition.<sup>104</sup> It is also apparent from General Comment No 27 that there exists the potential for a violation to be found on the basis of procedural deficiencies, notably should any related proceedings not be expeditious or if reasons for a restrictive measure are not given.<sup>105</sup> In this respect, the UN Human Rights Committee noted in *Sayadi and Vinck* that 'the authors' names were transmitted to the Sanctions Committee even before the authors could be heard',<sup>106</sup> albeit that this was not determinative of the issue at hand.

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<sup>101</sup> *Sayadi and Vinck*, para 10.7.

<sup>102</sup> General Comment No 27, para 6.

<sup>103</sup> Beyani (2000) 9.

<sup>104</sup> As has been shown here, this addition of proportionality as a distinct condition is given greatest support by the UN Human Rights Committee's General Comment No 27 and the communications that have arisen subsequent to this. While Beyani's assessment was unable to take into consideration these developments, he did nonetheless seemingly pre-empt the question of proportionality being treated as one separate to the question of necessity (see *ibid*).

<sup>105</sup> General Comment No 27, para 15.

<sup>106</sup> *Sayadi and Vinck*, para 10.7.

Taken together, these requirements form a complex, multifaceted test, which, while permitting restrictions to Article 12(1), also *prima facie* demands rigorous scrutiny in the interest of protecting the dual right to movement and residence. Yet, the question must be asked as to just how ‘anxious’ this scrutiny is, and what the consequence is for the eligibility for return. In terms of critique, *Celepli* is the obvious example to take. As mentioned above, the UN Human Rights Committee gave the briefest examination on the merits, with consideration of Article 12(3) extending to only two sentences. This brevity queries the conviction with which Article 12(3) is applied. Yet, it is not just a matter of length. In *Celepli*, simple invocation of national security by a conscientious State party was seemingly sufficient to declare lawful the restrictions imposed. Beyond noting that the restrictions had been reviewed and ultimately revoked completely, albeit only after a period of almost seven years and without criminal charges having been brought against the author,<sup>107</sup> the UN Human Rights Committee did not in its examination of the merits further scrutinise the specific restrictive measures that had been taken. The UN Human Rights Committee simply declared these compatible with Article 12(3).<sup>108</sup> Similarly, in *Karker*, the UN Human Rights Committee was satisfied that the restrictions imposed were necessary for reasons of national security solely because the domestic courts had found these to be necessary for reasons of national security.<sup>109</sup> Beyond noting that the domestic judicial decision was based on a review of the evidence put forward by the domestic authorities, there was no further discussion as to the necessity or appropriateness of the precise restrictive measures for achieving the protective function that underpins Article 12(3).

This is of course not to say that the UN Human Rights Committee will never interrogate a State Party’s resort to national security. Indeed, in *Sayadi and Vinck v Belgium*,<sup>110</sup> the UN Human Rights Committee did find a violation of the Covenant despite the invocation of national security, with this decision being reached in the light of the domestic courts having dismissed the criminal investigation against the authors.<sup>111</sup> It of course must also be appreciated that the UN Human Rights Committee does not have the competence to re-hear decisions taken at the domestic level, and that it is not uncommon for security critical information to not be heard by domestic courts should this itself not be in the interest of national security.<sup>112</sup> Yet, *Celepli* and *Karker* do nonetheless serve to highlight the concern that a complacent or overly deferential judiciary may simply acquiesce to the demands of domestic decision-makers, a concern that, while being conscious of institutional competencies, is not abated by such a

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<sup>107</sup> *Celepli*, paras 2.1, 2.3 and 3.1.

<sup>108</sup> *ibid*, para 9.2.

<sup>109</sup> *Karker*, para 9.2.

<sup>110</sup> *Sayadi and Vinck*.

<sup>111</sup> *ibid*, para 10.8.

<sup>112</sup> *Celepli*, para 3.1.



restrained approach to scrutiny as has been demonstrated by the UN Human Rights Committee in its deliberations on this matter.

Aside from national security, the UN Human Rights Committee has had little opportunity to expand upon what restrictive measures might be necessary to protect public order (*ordre public*), public health or morals or the rights and freedoms of others in the precise context of Article 12(3). In respect to public order, ‘restrictions of the freedom of movement of individuals who have not yet performed their military service are in principle to be considered necessary’.<sup>113</sup> As to public health or morals or the rights and freedoms of others, in its General Comment No 27, the UN Human Rights Committee gave the example of ‘limitations on the freedom to settle in areas inhabited by indigenous or minorities communities’.<sup>114</sup> However, beyond this, nothing more can be gleaned from General Comment No 27 or the related communications. Yet, by its decision in *Peltonen*, the UN Human Rights Committee has shown its willingness to resort to the *travaux préparatoires* as a determinative aid to the interpretation of the permissible grounds.<sup>115</sup> As has been documented by Bossuyt, the ICCPR Drafting Committee prepared ‘[l]ong lists of exceptions’.<sup>116</sup> One such list contained recommendations that restrictions be imposed, *inter alia*, for controlling labour practices, ‘for the well-being of helpless or dependent persons’, and ‘where it is necessary in the interests of peace and good government to proclaim reserved areas in favour of the different sections of the population, and to restrict and control the free movement and free choice of residence on the part of individuals belonging to different sections of the population’.<sup>117</sup> Moreover, as was stated in the UN Secretary-General’s Annotations on the Draft Text,<sup>118</sup> restrictions were considered by some as necessary in times of a national emergency or in epidemics, for the ‘control of prostitution’, as temporary measures on immigrants, and in certain cases on migrant workers and indigenous communities.<sup>119</sup> It was also noted that ‘limitations might vary greatly from State to State’.<sup>120</sup>

To refer to these examples is instructive, albeit of course not determinative given that a ‘more general formula’ was later preferred and adopted into the final text.<sup>121</sup> These do though give some indication

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<sup>113</sup> *Peltonen*, para 8.4.

<sup>114</sup> General Comment No 27, para 16.

<sup>115</sup> *Peltonen*, para 8.3.

<sup>116</sup> Bossuyt (1987) 252.

<sup>117</sup> *ibid* 252-253.

<sup>118</sup> UNGA, ‘Annotations on the Text of the Draft International Covenants on Human Rights’ (1 July 1955) UN Doc A/2929.

<sup>119</sup> *ibid*, para 53 (on page 38-39).

<sup>120</sup> *ibid*.

<sup>121</sup> Bossuyt (1987) 252.

of the potential breadth of the permissible limitations. Indeed, while it was broadly agreed that phrases such as ‘general welfare’, ‘economic and social well-being’ and ‘prevention of disorder or crime’ were too far-reaching to be included within the general formula,<sup>122</sup> the *travaux préparatoires* do reveal that some members remained anxious about the final formula that was eventually adopted. The formula was specifically criticised for being ‘too broad’ and for providing ‘no real protection against the enactment of arbitrary legislation’.<sup>123</sup> Moreover, there were concerns that it ‘could lead to abuse’, particularly in respect to the phrase ‘the rights and freedoms of others’.<sup>124</sup> Yet, while some members held real reservations about the potential breadth offered up by the phrasing, others appeared to welcome this breadth. This is revealed by the deliberations over the use of public order (*ordre public*). ‘Public order’ was not adopted into the draft text. The more limited phrase ‘public safety’ was instead preferred.<sup>125</sup> The concern here was not only over its equivalence, or not, with the phrase ‘*ordre public*’ in French, but a belief that ‘[f]ar-reaching restrictions could be justified under such a vague expression’.<sup>126</sup> Yet, in the end, a majority of members preferred ‘public order (*ordre public*)’, it appears precisely because this expression was believed to be broad.<sup>127</sup> As such, while the list of permissible grounds is exhaustive, it is nonetheless open to an expansive interpretation, this being not by chance but, as evidenced in the *travaux préparatoires*, by design. In the light of this, it is perhaps not unsurprising that there is a lack of clarity as to the precise scope of the permissible limitations under Article 12(3) because to do so may risk loss of this breadth that was intentionally built into the general formula.

As argued above, it is of course not just a matter of whether a restriction falls within and is necessary to protect one of the permissible grounds, but is also a matter of whether it is proportionate. Yet, once again, there is a distinct lack of clarity as to how proportionality is to be understood in the context of Article 12. Although it is clear from General Comment No 27 that a restriction must be proportionate to the interest to be protected, and that any restrictive measure must not be so restrictive as to impair the essence of the right, the UN Human Rights Committee has not yet explicitly applied this to any given set of facts. This therefore makes it difficult to ascertain what in practice may or may not constitute a proportionate restriction. In *Zoolfia*, there was no substantive discussion of proportionality because the UN Human Rights Committee cut short its examination of the merits on account of the State party having failed to provide pertinent information to justify the restriction.

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<sup>122</sup> UNGA (1 July 1955) UN Doc A/2929, para 56 (on page 39).

<sup>123</sup> *ibid*, para 55 (on page 39).

<sup>124</sup> *ibid*, para 56 (on page 39).

<sup>125</sup> *ibid*, 38.

<sup>126</sup> Bossuyt (1987) 258.

<sup>127</sup> *ibid*, 258.

Similarly, there was no such discussion in *Sayadi and Vinck*, this because the UN Human Rights Committee had already found the restrictions imposed to have not met the test of necessity.

An indication of what concrete restrictive measures may be proportionate under Article 12(3) can, however, be gleaned from the facts of some of the earlier communications that have come before the UN Human Rights Committee. For instance, in *Peltonen*, the UN Human Rights Committee noted that the author required the passport for ‘holiday-travelling’,<sup>128</sup> implying that if the passport had been needed for a different purpose, for example, for work or for essential family reasons, then the restrictions imposed may not have been deemed lawful, or at the very least, may have necessitated closer examination on the merits. In *Karker*, the UN Human Rights Committee assessed the restrictions imposed on the alleged victim’s movements as nevertheless permitting him residence ‘in a comparatively wide area’.<sup>129</sup> Here, therefore, is the implication that as long as the restrictions are not too limited in a geographical sense, then they will be lawful under Article 12(3). Specifically, the facts in *Karker* reveal that residence in a French *commune* covering an area of 117 square kilometres,<sup>130</sup> and a requirement to report to the police once per day, can be lawful.<sup>131</sup> In *Celepili*, the author’s confinement to his home municipality of 10,000 inhabitants seemingly raised no issue as to its lawfulness,<sup>132</sup> and neither did the requirement to report to the police three times per week, as well as the need for prior permission from the police before leaving his place of residence or changing his employment.<sup>133</sup> As well as geographical area, the UN Human Rights Committee has also, at least implicitly, considered the duration of a restrictive measure. In this respect, it is useful to refer to the UN Human Rights Committee’s decision in the administrative banishment communication of *Ngalula Mpandanjila et al. v Zaire*.<sup>134</sup> Although no explicit mention was made to Article 12(3) in this decision, the UN Human Rights Committee did say that ‘they [the authors] were deprived of their freedom of movement during *long periods* of administrative banishment’.<sup>135</sup> The restrictions here lasted for approximately three to four years,<sup>136</sup> and were deemed to have violated Article 12(1).<sup>137</sup> Yet, in *Karker*

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<sup>128</sup> *Peltonen*, para 8.4.

<sup>129</sup> *Karker*, para 9.2.

<sup>130</sup> Constituting 0.02% of French territory (see *Karker*, para 5.3).

<sup>131</sup> *Karker*, para 2.2.

<sup>132</sup> *Celepili*, para 2.2.

<sup>133</sup> *ibid.*

<sup>134</sup> UN Human Rights Committee, *Ngalula Mpandanjila et al. v Zaire* Communication No 138/1983 (1990) UN Doc CCPR/C/OP/2.

<sup>135</sup> *ibid.*, para 10 (emphasis added).

<sup>136</sup> Some of the authors (it is not specified which) were banished for a period of approximately 12 months; and all of the authors (and, on this occasion, some members of their families also) were banished for approximately three years until the time of the adoption of the UN Human Rights Committee’s views (see para 8.2).

<sup>137</sup> *Ngalula Mpandanjila et al.* para 10.

and *Celepili*, the restrictive measures spanned approximately seven to eight years,<sup>138</sup> and these were considered lawful. This reveals that even periods of restriction that would otherwise be considered long by the UN Human Committee's own standards can be compatible with Article 12(3).

Finally, returning once more to the decision in *Karker*. In addition to Article 12(1), the author also in her submissions alleged violations of, *inter alia*, Articles 17 and 23, in respect to the prohibition of 'arbitrary or unlawful interference with... privacy, family, home or correspondence', and the protection of the family as 'the natural and fundamental group unit of society', respectively.<sup>139</sup> Specifically in this respect, the author relied upon the fact that the compulsory residence order that had been imposed upon her husband meant that he was sent to live in south-east France, over one thousand kilometres from her and their six children in Paris.<sup>140</sup> The submissions in respect to family life were, however, declared inadmissible on account of non-exhaustion of domestic remedies,<sup>141</sup> and no further comment on the family's separation was made by the UN Human Rights Committee. Yet, this was not only a matter concerning Articles 17 and 23. It was also a relevant consideration under the admissible Article 12 submission, in respect to both the proportionality of the restrictive measure and its compatibility with other ICCPR rights. Yet, as with all the other communications discussed here, the UN Human Rights Committee did not conduct a proportionality assessment, this being despite the decision in *Karker* coming subsequent to the publication of General Comment No 27. The UN Human Rights Committee considered neither the proportionality of the restrictive measure vis-à-vis the interest protected nor whether this particular restrictive measure was the least intrusive means by which to achieve the desired result. Additionally, no mention at all was made to the fourth part of the test under Article 12(3) as to whether the restrictive measure was compatible with other ICCPR rights. That the UN Human Rights Committee had considered the submissions under Articles 17 and 23 inadmissible did not preclude it from nonetheless considering the impact on family life of the restrictive measure under Article 12(3).

#### 4.4.4 Implications for the IDP right to return

From all of the above, it becomes apparent that the UN Human Rights Committee is willing to accept as necessary and proportionate a broad range of potentially severe restrictions on an individual's

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<sup>138</sup> While in *Celepili* the restrictions had been revoked after almost seven years (see paras 2.1 and 2.3), in *Karker*, these were still ongoing at the time of the adoption of views, which was some eight years after the compulsory residence order had been made (see paras 2.1 and 6.3).

<sup>139</sup> *Karker*, para 5.4.

<sup>140</sup> *ibid*, para 2.3.

<sup>141</sup> *ibid*, para 8.4.

Article 12(1) rights. The implications of this for IDP return are clear. Permissible restrictions to the IDP right to return do exist, and despite what appears *prima facie* to be a stringent and multifaceted test of compliance, could nonetheless result in particularly severe interferences with the right. Moreover, such restrictions extend beyond those envisaged in the Guiding Principles, namely that rights and guarantees will only be restricted in the event that an individual attempts to use such rights as a shield by which to protect themselves from international criminal liability.<sup>142</sup>

The UN Human Rights Committee has, in a similar fashion to Kälin in his Annotations, remarked how an interference with liberty of movement and freedom of residence would be declared unlawful should it be tinged with any degree of discrimination. Of course, this is important to prevent any interference with the movement and residence rights of IDPs on account of their displacement status. Yet, based on the analysis presented here, it would be erroneous to suggest that just because IDPs are IDPs means they would benefit from any form of preferential treatment under Article 12. Indeed, it should be remembered that the alleged victim in *Karker* enjoyed refugee status under domestic law.<sup>143</sup>

On this point, it is also once again worthwhile reiterating that although none of the rights under Article 12 are absolute,<sup>144</sup> the qualifications that apply to Article 12(4) are far more limited than those provided for in Article 12(3), which, while applying to Article 12(1) and Article 12(2), do not apply to Article 12(4). Although Article 12(4) is a qualified right, there are no permissible limitations, simply that ‘No one shall be *arbitrarily deprived* of the right to enter his own country’.<sup>145</sup> In its General Comment No 27, the UN Human Rights Committee has been clear on the meaning of this. It has stated emphatically that ‘interference... should be, in any event, reasonable in the particular circumstances’,<sup>146</sup> and that it considers ‘there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable’.<sup>147</sup> In this respect, the UN Human Rights Committee has been unwavering in its view on the matter.<sup>148</sup>

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<sup>142</sup> Guiding Principles, Principle 1(2).

<sup>143</sup> *Karker*, para 2.1.

<sup>144</sup> *Zoolfia*, para 8.3.

<sup>145</sup> ICCPR Article 12(4) (emphasis added).

<sup>146</sup> General Comment No 27, para 21.

<sup>147</sup> *ibid.*

<sup>148</sup> Since the adoption of General Comment No 27, the UN Human Rights Committee has repeatedly used this phrasing verbatim when examining the merits in specific communications. In this respect, see, for example, UN Human Rights Committee, *Warsame v Canada* Communication No 1959/2010 (2011) UN Doc CCPR/C/102/D/1959/2010, para 8.6; UN Human Rights Committee, *Nystrom v Australia* Communication No 1557/2007 (2011) UN Doc CCPR/C/102/D/1557/2007, para 7.6. Although the UN Human Rights Committee has not had many opportunities to consider the matter, some indication as to what specific measures would be considered arbitrary can be seen in *Warsame*. In this decision, the UN Human Rights Committee found that deporting and subsequently impeding an individual’s right to return to their own country ‘would be

However, while IDPs may individually find themselves at risk of lawful interferences with their right to return pursuant to the permissible limitations under Article 12(3), this is not to say that this is fatal to the general position averred early in this chapter that, in principle, all IDPs are to be considered eligible in respect to the general IDP right to return. Indeed, it must be remembered that any attempt to restrict IDP return under Article 12(3) must be the exception and not the norm,<sup>149</sup> a point that overarches everything else that has been said here about the test in Article 12(3). As an exception, it cannot be employed as a general measure, meaning that Article 12(3) cannot be used to justify restrictions to the right to return of vast numbers of IDPs. Simply put, it can at this juncture still be confidently argued that all IDPs are *prima facie* eligible for return, but that the enjoyment of the right to return may, in 'exceptional cases', be restricted, albeit only if all conditions established pursuant to Article 12(3) are met.<sup>150</sup> While this would affect universal enjoyment of the right to return across all IDPs, this does not challenge the underlying principle that all IDPs are, at least initially, to be treated equally in respect to eligibility for return.

#### **4.5 Eligibility for IDP Return and Equality**

A more fundamental, conceptual, challenge still nonetheless remains. This is a challenge that is revealed when eligibility for the right to return is viewed through the lens of the ultimate aim of the international IDP regime. Attention now turns to this by way of exploring whether a more wholesale restriction on IDP return may find lawful grounding in international law.

As was concluded in Chapter Two, the ultimate aim of the international IDP regime is that IDPs are to enjoy in equality the same rights and freedoms as non-IDPs in the same State. In order to achieve this aim presupposes equality between IDPs themselves. Applying this to the right to return, one could simply say that IDPs shall enjoy their right to return in full equality with one another and with non-IDPs in the same State. However, the situation is not this simple. By taking together, on the one hand, the ultimate aim of equality, and, on the other hand, the legal reality that the general IDP right to return is inferred from ICCPR Article 12(1), it becomes apparent that it would be more accurate to say that IDPs shall enjoy *their right to liberty of movement and freedom of residence* in full equality with one another and with non-IDPs in the same State.

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disproportionate to the legitimate aim of preventing the commission of further crimes and therefore arbitrary' (*Warsame*, para 8.6).

<sup>149</sup> General Comment No 27, para 13.

<sup>150</sup> In accordance with the position stated in *Zoolfia*, para 8.3.

To articulate the situation in this way instantly raises an important question, one for which there is a potentially uncomfortable answer. That question is to what extent can IDPs legitimately rely upon the right to return when it is not only IDPs, but also non-IDPs, who find themselves unable to avail themselves of the enjoyment of their dual right to liberty of movement and freedom to choose their residence under ICCPR Article 12(1). Can it be said that the right to return is restricted to only those IDPs who *unlike* the non-IDP population within a particular State do not enjoy their right to liberty of movement and freedom of residence rights? Could seeking equality with non-IDPs within the same State result in a restriction on the right to return for entire populations of IDPs in particular States? This question is not one of fancy or mere theoretical intrigue. Around the globe exist numerous instances of circumstances such as this. Perhaps most notable are those internal displacement settings that have arisen in the context of territorial disputes, including, albeit not only, those linked to secessionist movements. The protracted conflicts in the former Soviet States of Armenia, Azerbaijan, Georgia and Ukraine, as well as internally within the Russian Federation, are just a few examples. Yet, this question also arises in non-conflict displacement settings, for example, in the case of technological disaster at Fukushima, and the ongoing disruption in Haiti following, *inter alia*, geophysical and weather related disasters. In fact, the more one thinks on it, the more it becomes apparent that many current displacement settings can be said to be beset by this dilemma.

In order to explore this question, it will be necessary to first briefly interrogate a little further how the principle of equality is to be understood in the context of the international IDP rights regime. The intention here is not to subject the international IDP regime to a detailed equality analysis.<sup>151</sup> But it is to get a better flavour of what equality means in this precise context, and to then apply this to the dilemma that has just been posed.

#### 4.5.1 Equality in the international IDP regime

In the Guiding Principles, it is Principles 1 and 4 that are of most relevance in respect to equality and non-discrimination. Principle 4 is concerned with equality in the enjoyment of the rights found within the Guiding Principles. Principle 4(1) states that 'These Principles shall be applied without

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<sup>151</sup> In respect to the literature, Fredman's 2016 article provides an excellent entrance into the topic. Moreover, her exposition of 'a multi-dimensional approach' offers a useful way in which substantive forms of equality can be conceptualised, and operationalised, in a manner that avoids some of equality's common pitfalls, such as 'levelling-down'. This pitfall is of particular relevance to the IDP context, but as stated, cannot here be covered in sufficient detail due to space limitations (see Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712).

discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.’ The concern here is equality between IDPs.<sup>152</sup> Specifically, that no individual IDP or demographic sub-group of IDPs shall be discriminated vis-à-vis other IDPs in their enjoyment of the rights and freedoms contained within the Guiding Principles. As stated in the Annotations, Principle 4(1) is, similar to ECHR Article 14, ‘an accessory right’,<sup>153</sup> in that it is not ‘an independent right to freedom from discrimination’,<sup>154</sup> but is instead a guarantee of the equal enjoyment of those rights and guarantees contained within the Guiding Principles. In this sense, it is limited; ‘[i]ts scope is restricted to protecting internally displaced persons against discrimination only with respect to the provisions set forth in the Guiding Principles.’<sup>155</sup>

In contrast, Principle 1(1) contains a general equality provision that is not limited in this way.<sup>156</sup> In this sense, Principle 1(1) is not restricted only to the enjoyment of the rights found within the Guiding Principles. It is a general provision that extends beyond the content of the Guiding Principles. This is important for the present discussion given that the Guiding Principles do not explicitly provide for a right to return and do not constitute the most authoritative source for an implied right of this sort. Equality in the sense in which it features in Principle 1(1) is instead concerned with the equality of IDPs as an entire group vis-à-vis non-IDPs, specifically, that it is prohibited to discriminate against IDPs on account of their displacement.<sup>157</sup> Moreover, Principle 1(1) is explicit in stating that IDPs shall enjoy ‘*the same rights and freedoms... as do other persons in their country*’.<sup>158</sup>

The precise formulation used here is intriguing. It is stated that IDPs shall enjoy the same rights and freedoms ‘in *full equality*’.<sup>159</sup> The meaning of ‘full equality’ is neither explained nor discussed in Principle 1 or anywhere else in the Guiding Principles – indeed, this phrasing is not again used in the text. Yet, this is not the only time that the term ‘full equality’ has been used in official UN texts associated with IDP rights. Deng used this same phrasing in the Compilation and Analysis. In this, Deng stated that, ‘Internally displaced persons are entitled to enjoy, *in full equality*, the same rights and

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<sup>152</sup> Annotations, 21.

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> This states that ‘[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced’.

<sup>157</sup> Annotations, 11.

<sup>158</sup> Emphasis added.

<sup>159</sup> Emphasis added.



freedoms under domestic and international law as do the rest of the country's citizens'.<sup>160</sup> He then went on to emphasise how, on account of displacement's 'very nature', 'such persons [IDPs], in practice, rarely enjoy such rights and freedoms'.<sup>161</sup> This likely explains the route by which the term made its way into the Guiding Principles. Yet, the Compilation and Analysis reveals little more as to the meaning of the phrase.<sup>162</sup> Similarly, Beyani also employed the term during his tenure as IDP mandate-holder. In his 2015 annual report to the UN Human Rights Council, he stated that 'It may take years to fully rebuild displacement-affected communities or to integrate them fully into new communities to the extent that they achieve *conditions of full equality*, access to services and participation in the economic, social and public and political aspects of society'.<sup>163</sup> Yet, once again, nothing more was said as to its precise meaning.

Some insights as to its meaning can, however, be discerned from the Annotations, albeit that this is still not here dealt with head-on. In respect to Principle 1, Kälin states that 'Sometimes treating internally displaced persons differently in order to respond to their specific needs is unavoidable or even justified'.<sup>164</sup> In this respect, he draws upon Manfred Nowak's commentary on ICCPR Article 26, specifically that '[e]qual treatment does not mean [...] identical treatment'.<sup>165</sup> He then goes on to say that 'the principle of non-discrimination does not preclude special measures addressing, for example, the specific needs of displaced women and children... but, to the contrary, may, as recognized by the Council of Europe, "entail the obligation to consider specific treatment tailored to meet internally displaced persons' needs.'"<sup>166</sup> The insights in respect to Principle 4 are also instructive. Although Principle 4 is more closely related to the equal enjoyment of IDP rights and freedoms among the IDP population, it does not render the insights obsolete as for IDPs to be able to enjoy their rights in equality with non-IDPs presupposes that IDPs are able to enjoy their rights in equality with one another. In respect to Principle 4(2), Kälin states that 'According special treatment to some groups of internally displaced persons does not violate the principle of equality as objectively disparate situations should not be treated equally and specific vulnerabilities should be taken into account'.<sup>167</sup>

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<sup>160</sup> Compilation and Analysis, para 9 (emphasis added).

<sup>161</sup> *ibid.*

<sup>162</sup> Also, no explicit definition or explanation of what is meant by 'full equality' is given in the Annotations.

<sup>163</sup> UN Human Rights Council, 'Report on the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani (1 April 2015) UN Doc A/HRC/29/34, para 82 (emphasis added).

<sup>164</sup> Annotations, 13.

<sup>165</sup> *ibid.*

<sup>166</sup> *ibid.*

<sup>167</sup> *ibid.*, 21.

While the meaning of ‘full equality’ may not be expressly defined, it is apparent that the phrase should be interpreted in line with a more substantive understanding of equality rather than in a narrower, formal sense. Indeed, as was discussed towards the beginning of this Chapter, the Guiding Principles do include provisions that emphasise specific demographic sub-population groups, such as women and children, recognising the need for attention to be directed towards such ‘specific vulnerabilities’<sup>168</sup> in order to advance towards the aim of IDPs and non-IDPs alike enjoying the same rights and freedoms.<sup>169</sup>

#### 4.5.2 Application to the IDP right to return

The issue at hand is how to respond to situations in which both IDPs and non-IDPs alike do not enjoy their dual right to liberty of movement and freedom to choose one’s residence under ICCPR Article 12(1). The question is whether this more substantive conceptualisation of equality, embodied in the principle of ‘full equality’, help towards promoting IDP return? Does it legitimate the initiation of special measures to support IDP return? It is clear from the above that in furtherance of equality, the international IDP regime is amenable to some degree of preferential treatment being given to IDPs. This is justified by the legitimate aim of ensuring that IDPs do, in practice, enjoy their rights and freedoms in equality with non-IDPs in the same State. Indeed, it is not seen as an affront to the principle of equality to do so. In the words of Kälin himself, it is sometimes justified to treat IDPs differently in order to respond to their specific needs.<sup>170</sup> It is plain to see that IDPs *are* in a substantially different position. The entire international IDP regime has indeed developed around the recognition that internal displacement has a multi-faceted detrimental impact on IDPs.

Yet, a fundamental issue nevertheless remains. That issue concerns the question of what is the essence of the actual inequality to which we are here referring, and what is the relation of this to return. Of course, IDPs are not able to return to their homes or places of habitual residence. This differs from non-IDPs who are able to return to their homes or places of habitual residence. Yet, as has been established, from a rights-based perspective, the question is not whether IDPs and non-IDPs can return to their homes, the question is whether IDPs and non-IDPs equally enjoy their dual right to liberty of movement and freedom to choose one’s residence. Return is not a standalone right in respect to which inequality can be independently assessed.

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<sup>168</sup> *ibid.*

<sup>169</sup> Guiding Principles, Principle 1(1).

<sup>170</sup> Annotations, 11.

When the question is correctly phrased in this way, it is apparent that no inequality exists. When restrictions on movement apply equally to IDPs and non-IDPs, it is clear there is no material inequality. In respect to freedom to choose one's residence, the answer is perhaps a little less clear-cut. As a consequence of restrictions on liberty of movement, IDPs are unable to return to *their* residence. For non-IDPs, the consequence of these same restrictions on liberty of movement is more accurately characterised as a restriction on free travel, as opposed to any form of restriction on return to their residence. Yet, once more, the issue needs to be correctly framed in respect to the existing human rights framework. IDPs do not, under ICCPR Article 12(1), have a right to a *particular* residence. They have the right to choose a residence that is theirs.<sup>171</sup> Although their right to choose is evidently curtailed, the question that must be asked is whether the degree to which this is curtailed is greater than for non-IDPs. While the impact in terms of lived experience is acute and evidently greater, the extent of the actual infringement of ICCPR Article 12(1) is surely equivalent. Within the bounds of what is a common infringement with liberty of movement, in the scenario posed, IDPs and non-IDPs have the same degree of choice as to their residence. To put the point bluntly, it just so happens that IDPs used to live elsewhere. In the light of the current international IDP rights framework, this does not legitimate granting IDPs preferential treatment over non-IDPs in respect to their liberty of movement and freedom to choose their residence under Article 12(1). To do so would seemingly run counter to the ultimate aim of achieving equality in the enjoyment of rights and freedoms between IDPs and non-IDPs within the same State.

On the face of it, it appears therefore that there might indeed be grounds for claiming that eligibility for return be restricted in a more wholesale manner. Yet, care must be taken not to succumb to extremes, or worse, a denial of existing rights. None of this in fact undermines IDP claims under ICCPR Article 12(1). It is not to say that IDPs lose their right to return in such settings. But it is to say that the issue, more correctly phrased, should be that no-one, whether IDP or non-IDP, is able to enjoy their dual right under ICCPR Article 12(1). This becomes a broader human rights issue, as opposed to an IDP only issue. Of course, many IDPs might still nonetheless experience differential treatment that is unlawful and discriminatory, and in such a situation legal recourse can be made to ICCPR Article 12(1). But unless this is the case, existing IHRL provides little in the way of assistance on this precise point. Moreover, neither do the Guiding Principles. This really does bring to the fore the inadequacies that exist as a consequence of the IDP right to return being an inferred right. The aim of achieving equality, even if in a substantive sense, is undermined. *If* IDP return were recognised independent to Article

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<sup>171</sup> It is here important to remember that ICCPR Article 12(1) recognises the right to freedom to choose one's residence, not the right to freedom to choose one's *own* residence.

12(1) then the situation might be different. *If* there were an express and unequivocal right to return in the Guiding Principles then, per the substantive view of equality that the Guiding Principles embody, this might very well justify preferential treatment. Yet the issue for return is that it demonstrably lies outside the core of the international IDP regime, meaning it is unable to benefit in this way.

A final point needs to now be made before concluding. This is a point that links back to the idea of categorisation, or more precisely, non-categorisation, within the international IDP regime. As was established earlier in this Chapter, the general position that underlies the international IDP regime is that the regime does not differentiate by sub-category. While specific attention may be directed towards particular vulnerabilities that arise out of certain demographics, it is not the case that certain rights and guarantees apply only to certain IDPs. Yet, categorisation is revealed in this analysis. Although the general IDP right to return in IHRL should not in principle be limited, it is apparent that this may indeed be the case. Moreover, in the scenario posed here, that of a situation in which IDPs and non-IDPs alike do not enjoy their dual right to liberty of movement and freedom to choose one's residence, while it has been posited that preferential treatment would not be justified under ICCPR Article 12(1), it must be remembered that if displacement occurs in the context of armed conflict, then, notwithstanding the limitations in respect to IHRL, recourse can still be had to CIHL Rule 132. Yet, of course, this is only of relevance in armed conflict settings. As such, while this explicit protection would apply in the conflict-induced displacement settings of the South Caucasus, it would not apply to situations in which displacement occurs in the context of disasters only, or in situations of generalised violence that fail to meet the IHL requirements for classification as an armed conflict. Moreover, as this applies only to those IDPs who have been displaced in the context of armed conflict, it would not apply, for example, in the South Caucasus, when displacement occurs not in relation to the armed conflict but instead solely for reasons connected to, for instance, development projects. Here, categorisation is seen, with a concrete difference in rights protections between those displaced in the context of armed conflict and those displaced by another displacement cause. Indeed, while it was earlier stated that CIHL Rule 132 provides an explicit but not an additional protection, it now becomes apparent that in such circumstances CIHL Rule 132 is an additional protection to that found in IHRL. Categorisation therefore does in reality appear, this being despite the general position that underlies the international IDP regime as a whole.

#### **4.6 Conclusion**

This discussion has revealed some uncomfortable truths in respect to eligibility for return. The international IDP regime as a whole espouses an approach where IDP rights are to be enjoyed equally by all IDPs. Indeed, this is to some degree essential to, first, promote the necessary homogeneity required to help distinguish IDPs from non-IDPs, and second, as a presupposition for achieving equality in rights enjoyment between IDPs and non-IDPs. Yet, return lies at the periphery, and to some extent outside of, this regime. Return must be seen in the light of being a right inferred from ICCPR Article 12(1), and not as a standalone right. It is the effects of this have been examined in this Chapter.

What has been shown is that, first, access to the general right to IDP return is impeded by non-ratification of the ICCPR. While the ICCPR may be one of the most ratified of the UN human rights treaties, it is nonetheless the case that a substantial number of IDPs are affected by their State not being a party to the Covenant. Second, return is susceptible to restrictions, pursuant to the ICCPR Article 12(3) limitations provision. While the topic of IDP return has not itself been specifically considered by the UN Human Rights Committee, it is evident that the UN Human Rights Committee is willing to sanction restrictions on Article 12(1) in individual cases, and there is no reason to suppose that this should not apply to internal displacement contexts. Third, in situations in which IDPs and non-IDPs alike are unable to avail themselves of their dual right to liberty of movement and freedom to choose one's residence under Article 12(1), the current international legal framework dictates that attention be directed towards this shared interference rather than solely on IDPs and return. Any measures taken that privilege IDPs in their rights claims under Article 12(1) would exceed the justification that underlies the entire international IDP rights regime, that of seeking equality in the enjoyment of the same rights and freedoms between IDPs and non-IDPs in the same State. This is not to negate, undermine or restrict the IDP right to return, but it is to bring the right from behind a façade that portrays return as an independent right automatically afforded to all IDPs regardless of the displacement context. Moreover, it reveals a contradiction in the international IDP regime in respect to the supposed universality of IDP rights.

### 5.1 Introduction

In this Chapter, attention turns to the question of to what IDPs can return. Specifically, the right to return to what? As with the other challenges being discussed here in Part III of this Thesis, this is a foundational question, but one for which greater clarity is nevertheless required.

In order to interrogate this question, its scope must be more precisely defined, as must the scope of this Chapter as a whole. The meaning of ‘to what’ can be interpreted at varying levels or degrees of abstraction. It can be interpreted narrowly in a way whereby concern is focused on material possession alone, specifically the home, land and possessions. It might, however, be interpreted more broadly, with consideration of factors such as, access to services, the provision of healthcare, opportunities to participate in public life, and similar. It could yet be interpreted more broadly still, to encompass the wider contextual conditions of return, such as return to safety, to peace, and similar. Many of these broader concerns have already been discussed, or at least alluded to, in this Thesis. It is partly for this reason that the focus in this Chapter will be on the former, narrower, interpretation of ‘to what’. But the primary reason for taking this narrower approach to the question at hand is that it is here where the greatest uncertainty lies. It is, for instance, uncontroversial to say that IDPs should be able to return to a place of safety, or that they should not face discrimination upon their return. Similarly, it is not especially ambitious to say that returnees should have access to public services and to be able to participate in public affairs. Indeed, these find express support in the Guiding Principles.<sup>1</sup> Yet, contention grows as soon as one starts to ask questions as to the level of tangible property and possessions to which returnees may be entitled. This question is of course complicated by the factual context of damage and destruction that typically characterises areas from which displacement has occurred.<sup>2</sup>

To answer this question, this Chapter will be concerned throughout with the issue of reparation for harm incurred through displacement. Reparation for harm is typically understood as a remedy; in this context, a remedy for those who have been displaced and have returned to their homes or places of habitual residence. Yet, reparation for harm has also been increasingly seen as a means by which to

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<sup>1</sup> Guiding Principles, Principle 29(1).

<sup>2</sup> Syria provides an obvious example. See, for example, Martin Clutterbuck, ‘Property Restitution in Post-Conflict Syria’ (2018) 57 *Forced Migration Review* 66.

promote and secure return itself, as well as a way by which to prevent future occurrences of harm.<sup>3</sup> For the purposes of this Chapter, however, reparations will be viewed solely in their remedial sense. For the purpose of scoping, it is also important to here note that while this Chapter is examining the question of ‘return to what’ through the lens of reparations, there is no intention to engage in a critique, or expound a general position, on *the right* to reparation. This Thesis as a whole is targeted specifically towards the right to return and not to the right to reparation. Moreover, such work, both supportive and critical of the legal basis for the right to reparation, has been conducted elsewhere.<sup>4</sup> The concern here lies with how reparation for harm has been understood in the context of internal displacement, and what this may tangibly mean for those who have returned to their homes or places of habitual residence (returnees). In order to interrogate the pertinent questions, this Chapter will consider what principles are to guide domestic decision-making in respect to reparation upon return, and in this connection, where the appropriate benchmarks lie. The focus throughout will be on restitution and compensation, both as distinct forms of reparation and in combination.

Recourse will of course here be made to the return and IDP-specific frameworks that have featured throughout this Thesis. However, in addition, attention will also be directed towards broader UN frameworks on reparation for harm, which while not specific to, are nonetheless applicable to the internal displacement context. This will include the similarly named 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines (IHRL and IHL)), and the 2007 UN Basic Principles and Guidelines on Development-Based Evictions and Displacement (Basic Principles and Guidelines (Development)).<sup>5</sup> The matter of equality in the enjoyment of right protections by IDPs vis-à-vis non-IDPs will also aid in the framing of the findings drawn in this Chapter.

This Chapter is structured into three main sections. It begins by first introducing reparations in general. The focus here will be on the two abovementioned sets of Basic Principles and Guidelines. Second,

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<sup>3</sup> For instance, Principle 23 of the Basic Principles and Guidelines (IHRL and IHL) (cited below) identifies ‘guarantees of non-repetition’ as a form of reparation that is not only remedial but that also contributes to the prevention of harms occurring in the first instance. Examples of measures that would fall under the umbrella of ‘guarantees of non-repetition’ include ensuring effective civilian control of military forces, and the strengthening of judicial independence.

<sup>4</sup> In respect to restitution specifically, see Scott Leckie, *Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations* (CUP 2008); and Megan Ballard, ‘Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations’ (2010) 28(2) *Berkeley Journal of International Law* 462.

<sup>5</sup> In doing so, it is important to recognise that these are not themselves legally-binding instruments, but, as is the case with the Guiding Principles, a collection of principles and guidelines that have been drawn from legally-binding provisions of international law.

with these introductory insights in mind, it will be considered how reparation for harm has been understood and employed in the precise context of IDP return. In this connection, the question of responsibility for reparation will also be raised. Third, attention will turn to look specifically at restitution and compensation. Initially, each of these will be taken in turn, before then being considered together as a combined form of reparation. This discussion will be primarily concerned with identifying the intention(s) of these two forms of reparation and their associated benchmark(s). As will be shown, such insights will prove crucial to answering the question of to what, precisely, IDPs can legitimately claim upon their return.

## **5.2 Introducing Reparations**

The 2005 Basic Principles and Guidelines (IHRL and IHL)<sup>6</sup> are the leading statement on reparation for harm at the international level. Their adoption brought to a close almost two decades of deliberations, initiated in 1988 by the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities under the auspices of the then UN Commission on Human Rights.<sup>7</sup> Their development involved input from, *inter alia*, the UNHCHR, UN mandates, independent experts, and, crucially, Member States.<sup>8</sup> The Basic Principles and Guidelines (IHRL and IHL) were adopted in quick succession by the UN Commission on Human Rights,<sup>9</sup> ECOSOC<sup>10</sup> and the UN General Assembly.<sup>11</sup>

For the purposes of the UN Basic Principles and Guidelines (IHRL and IHL), victims are ‘persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law’.<sup>12</sup> This precise focus on ‘gross violations of international human rights law and

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<sup>6</sup> UNGA Res 60/147 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (16 December 2005) UN Doc A/RES/60/147.

<sup>7</sup> UN Audiovisual Library of International Law, ‘Commentary on Basic Principles and Guidelines (IHRL and IHL)’ (2008) <[legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_ph\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf)> accessed 7 January 2019, 1.

<sup>8</sup> *ibid*, 4-5.

<sup>9</sup> UN Commission on Human Rights Res 2005/35 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (19 April 2005) UN Doc E/CN.4/2005/59, para 1.

<sup>10</sup> UN ECOSOC Res 2005/30 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (25 July 2005) para 2.

<sup>11</sup> Basic Principles and Guidelines (IHRL and IHL) para 1.

<sup>12</sup> *ibid*, Principle 8.



serious violations of international humanitarian law'<sup>13</sup> features not only in the title but is reiterated throughout. Yet, although the focus is precise, it is simultaneously broad in the sense that it can feasibly refer to a vast array of factual circumstances. This is important given the breadth of factual situations in which internal displacement can occur. Indeed, that these Basic Principles and Guidelines extend to gross violations of IHRL as well as IHL removes those issues associated with admissibility that have so frequently been identified in this Thesis as problematic when rules developed in the context of the law of armed conflict are applied to the internal displacement context. Given this breadth, and given the gravity of harm typically associated with internal displacement, IDPs, in general, are comfortably accommodated within the scope of the 'victim' definition found in the Basic Principles and Guidelines (IHRL and IHL).<sup>14</sup>

The Basic Principles and Guidelines (IHRL and IHL) assert that '[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to... [a]dequate, effective and prompt reparation for harm suffered'.<sup>15</sup> This point was echoed by the UN General Assembly in its adoption of the Basic Principles and Guidelines (IHRL and IHL), when it affirmed the importance of thoroughly and systematically addressing matters of remedy and reparation and of 'honouring the victims' right to benefit from remedies and reparation'.<sup>16</sup> Reparations are then dealt with in detail in Part IX. These are categorised into five distinct types. These are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,<sup>17</sup> which are respectively dealt with in Principles 19 to 23 (inclusive). In respect to restitution, this itself is said to be multifaceted, 'includ[ing], as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restitution of employment and return of property'.<sup>18</sup> While the Basic Principles and Guidelines (IHRL and IHL) do not articulate any express hierarchy or prioritisation of these five forms of reparation, it is nonetheless stated in Principle 19 that restitution should be provided 'whenever possible'. Compensation is then dealt with in

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<sup>13</sup> *ibid*, preamble.

<sup>14</sup> The recognition of internal displacement in the Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010) 2187 UNTS 3 demonstrates not only the gravity, but also the seriousness with which internal (and non-internal) displacement is now considered in international law. Specifically, that the 'forcible transfer of population' can, 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', constitute a crime against humanity (Article 7(1)); and that, in the context of an armed conflict not of an international character, '[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand' can constitute a war crime (Article 8(2)(e)(viii)).

<sup>15</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 11(b). Indeed, Part VII, in which Principle 11 is found, is titled 'Victims' right to remedies'.

<sup>16</sup> *ibid*, preamble.

<sup>17</sup> *ibid*, Principle 18.

<sup>18</sup> *ibid*, Principle 19.

Principle 20. It states that compensation ‘should be provided for any economically assessable damage... resulting from gross violations of international human rights law and serious violations of international humanitarian law’.<sup>19</sup> Principle 20 then proceeds to give a non-exhaustive list of what such damage might entail. This list includes physical or mental harm, lost opportunities, material damages and loss of earnings, moral damage, and costs required for, *inter alia*, legal or expert assistance.<sup>20</sup> Rehabilitation is briefly considered in Principle 21, which states that rehabilitation ‘should include medical and psychological care as well as legal and social services’. Principle 22 then deals with satisfaction. Satisfaction is said to involve, *inter alia*, the cessation of continuing violations, the disclosure of the truth, a public apology, commemorations and tributes, and sanctions against persons liable.<sup>21</sup> Finally, in respect to guarantees of non-repetition, Principle 23 provides a series of measures that it is explicitly stated not only constitute reparation but also contribute towards prevention. These include, *inter alia*, ensuring civilian control of military and security forces, strengthening judicial independence, and providing widespread education and training in human rights and IHL.<sup>22</sup>

Moving away now from the Basic Principles and Guidelines (IHRL and IHL), it is useful at this point to bring in the 2007 Basic Principles and Guidelines (Development).<sup>23</sup> The Basic Principles and Guidelines (Development) were prepared by the former UN Special Rapporteur on Adequate Housing, Miloon Kothari. They were developed in the light of the mandate-holder’s experiences during the preceding decade, and concluded a period of consultations held on the topic, most notably including the 2005 International Workshop on Forced Evictions, in Berlin.<sup>24</sup> Kothari presented the Basic Principles and Guidelines (Development) to the UN Human Rights Council in his February 2007 report. In this report, Kothari expressed the need for these to be endorsed by the UN Human Rights Council.<sup>25</sup> In its resolution 6/27,<sup>26</sup> the UN Human Rights Council ‘formally acknowledged’<sup>27</sup> the Basic Principles and

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<sup>19</sup> *ibid*, Principle 20.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*, Principles 22(a), 22(b), 22(e), 22(g) and 22(f), respectively.

<sup>22</sup> *ibid*, Principles 23(a), 23(c) and 23(e), respectively.

<sup>23</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari: Annex 1: Basic Principles and Guidelines on Development-Based Evictions and Displacement’ (5 February 2007) UN Doc A/HRC/4/18.

<sup>24</sup> Housing and Land Rights Network-Habitat International Coalition, ‘A Handbook on UN Basic Principles and Guidelines on Development-based Evictions and Displacement’ (3rd edn, November 2010) <[www.hicgs.org/content/International%20Handbook\\_Nov%202010.pdf](http://www.hicgs.org/content/International%20Handbook_Nov%202010.pdf)> accessed 20 February 2019, 7.

<sup>25</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari’ (5 February 2007) UN Doc A/HRC/4/18, 5 February 2007, para 24.

<sup>26</sup> UN Human Rights Council Res 6/27.

<sup>27</sup> Handbook on UN Basic Principles and Guidelines on Development-based Evictions and Displacement, 7.

Guidelines (Development) by 'taking note' of the work that had been conducted.<sup>28</sup> However, unlike the Basic Principles and Guidelines (IHRL and IHL), these were not formally adopted by the UN Human Rights Council.<sup>29</sup>

The stated aim of the Basic Principles and Guidelines (Development) is to 'address the human rights implications of development-linked evictions and related displacement in urban and/or rural areas'.<sup>30</sup> It is said they apply to 'acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection'.<sup>31</sup> Their scope is therefore far more narrowly prescribed than the Basic Principles and Guidelines (IHRL and IHL). However, they are still of direct relevance to the IDP context. Indeed, it is to be remembered that the Guiding Principles characterise as arbitrary, and thereby prohibit, displacement in cases of large-scale development projects when such projects 'are not justified by compelling and overriding public interests'.<sup>32</sup>

In respect to remedies, the Basic Principles and Guidelines (Development) state that 'All persons threatened with or subject to forced evictions have the right of access to timely remedy'.<sup>33</sup> Appropriate remedies in this context are said to include 'a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation'.<sup>34</sup> These remedies listed here

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<sup>28</sup> UN Human Rights Council Res 6/27, para 6. The precise wording fell short of an official endorsement. The resolution stated that the Human Rights Council '[t]akes note of the work on the Basic principles and guidelines on development-based evictions and displacement and of the need to continue to work on them, including through consultations with States and other stakeholders' (emphasis in original). Kothari's tenure as Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living ended in the first half of 2008 (see UN OHCHR 'Mr Miloon Kothari' <[www.ohchr.org/EN/Issues/Housing/Pages/MiloonKothari.aspx](http://www.ohchr.org/EN/Issues/Housing/Pages/MiloonKothari.aspx)> accessed 20 February 2019).

<sup>29</sup> While cognisant that formal adoption by the UN Human Rights Council does not mean a framework becomes legally-binding, it is nonetheless important to emphasise that the Basic Principles and Guidelines (Development) have not been formally adopted by the UN Human Rights Council. This evidences a clear difference in legal standing between the Basic Principles and Guidelines (IHRL and IHL), and the Basic Principles and Guidelines (Development), this being despite the two frameworks being very similarly titled.

<sup>30</sup> Basic Principles and Guidelines (Development) para 3. It is stated that while '[f]orced evictions constitute a distinct phenomenon under international law', it is nonetheless recognised that they also 'share many consequences similar to those resulting from arbitrary displacement, including, *inter alia*, practices involving the coerced and involuntary displacement of people from their homes, lands and communities' (para 5).

<sup>31</sup> *ibid*, para 4. In this connection, it is recognised in a footnote to this paragraph that 'The prohibition of forced evictions does not apply to evictions carried out both in accordance with the law and in conformity with the provisions of international human rights treaties'.

<sup>32</sup> Guiding Principles, Principle 6(2)(c).

<sup>33</sup> Basic Principles and Guidelines (Development) para 59.

<sup>34</sup> *ibid*, para 59.

are therefore very similar to the five forms of reparations outlined in the Basic Principles and Guidelines (IHRL and IHL). However, there is one crucial difference. Whereas the Basic Principles and Guidelines (IHRL and IHL) are clear in their prioritisation of restitution 'whenever possible',<sup>35</sup> compensation is instead the predominant focus of the Basic Principles and Guidelines (Development). This is not, however, to say that restitution is demoted as a form of reparation. The Basic Principles and Guidelines (Development) are clear that 'when circumstances allow, States should prioritize these rights [to restitution and return] of all persons, groups and communities subjected to forced evictions'.<sup>36</sup> The difference in the weighting given to compensation vis-à-vis restitution arises out of the factual reality that '[t]he circumstances of forced evictions linked to development and infrastructure projects... seldom allow for restitution and return'.<sup>37</sup>

### **5.3 Reparations in the Context of IDP Return**

With the introductory insights from these two general international frameworks in mind, attention now turns to reparations in the IDP and return specific frameworks. From the frameworks here surveyed, it is clear that in the IDP return context the focus is predominantly on the first two forms of reparation identified in the Basic Principles and Guidelines (IHRL and IHL), those of restitution and compensation.<sup>38</sup>

As was briefly introduced in Chapter Three, restitution lies at the very core of the Pinheiro Principles. In Section II of the Pinheiro Principles, Principle 2 unequivocally asserts that all refugees and displaced persons have '[t]he right to housing and property restitution'. Moreover, it is stated that 'The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution'.<sup>39</sup> Restitution also

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<sup>35</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 19.

<sup>36</sup> Basic Principles and Guidelines (Development) para 64.

<sup>37</sup> *ibid.*

<sup>38</sup> That the focus is predominantly on restitution and compensation is not to say that this is at the exclusion of the other forms of reparation, as elements of these do feature. Indeed, the Guiding Principles Principle 29(2) recognise that if restitution is not possible then recourse be made to 'obtaining appropriate compensation or *another form of just reparation*' (emphasis added).

<sup>39</sup> Pinheiro Principles, Principle 2.2. In this connection, Ballard (2010) is heavily critical of the view that the right to property restitution has firm foundations in established international law. In the context of armed conflict specifically, she argues that 'the right to property restitution following displacement caused by armed conflict should be viewed as a new right based on the evolution of international law, rather than one firmly grounded in international law' (483). In respect to the Guiding Principles, Phuong (2005) similarly critiques the assertion that the right to restitution was simply a restatement of existing law, as claimed. She argues that Principle 29(2) 'demonstrates how a broad and creative interpretation of existing norms was adopted when drafting the Guiding Principles', one which did, in some cases, go beyond what was contained in existing law and 'create[d] new law' (61-65).

features in Principle 10, which as will be remembered explicitly asserts a general right to return for refugees and displaced persons.<sup>40</sup> Principle 10.3 states that ‘Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing *their right to the restitution of their housing, land and property*’.<sup>41</sup> The remainder of the Principles seek to ensure this right be protected and realised. Section III lists a series of ‘overarching principles’. These include the right to non-discrimination,<sup>42</sup> and to equality between men and women;<sup>43</sup> as well as the right to, *inter alia*, privacy and respect for the home,<sup>44</sup> peaceful enjoyment of possessions,<sup>45</sup> and adequate housing.<sup>46</sup> The intention of Section III is therefore essentially to emphasise those already existing treaty law provisions that when combined form the bedrock of the right to restitution. In Section V, attention shifts to implementation mechanisms. This provides, in particular, that ‘States should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims’.<sup>47</sup> It recognises, *inter alia*, the importance of effective legislative measures concerning the right to housing, land and property restitution;<sup>48</sup> the need for claims procedures to be accessible without any preconditions being placed on claimants;<sup>49</sup> and the requirement to (re-)establish appropriate records systems.<sup>50</sup>

The Pinheiro Principles emphatically assert that restitution holds primacy over all other forms of reparation. It is stated in Principle 2.2 that ‘States shall *demonstrably prioritize* the right to restitution as *the preferred remedy* for displacement...’<sup>51</sup> This prioritisation of restitution over all other forms of reparation includes over compensation. It is indeed clearly stated that compensation shall only be resorted to when restitution is ‘not factually possible’,<sup>52</sup> and that factual impossibility should be declared only ‘in exceptional circumstances, namely when housing, land and/or property is destroyed

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<sup>40</sup> Pinheiro Principles, Principle 10.1.

<sup>41</sup> Emphasis added.

<sup>42</sup> Pinheiro Principles, Principle 3.

<sup>43</sup> *ibid*, Principle 4.

<sup>44</sup> *ibid*, Principle 6.

<sup>45</sup> *ibid*, Principle 7.

<sup>46</sup> *ibid*, Principle 8.

<sup>47</sup> *ibid*, Principle 12.

<sup>48</sup> *ibid*, Principle 18.

<sup>49</sup> *ibid*, Principle 13.

<sup>50</sup> *ibid*, Principle 15.

<sup>51</sup> Emphases added. This point is further emphasised in the Handbook. While recognising that ‘both restitution and compensation rights are enshrined within the text [the Pinheiro Principles]’, the Handbook asserts that ‘there is a clear predilection for restitution to be treated as the *preferred remedy for displacement*’ [emphasis in original]. Further, ‘States are expected to *demonstrably prioritise* [emphasis in original] restitution rights, and therefore, *not view rights to restitution and rights to compensation as necessarily of the same value* [emphasis added] when seeking durable solutions’ (24-25).

<sup>52</sup> Pinheiro Principles, Principle 21.1.

or when it no longer exists, as determined by an independent, impartial tribunal'.<sup>53</sup> The Pinheiro Principles do nonetheless assert that '[a]ll refugees and displaced persons have the right to full and effective compensation',<sup>54</sup> either 'monetary or in kind'.<sup>55</sup> Compensation can therefore be considered an appropriate remedy 'when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation'.<sup>56</sup> It is also recognised that compensation and restitution are not mutually exclusive,<sup>57</sup> and that '[i]n some situations, a combination of compensation and restitution may be the most appropriate remedy'.<sup>58</sup> This is a point to which this Chapter shall return in section 5.4.3 (below). The Pinheiro Principles also recognise the rights of tenants and other non-owners with legitimate rights in respect to particular property, stating that 'To the maximum extent possible, States should ensure that such persons are able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights'.<sup>59</sup>

The position is similar in the Guiding Principles, albeit that the message is neither so explicit nor so dominant. The Guiding Principles deal only briefly with reparation for harm. This is in large part due to the Guiding Principles having the ambitiously broad scope of dealing with all phases of displacement, and predominantly with that of protection and assistance during displacement. The issue of reparation features alongside return in the final, and shortest, section of the Guiding Principles, Section V. The first part of Principle 29(2) states that 'Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement'. The term 'restitution' is here noticeable by its absence. It indeed neither explicitly features in Principle 29(2) nor anywhere else in the Guiding Principles. The word 'recover' is instead preferred. However, this is not to say that restitution is not contemplated. It is also not to say that 'recover' has been used as a term separate and to the exclusion of 'restitution'. Looking to the Annotations, the term 'restitution' frequently features. In particular, Kälin explicitly refers to what he calls 'a certain trend in general human rights instruments...' towards recognising a right to restitution for property loss,<sup>60</sup> hereby echoing the terminology used in the Pinheiro Principles. This same

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<sup>53</sup> *ibid*, Principle 21.2.

<sup>54</sup> *ibid*, Principle 21.1.

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid*.

<sup>57</sup> FAO, IDMC, OCHA, OHCHR, UN-Habitat and UNHCR, 'Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'' (March 2007) 92.

<sup>58</sup> Pinheiro Principles, Principle 21.2.

<sup>59</sup> *ibid*, Principle 16.

<sup>60</sup> Annotations, 132.

conclusion was also earlier drawn by Deng in the Compilation and Analysis,<sup>61</sup> with Deng further recognising that ‘When internally displaced persons return to their homes... they need restitution of the property or compensation for its loss’.<sup>62</sup> Therefore, while it is intriguing that the term restitution does not explicitly feature in the Guiding Principles, it would, in the light of the Annotations and the *travaux préparatoires*, be misguided to interpret this to mean that restitution is in any way excluded from the purview of Principle 29(2). Compensation then features in the second half of Principle 29(2). This states that ‘When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining compensation or another form of just reparation’.<sup>63</sup> Once again, compensation is therefore seen as an alternative form of reparation, to be considered when recovery of property and possessions is deemed factually impossible. Aside from compensation, Principle 29(2) does all additionally recognise the possibility of other alternative, albeit unspecified, forms of ‘just reparation’ that might be appropriate in particular circumstances.

It is clear from examining the Pinheiro Principles and the Guiding Principles that, in the context of internal displacement, focus is predominantly on the first two forms of reparation identified in the Basic Principles and Guidelines (IHRL and IHL), those of restitution and compensation.<sup>64</sup> It is also clear that if restitution is factually possible, then this shall be demonstrably prioritised, assuming of course that this is desired by individual IDPs themselves. This is unsurprising. To do otherwise would be to facilitate arbitrary displacement and dispossession, and to implicitly condone, *inter alia*, the unlawful conflict, violence and/or coercion that is most often associated with such displacement. In respect to ensuring just reparation for harm, it is States, or to use the phraseology of the Guiding Principles, competent authorities, that have the leading role. This is consistent with the position in respect to the IDP right to return.

The Guiding Principles are indeed clear that it is competent authorities that have ‘the duty and responsibility to assist’ returnees in recovering their property.<sup>65</sup> Competent authorities also have a central role in respect to other forms of reparation, as they ‘shall provide or assist these persons [IDPs]

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<sup>61</sup> Compilation and Analysis, para 275.

<sup>62</sup> *ibid*, para 269.

<sup>63</sup> Guiding Principles, Principle 29(2). Article 12 of the Kampala Convention similarly states that ‘States Parties shall provide persons affected by displacement with effective remedies’.

<sup>64</sup> For critique of the appropriateness and applicability of both restitution and compensation as forms of reparation in the context of rural property and custom, see Sandra F Joireman and Laura S Meitzner Yoder, ‘A Long Time Gone: Post-conflict Rural Property Restitution under Customary Law’ (2016) 47(3) *Development and Change* 563, 580-583.

<sup>65</sup> Guiding Principles, Principle 29(2).

in obtaining appropriate compensation or another form of just reparation'.<sup>66</sup> Principle 15 of the Basic Principles and Guidelines (IHRL and IHL) clearly says that 'a State shall provide reparation to victims for acts or omissions which can be attributed to the State...' Yet, States also have a role in ensuring that victims receive reparation even when the harm incurred cannot be attributed to the State. In circumstances in which a (non-State) party has been found liable for reparation, while it is the liable party that is obliged to provide reparation to the victim, States are under an obligation to 'endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations'.<sup>67</sup> Moreover, the Basic Principles and Guidelines (IHRL and IHL) also envisage a scenario in which a State may provide reparation to a victim despite another person or entity having been found liable.<sup>68</sup> In such a situation, the liable person or entity should then compensate the State.<sup>69</sup> It is to this extent envisaged that States may provide reparation to victims even if someone other than the State has been found liable for reparation. States also have the responsibility of establishing 'effective mechanisms for the enforcement of [judicial] reparation judgements [sic]'.<sup>70</sup> In accordance with the Pinheiro Principles, States have the responsibility for 'establish[ing] and support[ing] equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims'.<sup>71</sup> States are also under an associated obligation to ensure that such procedures are, *inter alia*, just, accessible, timely, and free-of-charge.<sup>72</sup> The Kampala Convention too says that 'States Parties shall provide persons affected by displacement with effective remedies'.<sup>73</sup> In this connection, 'States Parties shall establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons',<sup>74</sup> and '... shall establish an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, to internally displaced persons for damage incurred as a result of internal displacement, in accordance with international standards'.<sup>75</sup>

Attention now turns to the relative intention(s) of restitution and compensation as forms of reparation in the IDP return context. As was mentioned in the introduction to this Chapter, this is an important

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<sup>66</sup> *ibid.*

<sup>67</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 16.

<sup>68</sup> *ibid.*, Principle 15.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*, Principle 17.

<sup>71</sup> Pinheiro Principles, Principle 12.1.

<sup>72</sup> *ibid.*, Principle 13.2.

<sup>73</sup> Kampala Convention, Article 12(1).

<sup>74</sup> *ibid.*, Article 11(4).

<sup>75</sup> *ibid.*, Article 12(2).



question for one main reason. To understand the intended outcome(s) of each form of reparation provides a clearer indication of the applicable benchmark(s). In other words, it helps towards achieving a concrete answer to the question of to what, precisely, IDPs can legitimately claim upon their return to their homes or places of habitual residence.

#### **5.4 Restitution and Compensation in the Context of IDP Return**

The Basic Principles and Guidelines (IHRL and IHL) articulate a clear statement as to the intention of reparations in general. Principle 15 states that '[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law'. Yet, it will be remembered that the Basic Principles and Guidelines (IHRL and IHL) also deal individually with the five identified forms of reparation, doing so separately in distinct Principles.

##### **5.4.1 Restitution**

Principle 19 deals exclusively with restitution. It articulates an explicit restorative intention. It states that restitution 'should, whenever possible, *restore the victim to the original situation* before the gross violations of international human rights law or serious violations of international humanitarian law occurred'.<sup>76</sup> Applying this to the context of IDP return, restitution is to be viewed as a form of reparation that intends to put returnees back in a position, as far as is possible, that equates with their pre-displacement situation. The aim of restitution is, in other words, to achieve the *status quo ante*. In this sense, restitution is to be interpreted more broadly than simply the recovery of property, in both a practical and conceptual sense. The precise language of 'restore' is seen in a number of the frameworks here surveyed, including in the International Conference on the Great Lakes Region Protocol on the Property Rights of Returning Persons,<sup>77</sup> and the Kampala Convention, as well as in CERD General Recommendation XXII in which the specific phrasing used is a 'right to have restored'.<sup>78</sup> At the domestic level, 'restore' also explicitly features in the DDPD in Sudan,<sup>79</sup> as well as in the Dayton Agreement and therefore in the related constitutional provisions in BiH.<sup>80</sup> The UNMIK Protocol is especially clear in articulating a restorative intent, albeit not actually using the word 'restore'. It asserts

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<sup>76</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 19 (emphasis added).

<sup>77</sup> International Conference on the Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons (30 November 2006) Article 4.

<sup>78</sup> CERD General Recommendation XXII, Article 2(c).

<sup>79</sup> DDPD (Sudan) Article 52, paras 260 and 262.

<sup>80</sup> Article I(1) and Article II(5), respectively.

in Article 2 that '[t]he primary focus of the return process is *to reverse* the effect of the conflict-related population movements and to end the situation of displacement'.<sup>81</sup> Here, the restorative intention of returning to the *status quo ante* extends beyond solely housing, land and property rights to the return process as a whole.

Restoration also runs strongly as a theme throughout the Pinheiro Principles. The ambition of achieving restorative justice for the displaced through means of restitution is indeed unequivocally present on multiple occasions.<sup>82</sup> Restitution of course forms the very core of the Pinheiro Principles, with Principle 2 asserting the right to housing and property restitution, specifically that '[a]ll refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived'.<sup>83</sup> Yet, restitution as a term is not defined in the Pinheiro Principles. Its meaning is, however, precisely outlined by Pinheiro in his Explanatory Notes. In these, restitution is said to refer to 'an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position'.<sup>84</sup> In an introduction to the Pinheiro Principles written by Leckie, it is similarly stated that 'Ultimately, the concept of restitution provides a source of hope and a wellspring of potential justice. Restitution offers the displaced the promise that a history of injustice, the abuse of basic rights, or terror and harassment can actually, at least in this one important respect, *be reversed*'.<sup>85</sup> Leckie then goes on to say in the UN-endorsed Pinheiro Principles Handbook, of which he was the primary author, that the intention of restitution is 'that victims are returned as far as possible to their original pre-loss or pre-injury position (i.e. *status quo ante*)'.<sup>86</sup> While neither of these latter two statements can themselves be considered authoritative, they are nonetheless of the same flavour as the position expressed by Pinheiro to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>87</sup> The position is therefore clearly one of restitution as restorative.

The Pinheiro Principles also tackle an issue of particular contention that can impede attempts at securing restitution as restoration, that of secondary occupancy.<sup>88</sup> In this context, secondary

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<sup>81</sup> UNMIK Protocol, Article 2 (emphasis added).

<sup>82</sup> See Pinheiro Principles 2.1, 2.2, 21.1 and 21.2.

<sup>83</sup> *ibid*, Principle 2.1.

<sup>84</sup> Explanatory Notes on the Pinheiro Principles, para 4.

<sup>85</sup> Centre on Housing Rights and Evictions (COHRE) 'The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons' (1 December 2005) 3 (emphasis added).

<sup>86</sup> FAO, IDMC, OCHA, OHCHR, UN-Habitat and UNHCR, 'Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'' (March 2007) 92.

<sup>87</sup> Conscious here of course that Leckie was himself involved in the Pinheiro Principles drafting process.

<sup>88</sup> Pinheiro Principles, Principle 17. Ojeda (2014) identifies secondary occupancy as one of the difficulties that often besets the ending of displacement (641).

occupancy refers to persons who reside in the homes of the displaced, in the absence of the latter. They may do so either intentionally, as a measure taken in pursuit of a strategy of displacement, or unintentionally, or perhaps in complete ignorance of the displacement that has occurred. The Pinheiro Principles provide that secondary occupants be themselves protected from arbitrary or unlawful forced eviction.<sup>89</sup> Yet, it is clear that such evictions shall nevertheless take place when these are 'deemed justifiable and unavoidable for the purposes of housing, land and property restitution'.<sup>90</sup> Safeguards of due process, including, *inter alia*, the provision of legal remedies and opportunities for legal redress, are to be extended to secondary occupants, but such safeguards should not prejudice repossession by the displaced legitimate owners, tenants and others who hold rights in respect to the property.<sup>91</sup> Moreover, any delay in finding alternative provision for secondary occupants 'should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land and property restitution'.<sup>92</sup> Similar issues also arise in respect to third-party purchasers of the properties of displaced persons. In this connection, should such properties have been purchased in good faith from secondary occupants, 'States may consider establishing mechanisms to provide compensation to injured third parties',<sup>93</sup> yet 'The egregiousness of the underlying displacement... may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of *bona fide* property interests in such cases'.<sup>94</sup>

The frequent message across the here surveyed frameworks, whether general or specific to internal displacement, is that, in the context of IDP return, restitution is to be understood in a restorative sense. The intention of restitution as a form of reparation is to restore IDPs to their *status quo ante*, and therefore to essentially reverse the impact of displacement, at least, albeit not only, in a housing, land and property sense. In respect to quantifying reparation, the benchmark to be achieved is thereby set at the level of the state of affairs that existed prior to displacement; the aim being to ensure returnees can be returned back to this as far as is possible given the factual circumstances that now prevail. The benchmark is the *status quo ante*. To a significant extent, this benchmark is therefore individualistic. It is dependent upon the individual's circumstances prior to displacement, and is therefore defined by these circumstances. Success is thereby to be measured relative to the individual's circumstances prior to displacement.<sup>95</sup>

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<sup>89</sup> Pinheiro Principles, Principle 17.1.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*, Principle 17.2.

<sup>92</sup> *ibid.*, Principle 17.3.

<sup>93</sup> *ibid.*, Principle 17.4.

<sup>94</sup> *ibid.*

<sup>95</sup> It might in the context of slow-onset displacement causes be more appropriate to phrase this point in time as being prior to the commencement of the causes associated with displacement.

As has already been ascertained, the most apparent alternative to restitution is compensation, whether monetary or in-kind. Indeed, when restitution is no longer deemed a factual possibility, the frameworks here surveyed universally recognise compensation as the appropriate alternative form of reparation. While the Basic Principles and Guidelines (IHRL and IHL) do also envisage other forms of reparation, it is compensation that is given by far the most explicit attention in the frameworks specific to internal displacement. However, precisely what level of compensation IDPs are entitled is unclear in the current frameworks. While it would not be expected that such high-level frameworks should closely prescribe specific amounts, the principles upon which such a quantification assessment should be based should be sufficiently defined. It is towards identifying these principles that this discussion now turns.

#### 5.4.2 Compensation

Once again, looking first to the Basic Principles and Guidelines (IHRL and IHL). Compensation is the exclusive concern of Principle 20. This states that compensation ‘should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case...’ In contrast to Principle 19 as concerns restitution, here in Principle 20 there is no indication that compensation be awarded with any restorative intention. While it is explicitly stated that restitution has the restorative intention of returning the victim back to their former situation prior to their displacement, ‘restoration’ does not feature in respect to compensation. In fact, outside of Principle 19, there is only one further mention of restoration in the Basic Principles and Guidelines (IHRL and IHL). This is in respect to satisfaction. It is stated that satisfaction ‘should include, where applicable, ... [a]n official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim’.<sup>96</sup> While this is of course important, it is not, however, concerned with the question of ‘return to what’ in the practical sense with which it is here being discussed.

Is it therefore accurate to say that the intention of compensation is restorative in the sense of returning IDPs back to the *status quo ante*? On the face of the Basic Principles and Guidelines (IHRL and IHL) alone, no it is not, and this same conclusion can be drawn from all of the frameworks here surveyed. The only possible exception to this are the Pinheiro Principles.

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<sup>96</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 22(d).

The Pinheiro Principles Handbook is explicit on this point. It states that ‘Compensation must be granted with the same intention as restitution... so that victims are returned as far as possible to their original pre-loss or pre-injury position (i.e. *status quo ante*)’.<sup>97</sup> It is crucial to note, however, that in respect to compensation, there is no such mention of restorative intention in either the actual Pinheiro Principles or in the Pinheiro Principles Explanatory Notes. Indeed, it must be said that there is, at least *prima facie*, a certain degree of internal incoherence in the wording of Principle 21 on compensation. Compensation is seemingly considered to be something that is simultaneously an integral component of, yet separate to, restitution. The first sentence of Principle 21.1 states that ‘All refugees and displaced persons have the right to... compensation *as an integral component of the restitution process*’.<sup>98</sup> Yet, compensation is then referred to as something that is to be awarded ‘in lieu of restitution’, plus Principle 21.1 contemplates the combining of, on the one hand, restitution, with, on the other hand, compensation, suggesting that the two are in fact separate, and not that the latter is an integral part of the former.

To reconcile this apparent incoherence necessitates interpreting Principle 21.1 in a way that more clearly distinguishes between restitution as a remedy, and restitution as a process. While it is unnecessary for present purposes to expand upon this difference in any great detail, it is apparent that restitution as a process is to be understood in a broader sense than restitution as a remedy. A close reading of Principle 21.1 reveals this distinction between remedy and process, but this message is obscured through the combining of the two into a single sub-part of a single principle, and a related failure to explicitly distinguish between them. With this in mind, it becomes clear that compensation alone is not to be considered a form of restorative justice. This is revealed through a close reading of the third sentence of Principle 21.1, which states that ‘States shall, *in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible...*’<sup>99</sup> This strongly implies that, unlike restitution as a remedy, compensation is not imbued with this same restorative intention. An award of compensation should in fact not be interpreted as being in compliance with the principle of restorative justice. For compensation is to be resorted to only when the restorative aim has been abandoned. This runs contrary to what is stated in the Pinheiro Principles Handbook, and thereby brings into some doubt the assertion that compensation must be granted with the same restorative intention as restitution.<sup>100</sup>

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<sup>97</sup> Pinheiro Principles Handbook, 92.

<sup>98</sup> Emphasis added.

<sup>99</sup> Emphases added.

<sup>100</sup> Pinheiro Principles Handbook, 92.

The exclusivity with which restoration is attached to restitution must be taken to mean that compensation, as well as the other forms of reparation identified in the Basic Principles and Guidelines (except for the single, highly specific example given above in respect to satisfaction), does not intend to achieve the *status quo ante*. The aim of compensation must instead be interpreted from the general intention attached to reparation for harm articulated in the Basic Principles and Guidelines (IHRL and IHL), that is 'to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law'.<sup>101</sup> However, this leaves unresolved the question of benchmarking. With restoration, the *status quo ante* itself provides the benchmark. The question that arises here is what specifically is required in terms of compensation to ensure that the reparative aim of 'promot[ing] justice by redress'<sup>102</sup> is met? What principle, or principles, are to guide decision-making in respect to compensation, and is there a particular benchmark of general application specific in terms of quantum?

In respect to reparations in general, the Basic Principles and Guidelines (IHRL and IHL) are clear that reparation be '[a]dequate, effective and prompt'.<sup>103</sup> Indeed, it is explicitly stated in Principle 11(b) that victims have a right to '[a]dequate, effective and prompt reparation for harm suffered'.<sup>104</sup> The Basic Principles and Guidelines (Development) are also instructive here. In this respect, it should be remembered that, on account of their narrower scope, dealing solely with forced evictions for development purposes, they are directed more precisely towards compensation rather than restitution.<sup>105</sup> These state that 'When eviction is unavoidable, and necessary for the promotion of the general welfare, the State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property'.<sup>106</sup> It appears, on the face of it, that there is a potential clash of principles here. On the one hand, that compensation be '[a]dequate, effective and prompt',<sup>107</sup> and that, on the other hand, compensation be 'fair and just'.<sup>108</sup> However, on further inspection, no such clash materialises. Both sets of Basic Principles and Guidelines explain their respective terms in an identical way. In order to be '[a]dequate, effective and prompt', and 'fair and just', the requirement is the same, that 'compensation should be provided... as

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<sup>101</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 15.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> This phrasing, specifically the use of 'prompt' and 'adequate', features in the DDPD (Sudan), which states, in Article 52: Housing, Land and Property Restitution, that '[n]o person or group of persons shall be deprived of any traditional or historical right in respect to land or access to water without consent or prompt and adequate compensation' (para 266).

<sup>105</sup> Basic Principles and Guidelines (Development) paras 59-68.

<sup>106</sup> *ibid.*, para 60.

<sup>107</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 11(b).

<sup>108</sup> Basic Principles and Guidelines (Development) para 60.

appropriate and proportional to the gravity of the violation and the circumstances of each case...'.<sup>109</sup> That the two positions are so similar comes as little surprise when it is known that the Basic Principles and Guidelines (Development) explicitly call for compliance with the Basic Principles and Guidelines (IHRL and IHL) in respect to remedies,<sup>110</sup> yet the identical wording is nonetheless striking. It is clear therefore that '[a]dequate, effective and prompt',<sup>111</sup> and 'fair and just',<sup>112</sup> are but linguistic variations of what is essentially the same common benchmark of 'appropriate and proportional'. Before moving on, it is important to note that, in addition, the Basic Principles and Guidelines (IHRL and IHL) also state, in Principle 18, that 'victims... should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation...'. Here there is the addition of the word 'full'. Yet, this should not be interpreted as requiring anything more than what can be considered 'appropriate and proportional', as the meaning of 'full and effective' is itself qualified by 'appropriate and proportional'.

Turning now to examine the IDP and return specific frameworks. The similarity is once again striking. However, it is appropriateness alone that features in both the Guiding Principles<sup>113</sup> and CERD General Recommendation XXII,<sup>114</sup> as well as in the International Conference on the Great Lakes Protocol on the Property Rights of Returning Persons. This latter Protocol states in Article 4 that 'When recovery of such property and possessions is not possible, Member States shall provide or assist such persons in obtaining appropriate compensation as provided for in Article 8.' The relevant part of Article 8 then states that 'Member States shall determine an appropriate compensation package for the loss of the property of internally displaced persons and refugees on the basis of national legislation which shall set out the terms of such a compensation package'.<sup>115</sup> Appropriateness also finds favour in the 1994 Quadripartite Agreement, which as outlined earlier in this Thesis pertains to displacement in the context of the Georgia-Abkhazia conflict. This states that 'Returnees shall, upon return, get back movable and immovable properties they left behind and should be helped to do so, or to receive

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<sup>109</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 20; Basic Principles and Guidelines (Development) para 60.

<sup>110</sup> Basic Principles and Guidelines (Development) para 59.

<sup>111</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 15.

<sup>112</sup> Basic Principles and Guidelines (Development) para 60.

<sup>113</sup> Guiding Principles, Principle 29(2).

<sup>114</sup> Paragraph 2(c) states that '[a]ll such refugees and displaced persons have, after their return to their homes or origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them...'

<sup>115</sup> International Conference on the Great Lakes Region Protocol on the Property Rights of Returning Persons (30 November 2006) Article 8(3).

whenever possible an appropriate compensation for their lost properties if return of property appears not feasible'.<sup>116</sup>

Appropriateness therefore features as the guiding principle in international legally binding and non-binding frameworks, in treaty body recommendations, and in peace agreements. However, it would be incorrect to say that 'appropriate' features in all of the surveyed frameworks. In this precise context, it appears in neither ILO Convention No 169 nor the Pinheiro Principles. The former states that '[p]ersons thus relocated shall be fully compensated for any resulting loss or injury'.<sup>117</sup> This appears to be a more liberal standard than that of 'appropriate'. While this might be the case, it is important to remember that ILO Convention No 169 applies only in the specific context of planned, forced evictions of indigenous and tribal peoples, which, as was argued earlier in this Thesis, is but a narrow and very specific subset of IDPs. So, while it is important to recognise the existence of this more liberal standard, it cannot be said to apply to all IDPs in general. Yet, Principle 21.1 of the Pinheiro Principles, which is of general application, is similarly phrased. This states that '[a]ll refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process'.<sup>118</sup> There is no explanation given in the Pinheiro Principles themselves of what is considered to be 'full and effective compensation', nor is any insight provided by the Pinheiro Principles Explanatory Notes.<sup>119</sup> However, the accompanying Pinheiro Principles Handbook does give some indication of how this is to be interpreted. Of course, caution needs to be taken when drawing insights solely from the Pinheiro Principles Handbook, not only because it lacks authority but also because of the doubts raised above in respect to its consistency with the actual Pinheiro Principles, but on this point, the Handbook states that 'When compensation is provided it must be given in a manner that is *reasonable* in terms of its relationship with the value of the damage suffered by the victim'.<sup>120</sup> Although no further explanation of what constitutes 'reasonable' is given, it nonetheless reveals that an element of discretion exists in the decision-making process, and therefore a need to weigh up different considerations to come to a 'reasonable' outcome. In this sense, it appears that the answer to the question of what is 'full and effective' might not be so different from that which is considered 'appropriate (and proportional)'. Indeed, it is worth remembering the conclusion drawn above that 'full and effective' in the Basic Principles and Guidelines (IHRL and IHL) is itself qualified by

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<sup>116</sup> Quadripartite Agreement, Provision 3(i).

<sup>117</sup> ILO Convention No 169, Article 16(5).

<sup>118</sup> Pinheiro Principles, Principle 21.1.

<sup>119</sup> UN Commission on Human Rights, 'Final report of the Special Rapporteur, Paulo Sérgio Pinheiro: Addendum: Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons' (11 July 2005) UN Doc E/CN.4/Sub.2/2005/17/Add.1.

<sup>120</sup> Pinheiro Principles Handbook, 92 (emphasis in original).



the common benchmark of ‘appropriate and proportional’.<sup>121</sup> So, while Principle 21.1 appears, at least *prima facie*, to be the most generous of the provisions found in the IDP-specific frameworks, it is perhaps not so far removed from the position found in the Basic Principles and Guidelines (IHRL and IHL) and the other IDP and return-specific frameworks.

It is apparent that, despite the variation in terminology, there is a definable standard in respect to compensation as reparation for harm in the IDP context and that this standard is remarkably similar across all of the here surveyed frameworks. The common standard is that which is expressed in the Basic Principles and Guidelines (IHRL and IHL), that compensation be ‘appropriate and proportional to the gravity of the violation and the circumstances of each case’.<sup>122</sup> While this might be described as ‘fair’, as ‘effective’, or as ‘full’, as has been shown here, whichever term is used, it is the test of ‘appropriate and proportional’ that is to guide decision-making in respect to compensation, including in respect to quantum. Moreover, compensation that satisfies this benchmark will meet the overarching reparative aim of ‘promot[ing] justice by redress’.<sup>123</sup> Yet, although the benchmark is consistent, it is less prescriptive than that of the *status quo ante* benchmark in respect to restitution. For instance, while it may in a given case be decided that it is appropriate and proportional to reimburse a claimant in full for the damage incurred in respect to their property, it does not, unlike the *status quo ante* benchmark applied in a restitution claim, demand so whenever this is possible.<sup>124</sup> There is therefore an enhanced level of discretion here that extends beyond what little discretion exists in respect to pure restitution claims, and this discretion is to be exercised by those responsible for assessing compensation claims under the auspices of the State.

The requirement to conduct a balancing exercise is also inherent in this test of ‘appropriate and proportional’. This balancing exercise necessitates the weighing up of legitimate competing priorities. This would, for instance, likely involve the balancing of an individual claim for compensation with the total amount of funds available for resolving such claims. In this connection, there would inevitably be a consideration of the merits of one claim vis-à-vis other similar claims. It is in this respect that the pursuit of achieving an appropriate and proportional outcome demands recourse to the principle of equality. Indeed, it is to be remembered that such reparative measures exist within the broader framework established by the international IDP regime, a framework that is underpinned by the principle of equality. As was concluded in Chapter Two of this Thesis, the international IDP regime is

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<sup>121</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 18.

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*, Principle 15.

<sup>124</sup> *ibid.*, Principle 19.

underpinned and justified by the ultimate, overarching aim of achieving full equality in the enjoyment of rights and freedoms between IDPs and non-IDPs in the same State. Decision-makers must therefore, when conducting this balancing exercise and when exercising their discretion, take equality into consideration.

It is important at this point to reiterate the meaning of equality in this context, and to reflect momentarily on what this demands of decision-makers when making such decisions in respect to compensation. It has frequently been mentioned in this Thesis that achievement of equality between IDPs and non-IDPs within the same State presupposes equality between IDPs themselves in the enjoyment of their rights and freedoms. IDPs within the same State are to be treated in a consistent manner, and this must extend to decision-making in respect to reparation for harm. This means that claims must be considered in an equal manner on their merits, done so in the light of a consistent application of the same appropriate and proportional test. This is not, however, to say that IDPs must each receive the same *amount* of compensation. Such an egalitarian claim would indeed be at odds with the consideration that is called to be given to ‘the circumstances of each case’ within the appropriate and proportional test.<sup>125</sup> But claims must be dealt with in a manner that respects the principle of full equality between IDPs, and they must also deal equitably with the inevitable reality of finite funds.

Perhaps the most important point to emphasise here is that in respect to compensation the drive is for equality between IDPs. It is not a question of seeking equality between an individual IDP and their own pre-IDP self. This would be to set the benchmark at the *status quo ante*. Although the requirement to take into account the ‘circumstances of the case’ will likely demand respect be given to the pre-IDP self as part of the balancing exercise, this is not, however, considered determinative. As has indeed been consistently argued throughout this Chapter, the *status quo ante*, while pertinent to restitution, is not the applicable benchmark set by international law in respect to compensation.

#### 5.4.3 A combined approach to reparation

This Chapter has throughout relied on a clear distinction being drawn between restitution and compensation as separate forms of reparation. This approach has been taken because it reflects the manner in which these are treated in the Basic Principles and Guidelines (IHRL and IHL), and how they are at least implicitly dealt with in the majority of the here surveyed frameworks. For example, the

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<sup>125</sup> *ibid*, Principle 18.

Guiding Principles provide that ‘When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons [IDPs] in obtaining compensation or another form of just reparation’.<sup>126</sup> Similarly, the Basic Principles and Guidelines (Development) state that ‘When return to one’s place of residence and recovery of property and possessions is not possible, competent authorities must provide victims of forced evictions, or assist them in obtaining, appropriate compensation or other forms of just reparation’.<sup>127</sup> This is not to say that these frameworks treat restitution and compensation as mutually exclusive, but it is to say that they deal with them separately and do not therefore consider if and how they may combine.

The decision as to which form of reparation is appropriate is one to be made by the State concerned ‘[i]n accordance with its domestic laws and international legal obligations’.<sup>128</sup> Any such decision will be case-specific. It is though likely that in reality the two will combine. It is indeed easy to envisage situations in which a damaged home is restored *de facto* to its legitimate *de jure* owner (i.e. restitution), with the owner then seeking compensation to repair the damage that has occurred during the course of the displacement event. Even in a scenario where a returnee’s home has been completely destroyed, this does not affect their right to have restored to them their *de facto* ownership of the land upon which their home once was, yet, it is of course highly likely that some form of compensation would be sought to indemnify them for their loss. While frameworks such as the Basic Principles and Guidelines (IHRL and IHL) and the Guiding Principles do not exclude the possibility of a combined approach to reparations, it is only the Pinheiro Principles that explicitly articulate this as an option. Principle 21.2 recognises that ‘... the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible’. It then goes on to say that ‘In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice’.<sup>129</sup> This point is also reiterated by Pinheiro in his Explanatory

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<sup>126</sup> Guiding Principles, Principle 29(2).

<sup>127</sup> Basic Principles and Guidelines (Development) para 67.

<sup>128</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 15.

<sup>129</sup> Principle 21.1. It will be recalled that earlier in this Chapter, it was argued that the Pinheiro Principles deal inconclusively with the relationship between compensation and restitution. While this discussion does not need to be repeated here in full, it is nonetheless important to note that Principle 2.1, which also deals explicitly with both restitution and compensation, does not in fact take the combined approach expressed in Principle 21.2. In the same way as the Guiding Principles, Principle 2.1 frames the two options of restitution and compensation as an ‘either or’ choice. It states that ‘[a]ll refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore... (emphasis added)’. It once again reveals a degree of incoherency within the Pinheiro Principles, here between Principle 2.1 and Principle 20.

Notes.<sup>130</sup> In the latter, a combination of restitution and compensation is explicitly listed as an option, alongside, but distinct to, either restitution or compensation taken alone.<sup>131</sup>

Yet, a combined approach to reparations raises uncertainty in respect to benchmarking. Specifically, what is the target benchmark when opting for a combination of restitution and compensation? Is it the *status quo ante* as in the case of restitution, or is it the appropriate and proportional test that governs the award of compensation?<sup>132</sup> As was discussed earlier in this Chapter, the Pinheiro Principles are decidedly in favour of restoration. Indeed, it will be recalled that the Pinheiro Principles Handbook states that compensation be awarded with the same restorative intention as restitution.<sup>133</sup> This assertion that compensation be seen as restorative has, however, already been discredited. But just to consider momentarily if it had not. If this were the case, then the reparative intention of a combination approach would be restorative. Simply put, if the intention of restitution is restorative, and the intention of compensation were also restorative, then the same must logically be said of a remedy that combines both restitution and compensation. The benchmark aim for this combined approach would therefore be the *status quo ante*. Yet, the situation is not so clear cut, and the question still remains as to what is the applicable benchmark for a combination approach?

Drawing on everything that has been discussed in this Chapter, and without any clear and authoritative provision to the contrary, it must be concluded that it is necessary to combine the two benchmarks. That is to say that both the *status quo ante* benchmark, and the appropriate and proportional test, are to be maintained. In practice, this means restoring to the *status quo ante* in respect to the *de facto* enjoyment of returnees' housing, land and property rights; and awarding compensation that is appropriate and proportional to the gravity of the violation and the particular circumstances of the case. What is crucial is that this does not demand compensation be provided with the intention of restoring the *status quo ante*. Despite explicit contrary statements in the documentation surrounding the Pinheiro Principles, there is insufficient authority to say that compensation must be provided with the intention of restoring the *status quo ante*, even when reparation is delivered in a combined form. Any question of compensation remains subject to the

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<sup>130</sup> Pinheiro Principles Explanatory Notes, para 70.

<sup>131</sup> *ibid.*

<sup>132</sup> Current available case law offers little assistance in this respect. The reason is that, as was revealed in Chapter Three, actual IDP right to return has not been explicitly and directly dealt with in the cases that have come before the regional human rights judicial bodies. Specifically, those cases taken to the ECtHR have typically dealt with reparations in respect to property in the context of *non*-return; and in respect to the African Court, the judgment on reparations in the Ogiek case is still outstanding at the time of writing.

<sup>133</sup> Pinheiro Principles Handbook, 92.

lower threshold test of what is appropriate and proportional. Moreover, domestic decision-makers continue to enjoy the discretion to which they are entitled by the pertinent international frameworks.

In practice, this might lead to outcomes such as the following. A scenario can be envisaged where a displaced family returns to their home to find that it has suffered a small amount of damage that requires only minor repairs. The returned family should have restored to them their *de facto* ownership of their property, and, if needed, any steps required to reinstate their *de jure* ownership rights should also be taken. To this extent, they will have been restored to their *status quo ante*. They may in addition seek compensation from the State to cover the costs of the needed repairs. The State-appointed decision-making body may decide to cover a proportion of the costs. Alternatively, given that only minor repairs are required, full compensation may be awarded. Indeed, if only a small amount of money is required to cover the needed repairs, then it may be deemed inappropriate to not fulfil the entire claim, or it may be that, when viewed holistically, the harm that has been suffered by the family more than outweighs the small amount of compensation requested, and to refuse the award in full would be deemed disproportional. But the point is that the State will only be compelled to fulfil the claim in its entirety if to not do so would be deemed inappropriate and/or disproportional; in other words, if it were to fail to meet the lower threshold test. The State would not be compelled to fulfil the entire claim arising out of any obligation to restore the family to their *status quo ante*.

An alternative scenario would be one involving a previously very wealthy individual. He returns to find that his large and lavish home has been destroyed. As with the first scenario, he should have restored to him his *de facto* ownership of his property, and, if needed, any steps required to reinstate his *de jure* ownership rights should also be taken. Again, to this extent, he will have been restored to his *status quo ante*. Yet, his home requires rebuilding. In the short-term, the State would be expected to provide him with temporary accommodation. He might seek funds from the State to rebuild his home to its previous standard. But the State would have no obligation to provide the full award, unless it was decided that to do so was appropriate and proportional per the test for compensation. Yet, the opposite might instead prove to be the case, that to provide the full award would be inappropriate and/or disproportional, especially in the light of finite available funds and the equality requirement that is attached to the test courtesy of the ultimate aim of the international IDP rights regime.

In sum, a combined form of reparation brings with it a combined form of benchmarking. For those matters that are concerned purely with restitution, the *status quo ante* benchmark applies. Yet, any time compensation arises as part of a reparative claim, it brings with it, in respect to this compensatory

component, the lower threshold test of ‘appropriate and proportional’, along with its attendant higher level of discretion exercisable by the State-appointed decision-maker. Despite this combined benchmark, compliance is nonetheless maintained with the overarching aim of reparations given in the Basic Principles and Guidelines (IHRL and IHL), that is ‘... taking account of individual circumstances, victims... should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation’.<sup>134</sup> Indeed, it is critical to remember that, as has been revealed through this analysis, the overarching aim of reparations in general is not the restoration of IDPs back to their own personal *status quo ante*.

## **5.5 Conclusion**

The focus in this Chapter has been on the question of IDP return to what. As was the case in Chapter Four, while the answer to the question of what might, at least at first, appear to be somewhat self-evident, it has become clear that the situation is far more complex. This complexity demonstrably arises out of the factual challenges on the ground that are posed by internal displacement. The discussion in this Chapter has mapped and examined the current standards related to reparation of harm in the context of internal displacement.

This analysis has led to three key findings. First, that of the forms of reparation envisaged in the Basic Principles and Guidelines (IHRL and IHL), it is restitution and compensation that find greatest support in the internal displacement context. Second, that restitution is demonstrably prioritised. Yet, third, it has also been argued that, while there may always be a preference towards restitution, compensation is also of critical importance, most often taken in connection with restitution. This combining of the two forms of reparation, it has been argued, leads to a clash between the aims of restitution and compensation in the internal displacement context. While restitution typically seeks to restore an individual back to their *status quo ante*, compensation is far more discretionary. It has been argued here that whenever the question of compensation arises, this brings with it an attendant discretion that risks leaving IDPs short-changed.

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<sup>134</sup> Basic Principles and Guidelines (IHRL and IHL) Principle 18.



## CHAPTER 6 – IDP RETURN WHEN?

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### **6.1 Introduction**

The focus of this Chapter is on the temporal aspect of return. Given the qualifications that are attached to the IDP right to return, it is important to consider both the commencement and the cessation of the right. Both of these are complex questions, which while interrelated, raise different questions of law and practice.

This Chapter is thereby split into two halves. The first half will deal with the question of IDP return *from* when. In this respect, the crucial issue is one of whether commencement of the IDP right to return is subject to any conditions. If so, what conditions, and therefore at what point, is the right to return triggered?

In respect to the second half and the question of cessation of the right, this discussion will itself be split into two sections. First, the question of a temporary suspension of the right to return will be considered. Here, the discussion will be concerned with whether, and if so in what circumstances, return may be suspended. Second, the Chapter will move on to discuss the possibility of the permanent cessation of the IDP right to return. As will be shown, while the question of whether and when the IDP right to return can permanently cease might initially seem to have a rather self-evident answer, this matter becomes far more uncertain when cessation is considered in the context of non-return. To reach a clear conclusion on this point will necessitate a specific focus on the durable solutions approach in the context of internal displacement, as well as further reflection on the seemingly intractable matter of the cessation of the IDP classification itself.

There is scant scholarly literature on the temporal limits of the IDP right to return. As such, substantial attention will be given in this Chapter to those frameworks most relevant to the temporal aspects of return. Of the here surveyed frameworks, particular focus will be given to, at the international level, CIHL Rule 132 and ILO Convention No 169, as well as the Pinheiro Principles; and at the domestic level, the DDPD (Sudan) and the UNMIK Protocol.

### **6.2 Return *from* When?**

The question here is one of commencement. It is a question of whether the triggering of the IDP right to return is conditional on any limits in respect to time, and if so, at what point it can be said that the



right to return is triggered. This is a difficult question. It is one that involves not only legal questions, but also the concerns and complications that arise from socio-political dilemmas. Yet, it is important to state from the outset that while the latter may act as a restraint on the factual enjoyment of return, it is not to be assumed that they form a legitimate bar on the right to return. Indeed, the very aim of this section is to identify what, if any, conditions exist in law in respect to the triggering of this right based on the here surveyed frameworks.

### 6.2.1 Temporal matters in the right to return provisions

This discussion begins with a brief scoping of the explicit right to return provisions contained within the here surveyed frameworks, doing so through the lens of the question of return from when.

Looking first to the explicit right to return provisions in international law. In CIHL Rule 132, it is stated that ‘Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence *as soon as the reasons for their displacement cease to exist*.’<sup>1</sup> Likewise, ILO Convention No 169 states in Article 16(3) that ‘Whenever possible, these peoples shall have the right to return to their traditional lands, *as soon as the grounds for relocation cease to exist*.’<sup>2</sup> The right to return in CERD General Recommendation XXII is similarly brief. It states simply that ‘All such refugees and displaced persons have the right freely to return to their homes or places of origin under conditions of safety.’<sup>3</sup> Here, as with CIHL Rule 132, there is mention to the voluntary and safe nature of return, but notably unlike both CIHL Rule 132 and ILO Convention No 169, there is no explicit reference to time. In respect to the Pinheiro Principles, Principle 10.1 states in its first sentence that ‘All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity’. Once again, voluntariness and safety are explicitly mentioned, yet, as with CERD General Recommendation XXII, there is no explicit mention to time.

Turning now to the domestic level. The Dayton Agreement, and the respective constitutional provisions in BiH, simply state that ‘All refugees and displaced persons have the right freely to return to their homes of origin’.<sup>4</sup> This is with the exception of the BiH Instruction, which, while directly referencing the Dayton Agreement, develops upon this by stating that ‘all refugees and displaced

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<sup>1</sup> Emphasis added.

<sup>2</sup> Emphasis added.

<sup>3</sup> CERD General Recommendation XXII, para 2(a).

<sup>4</sup> Dayton Agreement, Article I(1) of Annex 7; Constitution of BiH, Article 5; Constitution of the Federation of BiH, Article 3.

persons have the right freely to return to their homes of origin in safety and with dignity'.<sup>5</sup> In the UNMIK Protocol, Article 1 explicitly refers to 'voluntary and sustainable return... in safety and dignity'. Article 2 then goes on to promote '... duly respecting the right of the internally displaced to return to their homes as well as their right to freely choose their places of residence'. The first part of Article 49 (paragraph 241) of the DDPD (Sudan) states that 'All IDPs and refugees have the right to return voluntarily, and in safety and dignity, to their homes of origin or places of habitual residence or to resettle in another place of their choice...'. Finally, in Colombia, Article 2(6) of Law 387 simply states that 'The forcibly displaced have the right to return to their place of origin'.

The most striking observation in respect to these provisions is that there is little in the way of any substantial discussion of the point at which the IDP right to return is triggered. Indeed, it is seemingly uncommon for the right to return provisions to include any direct reference to time. The most express references are those found in CIHL Rule 132 and ILO Convention No 169, Article 16(3). Both of these conclude with a qualifying clause to the effect that displaced persons, including IDPs, have the right to return from the point at which it is declared that the reasons for their displacement have come to an end. The two clauses are essentially the same. The variation in wording stems from the narrower focus of the ILO Convention No 169 provision, as this is targeted precisely towards matters of eviction and (planned) relocation.

While only a minority of the right to return provisions contain an explicit reference to the time at which IDP return is triggered, the majority, that is all except Law 387 (Colombia), do go beyond a pure assertion of the right to return. Frequent attention is given to safety and dignity, in particular. Safety features in CERD General Recommendation XXII, the Pinheiro Principles, CIHL Rule 132, the UNMIK Protocol, and in the DDPD (Sudan).<sup>6</sup> In respect to dignity, this is explicitly mentioned, typically in connection with safety, in the Pinheiro Principles, in the UNMIK Protocol, and in the DDPD (Sudan).<sup>7</sup> In addition to safety and dignity, the UNMIK Protocol also requires that return be sustainable.<sup>8</sup> That return be in safety and dignity is also seen in the other here surveyed frameworks that concern return, but which do not articulate an unequivocal right to return. This includes the return-related provisions in both the Guiding Principles and the Kampala Convention.<sup>9</sup>

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<sup>5</sup> BiH Instruction, para 1.

<sup>6</sup> CERD General Recommendation XXII, para 2(a); Pinheiro Principles, Principle 10.1; CIHL Rule 132; UNMIK Protocol, Article 1; DDPD (Sudan) Article 49, para 241.

<sup>7</sup> Pinheiro Principles, Principle 10.1; UNMIK Protocol, Article 1; DDPD (Sudan) Article 49, para 241.

<sup>8</sup> UNMIK Protocol, Article 1.

<sup>9</sup> Principle 28(1) and Article 11(1), respectively.

Aside from safety and dignity, and the occasional reference to sustainability, voluntariness also explicitly features in the right to return provisions. Indeed, that IDPs have a right to *voluntary* return or to *freely* or *voluntarily* return is explicitly mentioned in CERD General Recommendation XXII,<sup>10</sup> the Pinheiro Principles, CIHL Rule 132, the Dayton Agreement and the BiH constitutional provisions, in the UNMIK Protocol, and in the DDPD (Sudan).<sup>11</sup> This is in fact true even of Law 387 (Colombia). As mentioned above, Article 2(6) simply asserts the right to return. Here, there is no mention of voluntariness. However, although Article 2(6) itself contains no reference to voluntariness, Article 17 of Law 387, which concerns ‘socio-economic stabilization and consolidation’, does make explicit reference to ‘voluntary return’. Voluntariness is also referred to in Article 16, which states that ‘[t]he National Government shall support displaced populations that *want to* return to their places of origin...’<sup>12</sup> Moreover, in addition to Articles 16 and 17, it is a guiding principle of Law 387 that ‘The forcibly displaced have the right to consent to definitive solutions to their situation’.<sup>13</sup> Although this latter provision does not explicitly mention return, return is of course one of these ‘definitive solutions’. As such, the voluntariness of return is once again emphasised. Voluntariness also, as with safety and dignity, finds favour in the Guiding Principles and the Kampala Convention.<sup>14</sup>

Within many of the frameworks, it is emphasised that for a voluntary choice to be made requires that IDPs be ‘informed’.<sup>15</sup> In this connection, the Kampala Convention calls on States Parties to consult with and ensure the participation of IDPs in the search for sustainable solutions to their displacement.<sup>16</sup> Both the DDPD (Sudan) and the UNMIK Protocol emphasise the importance of IDPs having information pertaining to the conditions of return. While the former states that ‘IDPs and refugees shall have access to objective information about the conditions’ in the areas of return or resettlement’,<sup>17</sup> the latter requires that IDPs be provided with ‘[u]p-to-date and correct information about the conditions of return’.<sup>18</sup> Similarly, the Pinheiro Principles demand that IDPs be ‘provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in... places

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<sup>10</sup> In this connection, para 2(b) is explicit in placing an obligation on States Parties ‘to ensure that the return of such refugees and displaced persons is voluntary’.

<sup>11</sup> Pinheiro Principles, Principle 10.1; CIHL Rule 132; Dayton Agreement, Article I(1) of Annex 7; Constitution of BiH, Article 5; Constitution of the Federation of BiH, Article 3; UNMIK Protocol, Article 1; DDPD (Sudan) Article 49, para 241.

<sup>12</sup> Emphasis added.

<sup>13</sup> Article 2(5).

<sup>14</sup> Principle 28(1) and Article 11(1), respectively.

<sup>15</sup> Kampala Convention, Article 11(2); Pinheiro Principles, Principle 10.1; UNMIK Protocol, Article 1; and DDPD (Sudan) Article 49, para 244.

<sup>16</sup> Kampala Convention, Article 11(2).

<sup>17</sup> DDPD (Sudan) Article 49, para 244.

<sup>18</sup> UNMIK Protocol, Article 1.

of origin'.<sup>19</sup> In respect to restitution specifically, the Pinheiro Principles Handbook recommends the 'prepar[ation] and distribut[ion] [of] restitution information packets to all returnees which outline precisely which existing restitution rights and procedures [are] in place to facilitate access to their original homes and lands...'.<sup>20</sup> As with the Kampala Convention, the DDPD (Sudan), the UNMIK Protocol and the Pinheiro Principles are clear that the primary obligation for enabling voluntary IDP decision-making rests with the relevant parties, or to use the language of the Guiding Principles, the competent authorities. Additionally, the DDPD (Sudan) explicitly recognises that, in an effort to 'facilitate the timely flow of accurate information about the conditions in areas of return', assistance may be provided by 'competent local and international actors'.<sup>21</sup>

It is clear therefore that voluntariness is a universal requirement of fundamental importance. Whether referred to as a 'voluntary' choice or a 'free' choice, voluntariness is indeed asserted without fail in all of the here surveyed frameworks. It is for IDPs to decide whether they wish to return. The role of the State and other competent authorities is not to force or in any way coerce IDPs into making a decision either way. Their role is, as has been shown here, one of enabling IDPs to make an informed choice of their own. Demands are thereby placed on domestic authorities and actors, as well as the broader international community, to furnish IDPs with information, especially in respect to conditions at their homes or places of habitual residence, that is timely, accurate and objective, and which is sufficient to allow IDPs to make their own choice as to whether or not they wish to return. It is in this connection worth briefly re-emphasising the prohibition on forcible return. It will indeed be remembered that from Chapter Three that, in the Guiding Principles, the prohibition of the forcible return of IDPs is, in contrast to the actual right to return, explicitly stated. Principle 15(d) states that IDPs have '[t]he right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk'. Similar such protection against forcible return is also explicitly stated in, *inter alia*, the DDPD (Sudan)<sup>22</sup> and the Pinheiro Principles.<sup>23</sup>

This brief survey of the frameworks has revealed three important findings. First, the point at which return is triggered is only infrequently mentioned in the here surveyed frameworks. Second, return must be the voluntary choice of IDPs. Third, alongside voluntariness, safety and dignity are also repeatedly mentioned in the frameworks. It is clear therefore that voluntariness, safety and dignity

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<sup>19</sup> Pinheiro Principles, Principle 10.1.

<sup>20</sup> Pinheiro Principles Handbook, p 55.

<sup>21</sup> Article 49, para 244.

<sup>22</sup> *ibid*, para 241.

<sup>23</sup> Principle 10.3.

are integral to the right to return. Having come to these initial findings, this discussion now turns to examine in greater depth those provisions that do include a temporal clause, namely CIHL Rule 132 and ILO Convention No 169, as well as to consider the possible implications that the frequently stipulated requirements of safety and dignity may have on the triggering of the IDP right to return.

#### 6.2.2 Cessation of displacement cause as the trigger for the right to return

As has already been observed, both CIHL Rule 132 and ILO Convention No 169, Article 16(3), provide that the IDP right to return is triggered as soon as the grounds or reasons for displacement cease to exist. The question that therefore needs to be asked is when exactly does the ground or reason for, or cause of, displacement end? This is a matter made all the more pertinent by both of these provisions explicitly providing for the right to return ‘as soon as’ the cause of displacement has ceased. Yet, neither of the provisions themselves go into any detail as to how this precise point in time is to be identified or declared. There is indeed little in the way of any clear authority on these points in either framework.

Looking first to ILO Convention No 169. For the purposes of Article 16, displacement may in principle occur for any reason. There is neither a list of applicable displacement causes nor any clear indication as to example causes. It is to be remembered, however, that Article 16 deals explicitly with relocation, and to that end is particularly concerned with development projects, including, but of course not limited to, hydroelectric dam construction, infrastructure projects, and mineral exploration and exploitation.<sup>24</sup> Therefore, while Article 16(3) provides explicit protection of the right to return, it should be borne in mind that the ILO Convention No 169 displacement provision is predominantly concerned with setting out the necessary procedures and protections required when return is in fact deemed impossible.<sup>25</sup> Perhaps therefore unsurprisingly, the relevant ILO Manual<sup>26</sup> contains only a very short section on return. It simply states by way of explanation of Article 16(3) that ‘Indigenous and tribal peoples have the right to return to their lands as soon as the reason for which they had to leave is no longer valid’.<sup>27</sup> In the Manual, such return is envisaged in respect to non-development causes of displacement, with the example given that ‘in the case of a war or natural disaster, they [indigenous and tribal peoples] can go back to their lands when it is over’.<sup>28</sup>

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<sup>24</sup> International Labour Organization, ‘ILO Convention on Indigenous and Tribal Peoples 1989 (No 169): A Manual’ (revised edn, ILO 2003) 42-43.

<sup>25</sup> Article 16(4) is of particular importance in this respect.

<sup>26</sup> ILO Manual (cited above).

<sup>27</sup> *ibid*, 45.

<sup>28</sup> *ibid*.

In respect to CIHL Rule 132, the displacement cause narrows to that of armed conflict. Yet, as with ILO Convention No 169, Article 16(3), there is again limited guidance as to at what exact point the cessation of displacement cause occurs. Related treaty law offers little further assistance. Similar to CIHL Rule 132, the Fourth Geneva Convention provides that ‘Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased’ without actually giving any clear indication as to when hostilities should be determined to have ceased.<sup>29</sup> The same is in fact characteristic of the wider literature on the topic. As Rogier Bartels identifies,<sup>30</sup> ‘The debate has almost solely focused on the *start* of these armed conflicts... In fact, very little has been written on the temporal application of IHL, or indeed, on the *end* of these armed conflicts’.<sup>31</sup> In this connection, Bartels identifies within the English language academic literature just one working paper that dedicates any sustained attention to determining the precise point at which armed conflict ceases. That is Derek Jinks’ 2003 background paper on the temporal scope of the application of IHL.<sup>32</sup> In this, Jinks states that ‘the general rule’ is that IHL applies until the ‘general close of military operations’.<sup>33</sup> This indeed finds express provision in Article 6 of the Fourth Geneva Convention.<sup>34</sup> Jinks then goes on to draw the same conclusion in respect to the cessation of armed conflict, saying that “‘armed conflict’ persists until the “general close of hostilities””.<sup>35</sup> This he contrasts with the less exacting requirement of the ‘cessation of active hostilities’.<sup>36</sup> Within IHL, this requirement applies to issues such as the release and repatriation of prisoners of war.<sup>37</sup> For Jinks, the ‘cessation of active hostilities’ means ‘the termination of hostilities – the silencing of the guns’, whereas the ‘general close of military operations’ refers to ‘the complete cessation of all aggressive military maneuvers’.<sup>38</sup> Bartels also draws on these two standards. He does so in respect to Additional Protocol II, which in the associated ICRC Commentary states that ‘the rules relating to armed confrontation are no longer

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<sup>29</sup> Fourth Geneva Convention, Article 49.

<sup>30</sup> Rogier Bartels, ‘From *Jus In Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’ in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014).

<sup>31</sup> *ibid*, 299 (emphases in original).

<sup>32</sup> Derek Jinks, ‘The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts’ (Harvard Program on Humanitarian Policy and Conflict Research (HPCR) Background Paper 2003). This paper was prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of IHL, which was held in Cambridge on 27-29 January 2003.

<sup>33</sup> *ibid*, 3.

<sup>34</sup> The relevant part in full states that ‘In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations’.

<sup>35</sup> Jinks (2003) 3.

<sup>36</sup> *ibid*.

<sup>37</sup> Article 118 of the Third Geneva Convention relative to the Treatment of Prisoners of War states that ‘[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities’.

<sup>38</sup> Jinks (2003) 3.

applicable after the end of hostilities'.<sup>39</sup> He says that 'it is uncertain whether this ["the end of hostilities"] is a reference to the cessation of active hostilities, usually achieved by a ceasefire agreement, or whether it relates to the general close of hostilities, which would not occur until a peace agreement is reached'.<sup>40</sup> This same uncertainty must surely also apply to Article 49 of the Fourth Geneva Convention. As outlined above, this simply states that return (or 'transfer') shall occur 'as soon as hostilities in the area in question have ceased', and so is thereby absent of any reference to either 'active' or 'general close'.

Although it is clear that CIHL Rule 132 is informed by Article 49 of the Fourth Geneva Convention,<sup>41</sup> it must be emphasised that the word 'hostilities' does not actually feature in CIHL Rule 132. Its formulation is broader, in that it refers simply to the reasons for displacement and their cessation. Interpreting this to mean armed conflict would, in accordance with the insights provided by Jinks, result in the conclusion that the cessation of displacement cause for the purpose of CIHL Rule 132 does not occur until the 'general close of hostilities'.

The consequence of this for the triggering of the CIHL Rule 132 right to return is both demonstrable and significant. As Bartels states, 'the general close of hostilities... would not occur until a peace agreement is reached'.<sup>42</sup> It is also instructive in this connection to note that the IASC Durable Solutions Framework refers to the conclusion of a peace agreement as marking the resolution of the 'immediate cause of displacement'.<sup>43</sup> This requirement that a peace agreement have been reached would notably preclude the triggering of the IDP right to return in so-called "frozen conflict" contexts, for example, in the South Caucasus, where peace agreements remain elusive. This would be to say that conflict-induced IDPs displaced in the region do not at present have the right to return, as the legal conditions necessary to trigger the right have not yet been met. This is of course highly politically contentious. Moreover, as was discussed in Chapter One of this Thesis, it is in these very contexts that the UN General Assembly, the UN Security Council, and others, have most emphatically and unequivocally proclaimed the right to return of IDPs.<sup>44</sup> A disconnect is evident, with a political

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<sup>39</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1986) para 4492.

<sup>40</sup> Bartels (2014) 300.

<sup>41</sup> ICRC 'Customary IHL Database'.

<sup>42</sup> Bartels (2014) 300.

<sup>43</sup> IASC Durable Solutions Framework, 5.

<sup>44</sup> UNSC Res 1615 (29 July 2005) UN Doc S/RES/1615, para 18; UNSC Res 1808 (15 April 2008) UN Doc S/RES/1808, para 9; UNSC Res 1582 (28 January 2005) UN Doc S/RES/1582, para 17; UNSC Res 1554 (29 July 2004) UN Doc S/RES/1554, para 15; UNSC Res 1524 (30 January 2004) UN Doc S/RES/1524, para 16; UNGA Res 68/274 (5 June 2014) UN Doc A/RES/68/274, para 1; UNGA Res 51/126 (13 December 1996) UN Doc A/RES/51/126, para 1; UNGA Res 62/243 (25 April 2008) UN Doc A/RES/62/243, para 3.

declaration of the right to return having been made, when in law the threshold criterion for the triggering of the right has seemingly not yet been met. Yet, Jinks accepts that while peace treaties are '[t]he clearest method of ending an "armed conflict"',<sup>45</sup> they are increasingly rare. He goes on to say that '[e]ven in the absence of a peace treaty, there may be a complete cessation of hostilities; and the *de facto* resumption of normal peaceful relations between the parties'.<sup>46</sup> As Jinks states, contemporary IHL is characterised by a *de facto* approach to armed conflict, rather than the 'formalistic, *de jure* approach' of the pre-1949 regime.<sup>47</sup> While a peace treaty might form the clearest indication of the complete cessation of hostilities, it does not appear to necessarily be essential for the *de facto* 'general close of hostilities' to nevertheless be declared.

It could therefore be the case that UN bodies and agencies are correct to declare IDPs' right to return in the South Caucasus context, and elsewhere. The point is that it is 'hard to define'<sup>48</sup> the precise moment at which hostilities reach their final *de facto* end. This is in part because such a determination would undoubtedly require conducting a factual assessment of the circumstances in a particular context, in circumstances that may often be characterised as fluid. But this is also on account of there being no definitive legal guidance on the point. All of this goes to show what can only be described as an air of ambiguity surrounding the identification of the precise moment at which armed conflict final ceases, an ambiguity that necessarily extends to the triggering of the right to return under CIHL Rule 132.

These two provisions, ILO Convention No 169, Article 16(3), and CIHL Rule 132, provide clear evidence that IDPs do not have an automatic and immediate right to return. The right is triggered by, and is therefore conditional upon, the cessation of the cause(s) of displacement. Yet, even though this condition may be explicitly stipulated in both CIHL and ILO law, as this analysis has shown, there is little in the way of clarity in the law as to when this moment actually occurs, and consequently little in the way of clarity as to when the IDP right to return is triggered in such contexts. In respect to ILO Convention No 169, this is explained by the limited relevant commentary on the matter. As for CIHL Rule 132, this lack of clarity exists as a consequence of the uncertainty that surrounds the law pertaining to the cessation of armed conflict.

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<sup>45</sup> Jinks (2003) 3.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*, 1.

<sup>48</sup> Bartels (2014) 302. In this connection, Bartels gives the example of the Iraq conflict. He states that '... American president Bush announced that the major combat operations had ended, but in reality, the armed conflict (and the application of IHL) was far from over'.



It is, however, apparent that CIHL Rule 132 and ILO Convention No 169 are anomalous. They are exceptions on account of their being subject to the cessation of displacement cause trigger. The question that now arises is to what general rule do they form the exception? That only a small minority of the explicit right to return provisions contain any form of qualifying clause appears to indicate that the general rule is that there is no trigger point. That the right to return exists from the very moment that displacement occurs. Putting aside for one moment the specific ILO regime that exists for indigenous and tribal peoples, this would mean that in all displacement contexts other than armed conflict under IHL, the right to return could, in theory at least, be enjoyed at any point subsequent to initial displacement. Yet, before coming to such a finding, it first needs to be considered what, if any, bearing the requirement that return be in safety and dignity has on the triggering and realisation of return. It is to this that this discussion now turns.

### 6.2.3 Return in safety and dignity: conditions of and *on* return

As was revealed by the analysis conducted earlier in this Chapter, the requirement that return be ‘in safety’,<sup>49</sup> or ‘under conditions of safety’,<sup>50</sup> receives sustained support throughout the here surveyed frameworks. Dignity also often features, typically in connection to safety.<sup>51</sup> It is therefore apparent that safety and dignity are integral to the right to return, both in international and domestic frameworks. The importance that is attached to safety in particular is evidenced not only by its ubiquity, but also by the detailed attention that it receives in many of the frameworks.

In the UNMIK Protocol, matters of safety and security feature prominently in what is termed a list of ‘basic preconditions’ for return.<sup>52</sup> Most notable in this respect is the requirement for ‘[p]hysical and material security’, for the ‘[r]econstruction of the damaged and destroyed buildings’, for the provision of ‘[h]umanitarian assistance as necessary’, and for the creation of a ‘[b]etter overall climate for returns and decrease of distrust and negative propaganda’.<sup>53</sup> Similarly, in the DDPD (Sudan), an agreed list of ‘necessary conditions’ for return is detailed.<sup>54</sup> In this list, safety once again features heavily. The list indeed leads with a statement of support for ‘[t]he security and safety of IDPs and refugees, without risk of harassment, intimidation, persecution, or discrimination, during and after their

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<sup>49</sup> CIHL Rule 132; Pinheiro Principles, Principle 10.1; BiH Instruction, para 1; UNMIK Protocol, Article 1; and DDPD (Sudan) Article 49.

<sup>50</sup> CERD General Recommendation XXII, para 2(a).

<sup>51</sup> Pinheiro Principles, Principle 10.1; BiH Instruction, para 1; UNMIK Protocol, Article 1; and DDPD (Sudan) Article 49.

<sup>52</sup> UNMIK Protocol, Article 1.

<sup>53</sup> *ibid.*

<sup>54</sup> DDPD (Sudan) Article 50, para 249.

voluntary return...<sup>55</sup> Explicit reference is then later made to demining,<sup>56</sup> '[a]ssistance in erecting fixed shelters',<sup>57</sup> the repair of damaged properties,<sup>58</sup> the '[r]ehabilitation and construction of basic facilities in areas of return',<sup>59</sup> and the provision of humanitarian assistance to meet basic needs 'until IDPs... can resume [a] normal life'.<sup>60</sup> For IDPs to be supplied with information pertaining to safety and security matters also features. In the Pinheiro Principles, for example, it is stated that the information IDPs need to enable them to make a voluntary choice as to whether to return includes the provision of information on '*physical, material and legal safety issues* in... places of origin'.<sup>61</sup>

The pivotal importance that is placed on matters of safety and dignity raises an intriguing question in respect to 'return from when'. Given that these conditions are integral to the right to return, could their factual absence constitute a legal bar on return? Specifically, is the triggering of the IDP right to return conditional on the factual existence of conditions of safety and dignity? In this respect, it is indeed interesting to observe that the UNMIK Protocol refers not simply to 'basic conditions', but to 'basic *preconditions*'.<sup>62</sup> The same is apparent in the DDPD (Sudan). Although the DDPD (Sudan) does not use the word 'preconditions', it does nonetheless refer to its list of 'necessary conditions'<sup>63</sup> as '*conditions required for the voluntary return... of IDPs*'.<sup>64</sup> The DDPD then goes further. Towards the end of Article 50, it is explicitly stated that 'The Parties shall ensure that the appropriate conditions are in place *before* promoting return'.<sup>65</sup> The implication therefore is that these conditions, which include, *inter alia*, matters of safety, are to be secured prior to return. With this in mind, the question that needs to be asked is whether there is sufficient authority to support the position that the conditions of safety and dignity act as a restraint on the triggering of the right to return, doing so in a manner synonymous to that of the cessation of displacement cause trigger in CIHL Rule 132 and ILO Convention No 169, Article 16(3).

This essentially comes down to a matter of construction. As was outlined earlier in this Chapter, the cessation of displacement cause triggers in CIHL Rule 132 and ILO Convention No 169, Article 16(3), are both formulated in the same way. They are qualifying clauses that act upon the right itself. By

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<sup>55</sup> *ibid*, Article 50, para 249(i).

<sup>56</sup> *ibid*, Article 50, para 249(iii).

<sup>57</sup> *ibid*, Article 50, para 249(v).

<sup>58</sup> *ibid*, Article 50, para 249(v).

<sup>59</sup> *ibid*, Article 50, para 249(viii).

<sup>60</sup> *ibid*, Article 50, para 249(vi).

<sup>61</sup> Pinheiro Principles, Principle 10.1 (emphasis added).

<sup>62</sup> UNMIK Protocol, Article 1 (emphasis added).

<sup>63</sup> DDPD (Sudan) Article 50, para 249.

<sup>64</sup> *ibid*, Article 50, para 248.

<sup>65</sup> *ibid*, Article 50, para 250.

saying that the right to return exists ‘as soon as the...’ reasons or grounds for displacement cease is to say that, up until that point, the right does not apply. In that situation, the right’s very existence is dependent upon the cessation of the displacement cause. With the safety and dignity conditions, the formulation is fundamentally different. In all of the provisions here surveyed, the conditions of safety and dignity fail to constitute a qualifying clause. They are instead descriptive of the conditions of return, as opposed to conditions on the right itself.

If the intention had been for the right to return to be conditional on the factual existence of conditions of safety and dignity, then it would be expected that these would, like the cessation of displacement cause, be formulated into at least something akin to qualifying clauses. For example, rather than CERD General Recommendation XXII stating that ‘All such refugees and displaced persons have the right freely to return to their homes or places of origin under conditions of safety’,<sup>66</sup> this would, on the model of CIHL Rule 132, be phrased as ‘All such refugees and displaced persons have the right freely to return to their homes or places of origin *as soon as it is safe to do so*’. Equally, to take an example from domestic law, the right to return in the DDPD (Sudan), rather than providing that ‘All IDPs and refugees have the right to return voluntarily, and in safety and dignity, to their homes of origin or places of habitual residence or to resettle in another place of their choice...’, would have been worded as ‘All IDPs and refugees have the right to return voluntarily to their homes of origin or places of habitual residence or to resettle in another place of their choice *as soon as it is safe and dignified to do so*’. In this connection, it is indeed instructive to observe that in CIHL Rule 132, the condition of safety does not form part of the qualifying clause that is present. Were the intention to have been for the safety condition to have the legal effect of qualifying the right, then CIHL Rule 132 would have needed to have been phrased as ‘Displaced persons have a right to voluntary return to their homes or places of habitual residence *as soon as the reasons for their displacement cease to exist and it is safe to do so*.’<sup>67</sup> On the basis of this difference that exists between the formulation of the cessation of displacement cause as a qualifying clause and the more descriptive formulation of the safety and dignity conditions, the conclusion must therefore be drawn that there is insufficient authority to say that the triggering of the IDP right to return is conditional on the factual existence of conditions of safety and dignity.

That the triggering of the right is not dependent on conditions of safety and dignity is not, however, necessarily to say that the factual absence of conditions of safety and dignity is of no legal

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<sup>66</sup> CERD General Recommendation XXII 2(a).

<sup>67</sup> Emphasis added.

consequence to the IDP right to return. As has been shown throughout this Chapter, and indeed throughout much of this thesis, the responsibility for enabling voluntary IDP return in conditions of safety and dignity rests with States and, where relevant, other competent authorities.<sup>68</sup> Moreover, it must be remembered that these same authorities have a multitude of other protection and assistance duties towards IDPs, as documented in the Guiding Principles and elsewhere,<sup>69</sup> not least to protect IDPs from secondary or onward displacement. Suppose therefore that an IDP does voluntarily wish to return, but an objective assessment reveals that conditions conducive to return in safety and dignity cannot be secured. The finding here is that, in such a scenario, the relevant competent authorities, acting under their duty to protect IDPs, could rely on the factual absence of conditions of safety and dignity as a valid lawful justification to, at the very least, dissuade IDPs from returning.

This finding appears to go against the position, most unequivocally stated in the Pinheiro Principles, that ‘States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so’.<sup>70</sup> Yet, within the IASC Durable Solutions Framework, it is explicitly stated that ‘even when return, local integration or settlement elsewhere in the country are entirely voluntary, they should not be promoted if they endanger the life, safety, liberty or health of IDPs or if a minimum standard of agreeable living conditions bearing in mind local conditions cannot be ensured’.<sup>71</sup> Similarly, the Basic Principles and Guidelines (Development) recognise that ‘While all parties must give priority to the right of return, certain circumstances (including for the promotion of general welfare, or where the safety, health or enjoyment of human rights so demands) may necessitate the resettlement of particular persons, groups and communities...’<sup>72</sup> Even within the Pinheiro Principles Handbook there is an acknowledgment, albeit brief, that return may be restricted in certain circumstances. Buried within the commentary on the Principle 10 right to voluntary return in safety and dignity, shortly after stating bluntly that ‘[r]eturn cannot be restricted’, it is then advanced that ‘In some settings, return may be impossible, irresponsible or illegal due to the security situation or potential threats...’.<sup>73</sup>

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<sup>68</sup> It is on this point that the Guiding Principles (Principle 28(1)) and the Kampala Convention (Article 11(1)) are especially clear. Similar provisions also exist in, *inter alia*, the DDPD (Sudan), which states in Article 50, para 247, that ‘[t]he GoS [Government of Sudan] shall establish, as soon as possible, the security, political, economic and social conditions, and shall provide the means, to enable IDPs and refugees to exercise their right to return, voluntarily, in safety and dignity, to their homes of origin or places of habitual residence’.

<sup>69</sup> As was stated earlier in this Thesis, the Guiding Principles are throughout concerned with protection rights and guarantees, primarily during displacement itself (see Principles 10-23 in particular).

<sup>70</sup> Principle 10.2.

<sup>71</sup> IASC Durable Solutions Framework, 13.

<sup>72</sup> Basic Principles and Guidelines (Development) para 68.

<sup>73</sup> Pinheiro Principles Handbook, 56.

It must also be remembered of course that, in its general form, the IDP right to return is an inferred right, being deduced from ICCPR Article 12(1). It is therefore qualified, meaning interference with the right to return may be lawful should it meet the test laid out in the ICCPR Article 12(3) limitations provision. In this respect, it has already been discussed at some length in Chapter Four that the requirements imposed by ICCPR Article 12(3) form a complex and multifaceted test. In brief, for any interference to be consistent with the ICCPR, it must be based on clear legal grounds, be necessary, be proportionate, and be consistent with other ICCPR rights. Yet, it was also shown how, despite what is a *prima facie* stringent test, ICCPR Article 12(3) contains a broad range of possible limitations that are potentially open to an even broader interpretation. Moreover, the UN Human Rights Committee has been willing to authorise what are particularly severe interferences with ICCPR Article 12(1). The point here is not to say that ICCPR Article 12(3) can be used as a tool by which States and other competent authorities can arbitrarily prevent return *en masse*. Indeed, any attempt by an authority to prevent or in any way interfere with the voluntary return of IDPs would need to be subject to particular scrutiny. An arbitrary interference with the right to return is just that, arbitrary, and cannot be lawful. Moreover, that the responsibility to create conditions conducive to voluntary return in safety and dignity rests with States and other competent authorities means that taking no action towards achieving such conditions would constitute a failing on the part of the authorities to meet this obligation. The point nevertheless stands that this obligation to enable voluntary return in safety and dignity permits lawful prevention of return, assuming any such measures are in accordance with ICCPR Article 12(3), until a time at which conditions of safety and dignity do subsist.

#### 6.2.4 Interim conclusion

In the first half of this Chapter, the focus has been on the question of IDP return from when. The discussion has revealed that, in general, the triggering of the IDP right to return is not conditional upon any factor. Although it is the case that in the specific contexts envisaged by CIHL Rule 132 and ILO Convention No 169, Article 16(3), the commencement of the IDP right to return depends upon the cessation of the displacement cause, this is not characteristic of the other here surveyed frameworks. This is not, however, to say that IDP right to return exists without restriction, as interference with the enjoyment of return may be lawfully justified until a time at which return can be secured in conditions of safety and dignity. In other words, while the triggering of the right to return is not conditional on safety and dignity, postponement of the commencement of return may be permitted should conditions of safety and dignity not subsist at the material time.

### **6.3 Suspension and Cessation of the IDP Right to Return**

The focus in the second half of this Chapter is on questions pertaining to the end of the IDP right to return. At the outset, it is important to draw a sharp distinction between non-permanent suspension of the right, and permanent cessation of the right. As will be seen, the first of these requires only brief consideration; aspects of the second demand a deeper, more delicate, examination.

#### **6.3.1 Temporary suspension of the right to return**

As has just been said, the question of temporary suspension requires only brief consideration. The reason for this is that many of the findings drawn in the first half of this Chapter also apply in the context of temporary suspension. As was concluded in respect to the question of return from when, enjoyment of the general IDP right to return can be lawfully prevented on account of the factual absence of conditions of safety and dignity. In the previous section, this was applied in the context of the triggering of the right to return. There is, however, nothing to suggest that this should not also apply in the context of a temporary suspension of physical return subsequent to returns having already begun.

This applies in respect to both the general IDP right to return and the specific right under CIHL Rule 132. In respect to the latter, a disintegration of the factual conditions of safety and dignity would not affect the existence of the right. In other words, once the right to return has been triggered, this would not on account of a disintegration of the factual conditions alone require a re-triggering of the right, unless of course there is another displacement event. It is a temporary suspension on account of the current conditions of return. It does not impact upon the lawfulness of return itself, just that it provides a lawful justification for temporary suspension by the relevant authorities. Once again, any attempt to temporarily suspend returns by States or other competent authorities would demand particular scrutiny.

In addition, it is also important to briefly mention derogation. It is of course trite to say that the general right to return, as deduced from ICCPR Article 12(1), may be subject to derogation pursuant to ICCPR Article 4. This is clear on account of the absence of Article 12(1) from the list of exempted provisions given in Article 4(2). A State Party may take measures derogating from its obligations under Article 12(1), therefore meaning lawful interference with the IDP right to return. On numerous occasions in this Thesis, the point has been made that there is a difference between the internal (i.e. IDP) right to

return under Article 12(1), and the international (i.e. refugee) right to return to one's own country under Article 12(4). Most notably, this is the case in respect to the applicability of the Article 12(3) limitations provision. On this rare occasion, however, both are treated equally on account of the entirety of Article 12 being absent from the list in Article 4(2).

Derogation is of course only permitted in the gravest of circumstances, that is '[i]n time of public emergency which threatens the life of the nation'.<sup>74</sup> Even in times of derogation, specific standards nonetheless apply to any restriction on liberty of movement and freedom to choose one's residence,<sup>75</sup> albeit, as Beyani has suggested, 'the rule of *prima facie* invalidity does not apply to derogations... once a state of emergency has been proclaimed, restrictions on internal freedom of movement and residence would appear to be *prima facie* lawful'.<sup>76</sup> Moreover, any derogation must be officially proclaimed by the State Party,<sup>77</sup> with the UN Secretary-General and the other States Parties informed.<sup>78</sup> Yet, although derogation may only be permissible in these gravest circumstances, and therefore is expected to be extremely rare, it is nevertheless in exactly these types of situations that displacement can occur.<sup>79</sup> This might be in the context of armed conflict (either international or non-international), disasters, or some other similarly serious situation threatening the life of the nation. Furthermore, while any derogation and associated restrictions to movement and residence rights are in principle subject to enquiry from international tribunals,<sup>80</sup> Chapter Four of this Thesis called into question the level of rigour that is employed by the UN Human Rights Committee in its deliberations on restrictions pursuant to ICCPR Article 12(3). This finding thereby justifies a certain degree of scepticism as to the efficacy of such review by the UN Human Rights Committee of restrictions imposed during times of derogation from ICCPR Article 12(1). Therefore, despite being trite, derogation is nonetheless a pertinent and important consideration to bear in mind as one avenue by which the general IDP right to return may be subject to heightened restrictions including lawful suspension on a temporary basis.

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<sup>74</sup> ICCPR Article 4(1); Chaloka Beyani, *Human Rights Standards and the Free Movement of People Within States* (OUP 2000) 146.

<sup>75</sup> Chaloka Beyani (2000) 146. As outlined by Beyani on pages 132-139, the applicable standards include (i) the principle of exceptional threat (ii) the principle of proclamation (iii) the principle of notification (iv) the principle of non-derogability (v) the principle of proportionality (vi) the principle of non-discrimination, and (vii) the principle of consistency.

<sup>76</sup> *ibid*, 141.

<sup>77</sup> ICCPR, Article 4(1).

<sup>78</sup> *ibid*, Article 4(3).

<sup>79</sup> Chaloka Beyani (2000) 131.

<sup>80</sup> *ibid*, 144. Indeed, as Beyani says on page 131, '[i]n human rights terms the difficulty surrounding derogation lies in ensuring that when invoked, derogations do not mask a policy of perpetual abuse'.

### 6.3.2 An ultimate endpoint? Permanent cessation in the face of non-return

Attention now turns to the final issue that will be dealt with in this Chapter, and indeed in this Thesis as a whole. That is the question of whether there can be a permanent cessation to the IDP right to return.

This is a question fraught with political contention. It also remains somewhat legally uncertain. This contention and uncertainty arises to a substantial extent out of the connection that this question has with matters concerning the cessation of the IDP classification itself. As was discussed in Chapter Two, IDP does not constitute a legal status in international law, and there is no cessation clause found in the Guiding Principles. That IDP is not a legal status is made absolutely clear by the inclusion of the IDP definition in the introduction to the Guiding Principles, and not within the Guiding Principles themselves.<sup>81</sup> IDP is instead a ‘descriptive identification’ of a factual state.<sup>82</sup> The fact that IDPs remain within their home country means that they continue to have access to the same rights and guarantees that they had pre-displacement. IDPs have therefore not been subject to any change in legal status. What has changed, however, is their factual state, and it is towards remedying the ills associated with this that the international IDP rights regime is concerned. Yet, while IDP does not constitute a legal definition for the purposes of the Guiding Principles, it has in Africa been placed on a treaty footing courtesy of Article 1 of the Kampala Convention. That being said, the Kampala Convention is also absent of any cessation clause.<sup>83</sup> There are also, as was outlined in Chapter Two, numerous examples of IDP (or some other formulation of displaced status) constituting a legal status in domestic laws. On occasion, these domestic legislative frameworks also contain provisions that actually do deal explicitly with the cessation of IDP status.<sup>84</sup> The critical point here, however, is that even if an individual is no longer considered to be an IDP in domestic law, this has no bearing on whether or not they continue to be an IDP in international law.

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<sup>81</sup> Guiding Principles, introductory para 2.

<sup>82</sup> Annotations, 4.

<sup>83</sup> As Duchatellier and Phuong (2014) have confirmed, ‘[t]he [Kampala] Convention, however, does not provide guidance to Member States as to when a situation of displacement is considered to have ceased... There is no cessation clause for IDPs as it exists in the case of refugees’ (660).

<sup>84</sup> Of the here surveyed frameworks, such a provision can be found in Law 387 (Colombia). This states in Article 18 that ‘[f]orced displacement by violence status is discontinued when socioeconomic stabilization and consolidation are achieved, whether in the place of origin or the resettlement zones’. Aside from Law 387 (Colombia), provisions dealing with the cessation of IDP status can also be found in some of the other domestic legislative provisions that were considered in Chapter Three of this Thesis. These particular domestic laws have not, however, been brought forward into Part III on account of them not containing an explicit right to return.



For the purposes of international law, an IDP is an IDP for as long as their factual state aligns with the definition found in the Guiding Principles.<sup>85</sup> An individual who is no longer factually displaced is no longer an IDP. It is therefore self-evident that if an IDP has physically returned to their home or place of habitual residence, then they will no longer be an IDP. They will instead be considered a ‘returnee’<sup>86</sup> or a ‘returned IDP’,<sup>87</sup> or some other variation of such a term, depending upon the terminology employed by a particular framework.<sup>88</sup> Yet, despite the certainty that exists in respect to the effect that return has on the IDP classification, there remains a distinct lack of clear guidance on whether, and if so at what point, an individual might cease to be an IDP despite having not returned to their home or place of habitual residence.<sup>89</sup> This same conclusion similarly applies in respect to the cessation of the IDP right to return. It is self-evident that the IDP right to return will cease to apply, in both a legal and factual sense, to an IDP who has returned to their home or place of habitual residence, and who is therefore no longer an IDP. But beyond this, there is very little in the way of authority on the matter of cessation of the IDP right to return in the context of non-return. Indeed, only the briefest examination of the here surveyed frameworks is necessary to reveal that cessation of return is not directly dealt with in any of the right to return provisions or elsewhere within the frameworks.

Conscious of this lack of authority, this discussion nonetheless now turns to consider this troublingly uncertain question of whether, and if so when, the IDP right to return might cease to exist even though there has been no physical return to one’s home or place of habitual residence. Three options will be considered. First, whether the ICCPR Article 12(3) limitations provision might be used in a manner that results in the cessation of the IDP right to return in specific instances. Second, whether the right to

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<sup>85</sup> Introductory para 2.

<sup>86</sup> As seen, for example, in the DDPD (Sudan) 7, the IASC Durable Solutions Framework, 37, and the Durable Solutions In Practice Handbook (September 2017) I.

<sup>87</sup> As seen, for example, in the Guiding Principles, Principle 29.

<sup>88</sup> On this point, just because someone is no longer considered to be an IDP, but instead a returnee or a returned IDP, does not mean that the international IDP regime is no longer engaged. The Guiding Principles contain protections and guarantees that apply specifically to returnees, notably in Principle 29. This is of course in accordance with the Guiding Principles’ focus on all stages of displacement (before, during and after).

<sup>89</sup> In this respect, Beyani, Baal and Caterina (2016) have noted the uncertainty surrounding determination of the end of displacement and the impact this has on ensuring that there is ‘appropriate support for the search for durable solutions’ (39). Evidence of this uncertainty can in fact be seen in the Foreword to the IASC Durable Solutions Framework. Here, it is stated that its drafting and publication originated from a request made in 2001 by the ERC to the then IDP-mandate holder, Deng, ‘to provide guidance on how to determine when people should no longer be considered to be IDPs’ (v). This implies that achievement of a durable solution might result in the cessation of the IDP classification. Yet, this point is never explicitly dealt with in the IASC Durable Solutions Framework itself, nor is it mentioned in the recent Durable Solutions In Practice Handbook (September 2017). Duchatellier and Phuong (2014) have, however, more recently argued that ‘in most cases, displacement does not end immediately once the cause for fleeing has ceased to exist. The end of displacement is rather a process which can sometimes be quite long. During the process, the needs for assistance may diminish but the situation of displacement will be considered as ended only when a durable solution is achieved and when IDPs no longer have any specific assistance and protection needs that are linked to their displacement’ (660).

return is time-limited. Third, whether the realisation of an alternative, non-return, durable solution could result in cessation of the IDP right to return.

i. Limitation under ICCPR Article 12(3)

Earlier in this Chapter, it was found that there is no reason in principle why the ICCPR Article 12(3) limitations provision cannot be used to lawfully postpone the IDP right to return, that is on a temporary basis. The question here is whether this limitations provision can be used to successfully justify the permanent cessation of the right to return; or in other words, to lawfully authorise a permanent ban on the right to return.

In the Chapter Four analysis of ICCPR Article 12(3), it was found that the UN Human Rights Committee has in its jurisprudence been willing to approve movement-related restrictions that have had a severe impact on the lives of individuals. For example, under ICCPR Article 12(3), the UN Human Rights Committee has sanctioned a compulsory residence order that has separated a family over thousands of kilometres,<sup>90</sup> and has declared lawful restrictions on movement that that have spanned up to approximately seven to eight years.<sup>91</sup> The conclusion drawn on this point was that there is in theory no reason why such equivalent measures could not apply to IDPs, albeit that any such restriction would be closely scrutinised for any hint of displacement-based discrimination. Yet, while the UN Human Rights Committee has been willing to sanction such severe measures, and while it is true that the Committee has not had occasion to rule on a permanent ban on return to one's home or place of habitual residence, it is unlikely in principle that a permanent ban, should one ever come before the Committee, would be deemed lawful. It is of particular relevance here that proportionality forms a core aspect of the test under ICCPR Article 12(3), and that any interference must be proportional to the protective purpose of the measure imposed. Although it was observed in Chapter Four that the UN Human Rights Committee has not in the past employed the proportionality test to the full extent of its potential rigour, if it were faced with a permanent ban on IDP return, such rigorous application would undoubtedly be required. Based on this brief analysis, it can therefore be concluded that even in the most serious of circumstances, the finality of a permanent ban, rather than, for instance, an indefinite ban that is subject to review, is likely to be deemed disproportionate.

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<sup>90</sup> *Karker*, para 2.3.

<sup>91</sup> *Celepli*, paras 2.1 and 2.3; *Karker*, paras 2.1 and 6.3.

ii. Time-limited

As has already been stated, cessation of the right to return is not directly dealt with in any of the right to return provisions, nor is the possibility that the right to return might cease even though no physical return has occurred. The closest that any of the here surveyed frameworks get to discussing cessation of the right of return is in the Pinheiro Principles. As will be recalled, Principle 10.1 explicitly asserts ‘the right to return voluntarily... in safety and dignity’. Immediately subsequent to this, in Principle 10.2, it is stated that:

‘States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right [‘the right to return voluntarily... in safety and dignity’] cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.’<sup>92</sup>

Principle 10.2 begins by essentially reasserting the voluntariness point from Principle 10.1, but then strengthens this by placing a negative obligation on States to refrain from interfering with the voluntary return of IDPs (and others).<sup>93</sup> Yet, it is the latter part of Principle 10.2 that is most intriguing. It states that return cannot be subject to ‘arbitrary or unlawful time limitations’.<sup>94</sup> This implies that return can be subject to time limitations, so long as these are neither arbitrary nor unlawful. In this sense, it qualifies the obligation of State non-interference with the voluntary return of IDPs. The question of course is what is meant by ‘arbitrary or unlawful’ for the purpose of Principle 10.2, and in what concrete situations might such restrictions arise. Yet, nothing more is said on this matter in the Pinheiro Principles themselves, nor in Pinheiro’s Explanatory Notes or in the accompanying Handbook.

As has been consistently argued throughout this Thesis, the Pinheiro Principles are ambitious.<sup>95</sup> While this is in some ways positive, it means caution must be taken when drawing any form of definitive insights from its principles, especially those that extend furthest from established treaty provisions. Moreover, as was argued in Part II of this Thesis, the Pinheiro Principles enjoy only limited standing in

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<sup>92</sup> Pinheiro Principles, Principle 10.2 (emphases added).

<sup>93</sup> Although space restrictions do not permit discussion of this in any detail, it is interesting to observe the inclusion in Principle 10.2 of the word ‘former’ immediately prior to ‘homes, lands or places of habitual residence’. Given the general tenor and indeed intention of the Pinheiro Principles, one must assume this is to be interpreted as meaning former in a *de facto*, rather than a *de jure*, sense. Use of the word ‘former’ is nonetheless somewhat contentious.

<sup>94</sup> Pinheiro Principles, Principle 10.2.

<sup>95</sup> This is of course not to imply that the Guiding Principles are not also ambitious. As Phuong (2005) says, the Guiding Principles ‘represent an ambitious document which seeks to provide protection to all internally displaced persons’ (56).

international law, and they do not constitute a core part of the international IDP rights regime. Therefore, while it is striking to see a statement indicating the possibility of lawful time limits being placed upon the IDP right to return, Principle 10.2 cannot alone constitute sufficient evidence to draw the conclusion that the IDP right to return is time-limited. Of course, if any occasion should arise in which the right to return be subject to a definite upper time limit, and this were challenged at the international level before the UN Human Rights Committee, then such a time limit would stand to be tested in accordance with the requirements under ICCPR Article 12(3).

iii. Electing for an alternative, non-return, durable solution

As was introduced towards the beginning of this Thesis, return is not the only way by which a durable solution to internal displacement can be secured. The IASC Durable Solutions Framework indeed envisages three ways that a durable solution can be achieved. Return, or '[s]ustainable reintegration at the place of origin',<sup>96</sup> is one of these three ways. The other two are '[s]ustainable local integration in areas where internally displaced persons take refuge', or in other words local integration; and '[s]ustainable integration in another part of the country', or in other words resettlement.<sup>97</sup> To reiterate, the IASC Durable Solutions Framework states that '[a] durable solution is achieved when IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement'.<sup>98</sup> Although the terminology of 'durable solutions' does not feature anywhere in the Guiding Principles, it would be erroneous to downplay the importance or place of durable solutions at the core of the international IDP rights regime. Indeed, Kälin explicitly confirms in the Annotations that the Guiding Principles do, in Principle 28, address the matter of durable solutions, albeit not by that term.<sup>99</sup>

It is indeed a central tenet of the IASC Durable Solutions Framework that return is not the only means by which a durable solution can be achieved.<sup>100</sup> It is explicitly stated that 'An IDP can find a durable solution away from his or her former home if that [sic] the person's displacement-specific needs are

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<sup>96</sup> IASC Durable Solutions Framework, 5.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*, 5.

<sup>99</sup> Annotations, 125. As Kälin (2014) states, 'Principle 28 is particularly important as it provides the legal framework for finding durable solutions for IDPs' (619). However, it is interesting to note that within Principle 28, while explicit reference is indeed made to return and to resettlement, local integration does not feature. Kälin does, however, confirm that local integration is envisaged by Principle 28. This, it is assumed, is on the basis that IDPs are not to be forced into either return or resettlement.

<sup>100</sup> IASC Durable Solutions Framework, 6.

met and the person can enjoy his or her rights without displacement-specific discrimination'.<sup>101</sup> Moreover, it is core to the durable solutions approach that the three means of return, local integration and resettlement are to be viewed as equally valid.<sup>102</sup> Also core to the IASC Durable Solutions Framework is, perhaps unsurprisingly, the principle of voluntariness. It is for IDPs themselves to make a voluntary decision as to which of the three means they wish to pursue towards achieving a durable solution to their displacement. In respect to the Guiding Principles, Kälin confirms that '[a]t the core of Principle 28 lies the notion of *free choice* of internally displaced persons between return, local integration and resettlement'.<sup>103</sup> In respect to enabling IDPs to make a 'free choice', it is important to emphasise the demand that this places on ensuring that a choice can realistically be made between the three means. It is not possible for IDPs to make a choice if there is only a single viable option available to them. For instance, it would violate the principle of voluntariness to say, for example, that an IDP has voluntarily elected to integrate locally when it is in fact impossible to return in safety and dignity at that time.

It is apparent that achieving a durable solution to displacement is typically a complex challenge and a long-term aim.<sup>104</sup> The IASC Durable Solutions Framework includes a list of eight interlinking criteria against which the durability of any solution is to be assessed. These are demanding criteria, including, *inter alia*, safety and security; access to livelihoods; the restoration of housing, land and property; and access to effective remedies and justice; all of which are underpinned by the principle of non-discrimination.<sup>105</sup> The IASC Durable Solutions Framework is frank about the difficulties associated with achieving what it on occasion refers to as a 'truly durable solution'.<sup>106</sup> It is admitted that '[a] solution may become durable only years, or even decades, after the physical movement to the place of origin or place of settlement has taken place, or the decision to locally integrate has been made'.<sup>107</sup> In respect to the criteria, it is stated that these 'often mark an ideal that may be difficult to achieve in the medium term'.<sup>108</sup> It then goes on to say that 'The criteria should therefore be seen as benchmarks for measuring progress made towards achieving durable solutions'.<sup>109</sup> Applying this to the context of

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<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*, 12. The IASC Durable Solutions Framework here explicitly states that '[t]here is no hierarchy among different types of durable solutions'.

<sup>103</sup> Annotations, 129 (emphasis added).

<sup>104</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani' (1 April 2015) UN Doc A/HRC/29/34, para 43.

<sup>105</sup> IASC Durable Solutions Framework, 27.

<sup>106</sup> *ibid.*, 7.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*, 27.

<sup>109</sup> *ibid.*

return specifically, there is therefore no demand that a durable solution already be available prior to return.<sup>110</sup> It is instead a question of whether there exists the prospect of achieving a durable solution.

As has already been mentioned, there is no explicit authority on the question of whether electing for either local integration or resettlement results in cessation of the IDP right to return. Yet, a finding can nonetheless be made on the basis of this discussion. Electing for an alternative means to return can result in cessation of the right to return, subject to any such decision having been made voluntarily and with the prospect of that alternative means resulting in the achievement of a durable solution. These two conditions are interrelated. As has just been outlined, it is not considered possible for IDPs to elect for an alternative means if that means does not have the prospect of achieving a durable solution. Similarly, any decision in favour of an alternative means will not be considered to be a voluntary decision if return itself is not factually possible.

But for an IDP to elect for non-return on the basis of a realistic prospect of securing a durable solution is by itself insufficient to result in the cessation of the IDP right to return. A correlative decision in respect to housing, land and property rights at the place of origin is also required. This is because the right to return is not solely concerned with physical movement. It is important to remember that the general right is deduced not just from the right to liberty of movement, but from the dual right of liberty of movement and freedom to choose one's residence. As is emphasised in the Pinheiro Principles Handbook, and indeed by the very inclusion of a right to return in the Pinheiro Principles themselves, there exists an 'intimate relationship' between the right to return and the right to restitution, or some other form of appropriate reparation.<sup>111</sup> Despite having been deprived of their *de facto* enjoyment of their homes, land and properties, IDPs retain their legal rights over these. The decision over what to do in respect to these proprietary rights therefore lies with IDPs themselves. An IDP who elects to integrate locally, yet does not rescind their proprietary interest(s) at their place of origin, maintains their right to return. Yet, an IDP who elects to integrate locally and takes voluntary and effective steps towards relieving themselves of such proprietary interests evinces a clear and comprehensive intention to not return. In this latter scenario, their right to return would, in accordance with the law and policy on the matter, have ceased.

Before concluding on this discussion of the cessation of the IDP right to return, it is important to briefly clarify the repercussions of this conclusion just reached. To say that an IDP has relieved themselves of

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<sup>110</sup> *ibid*, 13.

<sup>111</sup> Pinheiro Principles Handbook, 54.

their right to return is not to say they have forfeited any right in respect to physical movement. They still retain their dual right to liberty of movement and freedom to choose one's residence under ICCPR Article 12(1). What has, however, come to an end is their right to return to a particular place, in the sense of a particular house, land plot or other form of a property. There is of course no reason in principle why at a later date a former IDP, or a member of a future generation, could not seek to return to that particular house, land or property. They retain the right to do so under international law as far as this is provided for under ICCPR Article 12(1) and other related IHRL rights. But any demand to do so pursuant to the IDP right to return would no longer have legal force.

In sum, the second half of this Chapter has engaged with the questions of suspension and cessation of the IDP right to return. As was stated at the beginning, this is a politically contentious and legally uncertain terrain. This is in no small part due to the limited attention that questions pertaining to cessation have garnered. This is true not only of the core international IDP rights framework, but also in respect to the domestic frameworks here surveyed. Notwithstanding this lack of authority, some key conclusions can be drawn. The first is that while the limitations under ICCPR Article 12(3) may permit lawful temporary postponement of the IDP right to return, it is unlikely that a permanent cessation of the right could be lawfully justified by this means. Second, although Principle 10.2 of the Pinheiro Principles implies that the IDP right to return may be time-limited, it would be premature to conclude, in the face of no other supporting authority, that the IDP right to return is, in law, subject to an upper definite time limit. Yet, third, it has been found that permanent cessation of the right to return is possible, this being in circumstances in which an IDP has made a voluntary decision to pursue the prospect of a durable solution by means of either local integration or resettlement, which is accompanied by voluntary relinquishment of all proprietary interest(s) at the place of origin.

#### **6.4 Conclusion**

This Chapter has traversed a substantial array of the most relevant legal terrain in the search for definitive findings as to the temporal aspects of the IDP right to return. In respect to the question of IDP return *from* when, this discussion has shown that the rights under CIHL Rule 132 and ILO Convention No 169, Article 16(3), are triggered only once the cause of displacement has ceased. Yet, it was also found that pinpointing exactly when this occurs is not an easy task, and that this is made even more difficult on account of a lack of express provision or authoritative guidance on the matter. Yet, these are exceptions. In general, and as evidenced by the here surveyed frameworks, the IDP right to return is subject to no temporal trigger point. This is not, however, to say that the commencement

of return may not be subject to any possible qualification. For the integral importance of conditions of safety and dignity in all of the explicit and implicit IDP right to return provisions means that, although conditions of safety and dignity cannot be said to constitute conditions on the triggering of the right, they nonetheless can constitute lawful postponement of the commencement of return. While the decision of *whether* to return therefore lies firmly with IDPs themselves, the decision of *when* to return is subject to both factual and legal restrictions. Although such restrictions are intended to protect the welfare of IDPs and others, they could, if employed arbitrarily, risk leaving IDPs at the behest of those who seek to control and manipulate the IDP return process.

In respect to whether the IDP right to return can be suspended or extinguished, both of these questions are to be answered in the affirmative. It has been found that there is no reason in principle or in law why the factual absence of conditions of safety and dignity could not constitute lawful temporary suspension of the right to return. In respect to permanent cessation, it appears unlikely based on existing provisions that the right to return could be successfully extinguished without the effective consent of IDPs, or that the right is time-limited. However, voluntary permanent cessation is feasible. Indeed, a voluntary decision by an IDP to elect for a means other than return by which to achieve a durable solution would result in the cessation of the right to return, subject to the decision being voluntary, the means elected offering the prospect of a durable solution, and all proprietary right(s) at the place of origin having been fully dispensed with.





## **PART IV**

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## CHAPTER 7 – CONCLUSION

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Over recent decades, internal displacement has been put firmly on the international agenda. The pace of change has been impressive. From a position of relative obscurity in the post-Second World War era, IDPs are now commonly accepted as a matter of priority to the international community. The developments that have occurred since the latter part of the twentieth century have culminated in the establishment of a bespoke international IDP regime. At the core of this regime lies the normative, rights-based framework that is the Guiding Principles. Legal and policy developments have also occurred at the domestic level, it is said in large part thanks to the efforts and influence of the international community. It is though fair to say that, notwithstanding the momentum that has been built around the issue, progress towards concrete domestic legislative developments has been slow. It is also fair to say that almost all domestic frameworks that do exist deviate from what are supposed to be international minimum standards for IDP protection and assistance.

Despite the demonstrable progress that has occurred, the situation remains challenging. In her most recent annual report to the UN Human Rights Council, UN IDP mandate-holder, Jimenez-Damary, stated that the continued upward trend in IDP numbers is ‘disheartening’.<sup>1</sup> Moreover, she has decried what she has termed the ‘massive and neglected crisis of internal displacement’.<sup>2</sup> It is clear that addressing internal displacement involves political endeavouring, as well as assistance and protection measures on the ground. Continued scholarly engagement with the issue is also critical. It is for this reason that contributions such as those made by this Thesis are so important.

The precise focus in this Thesis has been to examine IDP return. This has been approached through a predominantly human rights lens. In this respect, the research adds to what Phuong has remarked as being a paucity of rights scholarship on the internal displacement issue.<sup>3</sup> Three particular challenges have been addressed, those of IDP return for whom, to what, and when. It is here where the primary contribution of this Thesis lies. By providing answers to these questions it has revealed crucial insights into the essential nature of IDP return as a right in international law.

The consequences of the general IDP right to return being an inferred right are substantial. So too is the impact of the international IDP regime’s ultimate aim of achieving full equality in the enjoyment

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<sup>1</sup> UN Human Rights Council, Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons (11 April 2018) UN Doc A/HRC/38/39, para 19.

<sup>2</sup> *ibid.*

<sup>3</sup> Phuong (2005) 241. Indeed, Phuong argues on page 235 that ‘a human rights framework of analysis much be used with regard to internally displaced persons’. It is clear that this Thesis accords with this position.

of the same rights and freedoms between IDPs and non-IDPs in the same State, an aim that is presupposed by full equality between IDPs themselves. Eligibility for the right to return can be curtailed *en masse* when IDPs and non-IDPs alike do not enjoy their dual right to liberty of movement and freedom to choose one's own residence under ICCPR Article 12(1). It is indeed important in this respect to reiterate that, as the law stands, the question correctly formulated is not whether IDPs enjoy their right to return in full equality with non-IDPs, but whether IDPs enjoy *their right to liberty of movement and freedom of residence* in full equality with one another, and with non-IDPs in the same State. Moreover, return can be lawfully restricted on an individual basis in exceptional circumstances, this on account of return being a qualified right and thereby subject to limitations permitted by the general limitations formula found in ICCPR Article 12(3).

Matters of property are central to IDP return in the form of a remedy for harm incurred. Restitution in the displacement context seeks to restore the *status quo ante*, that is, to as far as is possible return IDPs to their pre-displacement selves. Yet, the reality of displacement often means that restitution of housing, land and property rights is unlikely in itself, to constitute a sufficient remedy. Matters of compensation are more than likely to arise. However, compensation cannot be considered to have this same aim of achieving the *status quo ante*. This is not compensation's benchmark. It is discretionary. Discretion as to whether, and in what sum, to award compensation in an individual case lies with the domestic authorities. Far from reviving the *status quo ante*, this risks leaving IDPs short-changed, either in fact or at least in perception.

It is uncontroversial to say that IDPs should be able to voluntarily choose whether or not they want to return, nor contentious to demand that they be able to do so in safety and with dignity. Moreover, it is understandable that the success of return relies upon such safety and dignity extending not only to the actual process of return, but also to the conditions at the place of return. Yet, it is apparent that return is not only associated with particular conditions, but that it is also conditional upon them. Specifically, the conditions of safety and dignity, while being characteristic of return as a durable solution, can also in law restrict the enjoyment of return. This may have the effect of either temporarily suspending return, or delaying its commencement. Yet, these requirements cannot provide lawful grounds for the permanent cessation of the IDP right to return. Permanent cessation may only occur when IDPs themselves voluntarily choose. But this itself is subject to conditions. It is envisaged that this can only occur when IDPs elect for an alternative (non-return) means by which to achieve a durable solution, and where this selected means offers at least a prospect of achieving a durable solution to their displacement. Moreover, steps need to be taken to part with proprietary

rights in the place of origin. Only then can the voluntary choice not to return be considered to constitute a cessation of the right to return itself.

A note does, however, need to be made on the principle of voluntariness. At the very core of the IDP right to return lies the principle of voluntariness. That is for IDPs themselves to decide whether or not they wish to return. Indeed, it is unequivocal save in the most exceptional circumstances that IDPs shall not be forcibly returned to their homes or places of habitual residence. Yet, it is clear that this voluntariness has its limits. IDPs do not have an absolute right to return. This much is clear from return being deduced from a qualified right. Moreover, while the decision of whether to return must be a voluntary one on the part of IDPs, this does not mean that IDPs have absolute decision-making authority as to *when and to what* they return. IDPs have the right to return when they want to, but only when the conditions allow, specifically when conditions of safety and dignity subsist. IDPs have the right to return to their property, but they cannot insist upon receiving a sum of compensation they believe fairly reflects the harm they have suffered. They are instead subject to resource constraints and the principle of equality playing out across all IDPs.

Yet, it is also apparent that these conditions, these restrictions and opportunities, will differ depending upon the nature of the displacement context. Specifically, whether or not displacement has occurred in the context of armed conflict. This analysis has shown that there does exist a general IDP right to return in international law. However, this is explicitly stated in neither legally-binding international treaty law nor in the Guiding Principles. Instead, the general IDP right to return remains to be deduced from general international law provisions pertaining to liberty of movement and freedom to choose one's residence, as most authoritatively provided for in ICCPR Article 12(1).

Yet, this is not the only IDP right to return that exists in international law. It is apparent that at the international level there are multiple right to return provisions, most notably those in CIHL Rule 132 and ILO Convention No 169 Article 16(3). That there is more than one provision is not in itself an issue. What is, however, an issue is that the explicit provisions that exist in CIHL Rule 132 and ILO Convention No 169 Article 16(3) offer *greater* substantive protection of the right to return than the inferred general right to return. To some extent, this therefore renders redundant the general right, for example, in situations of armed conflict. Not only does the right under CIHL Rule 132 offer greater clarity on account of its explicit articulation, but it is also not subject to the limitations that are associated with the general IDP right to return. Of course, CIHL Rule 132 is limited, in that it is only available to those who are displaced in the course of an IAC or a NIAC, but once this condition is met,

it becomes not only the *lex specialis*, but it also trumps the support offered by the general right. The same can be said about ILO Convention No 169 Article 16(3) in respect to the protections afforded to indigenous and tribal peoples, albeit that this is narrow in scope to the context of forced evictions alone.

This does not necessarily cause any great difficulty in and of itself. But it does prove troubling for an international IDP regime that is otherwise guided by the overarching principle of equality. As was argued in Chapter Two, the ultimate aim of the international IDP regime is to achieve full equality in respect to the enjoyment of rights and freedoms between IDPs and non-IDPs in the same State. As has been expressed throughout this Thesis, this presupposes equality between IDPs themselves. But when it comes to return, there exists a clear difference in legal entitlements concerning return that depends upon the cause of displacement. Yet, this is not how it is meant to be. This undermines what is an international IDP regime that otherwise espouses equality as its ultimate aim.

The insights and the conclusions that have been drawn from this Thesis are specific to the right to return. It is therefore not possible to say whether or not these findings are unique to the right to return, or whether they, to some degree or another, are also characteristic of other IDP rights. It is clear that more work is needed. This Thesis has, however, shed light on return as a right of IDPs, and has therefore gone some way towards addressing the ‘thorny question’ of defining IDP return.<sup>4</sup>

Return remains an uncertain and unlikely prospect for a great many IDPs. It is often, and appropriately, stated that the blame for this lies with ongoing socio-political and development challenges. Yet, law also plays a role here. Return remains unsettled as a right. Solutions to the barriers that return faces on the ground are essential to increasing the viability of return for those who wish to return to their homes or places of habitual residence. But what is also essential is understanding, as well as a clear and consistent framework for return, which not only clarifies rights, but also permits judicial development and challenge.

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<sup>4</sup> Bradley and Sherwood (2016) 182.

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