

Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges

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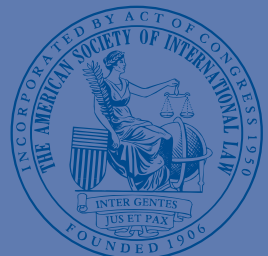
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Chapter 8

Protection of Family Life

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INTRODUCTION

Uniquely as an institution, the family is protected by international human rights law. Families may be organized in myriad ways, but regardless of composition, individuals take from their families a sense of identity, support, and responsibility. The family remains the primary institution responsible for the growth and well-being of the child, but it further offers a measure of protection and security to all of its members. It is because of this role, and its universality across cultures, that the family is accorded protection in the fundamental universal and regional human rights instruments.

Like everyone, internally displaced persons¹ are entitled to enjoy, in full equality, the right to respect of family life, including the right of the family to protection and assistance. Displacement, particularly when triggered by natural disaster or armed conflict, causes disruption, disassociation, and new or exacerbated vulnerabilities. Women and children, in particular, are more vulnerable to rights violations when separated from family and community. In contrast, if preserved and supported, the family can play a vital role in the emotional and material support of its members as they confront the challenges wrought by displacement.

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¹ The *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2/Annex, defines internally displaced persons (IDPs) as “persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.” Introduction, ¶ 2.

The *Guiding Principles on Internal Displacement*² is the primary normative text identifying the rights and guarantees relevant to internally displaced persons. Drawing on international humanitarian and human rights law, the *Guiding Principles* incorporate the right to respect of family life, addressing four discrete issues: preservation of family unity, pursuit of family reunification, ascertaining the fate of missing relatives, and respect for the dead. The principles are simply stated, acknowledging the rights of IDPs and indicating the corresponding duties of states and other actors.

As an increasing number of states adopt national legislation or policies addressing internal displacement, the *Guiding Principles*' provisions on family life are being incorporated domestically. But understanding and translating state obligations into specific state action is, quite understandably, a challenge. This chapter responds to this challenge first by exploring how international law has evolved in each of these four areas, identifying the content of these rights and corresponding state duties as they stand ten years following adoption of the *Guiding Principles*. After identifying the greatest obstacles IDPs have faced to full respect and realization of these rights, the chapter indicates legislative, administrative, and practical actions that states might consider as they seek to fulfill the right to respect of family life.

LEGAL FRAMEWORK

Relevant Guiding Principles

Two of the thirty Guiding Principles are directed to the protection of family life. Guiding Principle 17 provides protection and support to the family unit both as it existed prior to displacement and as it adapts in the context of displacement. Guiding Principle 16 addresses the fundamental human need to acknowledge and respect family members who are missing or dead.

The overarching rule is established by Guiding Principle 17(1), which provides that “Every human being has the right to respect of his or her family life.” As developed in the text, this right includes two components: the right to remain together as a family unit and the right to reunification of family

² *Id.*

members if separation has occurred. Thus, Guiding Principle 17(2) directs that “family members who wish to remain together shall be allowed to do so.” Guiding Principle 17(4) underscores that the right to family unity cannot be overridden even in the context of internment or confinement in camps.

Use of the word “shall” leaves no room for limitation or qualification by either the state or any other actor providing humanitarian assistance to displaced families. On its face, this obligation seems simple enough, yet it is particularly important for all actors to reflect upon and respect this right in their programmatic activities, *e.g.*, in the provision of transport and temporary housing for IDPs and in the parallel provision of essential services such as health and education when planning or promoting return.

Where separation has nonetheless occurred—whether due to conflict, natural disaster, state action, or other causes—Guiding Principle 17(3) establishes that family members “should be reunited as quickly as possible.” As such, the relevant authorities are obligated to take “all appropriate steps...to expedite the reunion of such families, particularly when children are involved.” The conditional language used in Guiding Principle 17(3) contrasts with the absolute language of Guiding Principle 17(1), and rightly so. It reflects the fact that more can be done to ensure that a family remains together than can be done to ensure reunification of a family that has already been separated. Thus, it specifies that families “should” be reunited as quickly as possible, and it provides some discretion to the relevant actor to determine “all appropriate steps,” as this requires an exercise of judgment in the context. Nonetheless, Principle 17(3) leaves no question that two such steps—“facilitat[ing] inquiries made by family members” and “encourag[ing] and cooperat[ing] with humanitarian organizations engaged in the task of family reunification”—are *always* appropriate and therefore required.

Guiding Principle 16 elaborates the rights of the internally displaced with regard to missing and dead relatives. Its first clause establishes that all internally displaced persons have “the right to know the fate and whereabouts of missing relatives.” Concerning authorities’ efforts to implement this right, Guiding Principle 16(2) imposes several concrete obligations. It first indicates that they must do more than merely “facilitate inquiries”—something which could be as limited as accepting requests and forwarding information received.

Rather, the authorities must actively “endeavour to establish the fate and whereabouts” of those reported missing. Principle 16(2) contains a corollary to Principle 17(3), specifically requiring authorities to cooperate with international organizations investigating the fate and whereabouts of the missing.

Principle 16(2) also contains an important procedural right. It recognizes the humanitarian consideration of keeping remaining family members apprised of the authorities’ efforts to learn the truth, even if an answer has not yet been found: efforts shall specifically include “inform[ing] the next of kin on the progress of the investigation and notify[ing] them of any result.” In contrast to the provision on preservation of family unity, the right to know, like the right to reunification, imposes an obligation of means rather than result.

Concerning the dead, Guiding Principle 16(3) provides that authorities must “endeavour to collect and identify the mortal remains of those deceased, [and to] prevent their despoliation or mutilation.” This duty is absolute; it pertains regardless of the existence of a request by a family member or, indeed, knowledge of the identity of the family. Where mortal remains are recovered, the authorities must (1) prevent their mutilation or despoliation, and (2) either return them to next of kin or dispose of them respectfully. Guiding Principle 16(4) further provides that grave sites are to be protected and respected, and family members “should have the right of access to the grave sites of their deceased relatives.” While the provisions related to the treatment and disposal of mortal remains are absolute, these provisions on protection of and access to grave sites, as well as the obligation to recover mortal remains, are precatory, recognizing that factors beyond the authorities’ control—such as the duty to protect public safety or the absence of territorial control—may limit their ability to realize these provisions in every instance.

Legal Basis

The Definition of the Family

Despite its recognition as “the natural and fundamental” unit of society,³ “the family” does not have a universally accepted definition, nor is it defined in the *Guiding Principles*. In practice, the definition of family varies by culture and context, and restrictions on its scope have been recognized based on the purpose for which the definition is used.

The United Nations Human Rights Committee has indicated that the objectives of the International Covenant on Civil and Political Rights (ICCPR) require that the term be given a broad interpretation “to include all those comprising the family as understood in the society of the State party concerned.”⁴ At a minimum, “when a group of persons is regarded as a family under the legislation and practice of a State,” it must be afforded protection. This is indicated by principles of non-discrimination and the prohibition of arbitrary treatment under law.

The meaning of “family” has primarily been considered in the context of reunification of migrant workers’ and of refugees’ families. Because there is no universally recognized right to family reunification in either instance, there is limited value in drawing an analogy to reunification of displaced families. Migrant workers, refugees, and their families are present by agreement of the host state, such that immigration for the purpose of family reunification is a privilege rather than a right. With this caveat, it is nonetheless instructive to explore definitions of the family applied in these contexts. The Executive Committee of the United Nations High Commissioner for Refugees has referenced the “nuclear family,” consisting of a husband, wife and their minor children, but has also acknowledged that many societies understand “family” as including dependent unmarried children, minor siblings, and dependant

³ Universal Declaration of Human Rights (UDHR), art. 16(3).

⁴ Human Rights Committee, General Comment 16, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation*, 1988, ¶ 5.

elderly parents.⁵ The European Union’s directive on the right to family reunification,⁶ which addresses third country nationals, allows states to provide for reunification of unmarried partners, as well as dependant adult children. Several states earlier recognized a right of reunification for same-sex partners.

Conventional international humanitarian law does not address the definition of “family,” but the commentary to Additional Protocol I of the Geneva Conventions indicates an intent to provide the broadest possible protection: “the word ‘family’ ... covers relatives in a direct line—whether their relationship is legal or natural—spouses, brothers and sisters, uncles, aunts, nephews and nieces, but also less closely related relatives, or even unrelated persons, belonging to it because of shared life or emotional ties (cohabitation, engaged couples, etc.). In short, all those who consider themselves and are considered by each other, to be part of a family, and who wish to live together, are deemed to belong to that family.”⁷ Precisely because a state cannot justify restricting the right to family reunification for its own nationals, this guidance from the International Committee of the Red Cross (ICRC) is appropriate regardless of the cause of internal displacement or the applicability of international humanitarian law.

Because family reunification serves a humanitarian purpose, any definition of the family in this wholly domestic context should be broad and flexible. Consanguinity should not be determinative, nor should the existence of a legally-recognized union of spouses. While a nuclear family often will form the core, caregivers and dependants may include grandparents, elderly parents and grown children, as well as aunts and uncles. In some cultures, co-wives play an important role as caregivers to each others’ children, and it may be in the child’s best interest to acknowledge those emotional and supportive ties. Moreover, an increasing number of states recognize *de facto* marriages and

⁵ Executive Committee of the High Commissioner’s Programme, EC/49/SC/CPR.14, July 4, 1999.

⁶ European Union, Council Directive 2003/86/EC, Sept. 22, 2003.

⁷ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 859 (Yves Sandoz et al. eds., 1987).

domestic partnerships, including between members of the same sex. By purposefully omitting to include a definition, the *Guiding Principles* allow for a flexible and pragmatic approach.

The Content of “Respect” for Family Life in International Law

Initially linked with the concept of fundamental freedoms and the right to privacy, the right to respect of family life requires that the state must not only refrain from interfering with the family but also protect it against interference by third parties.⁸ Increasingly, the international community has elaborated a right to affirmative assistance to support and reinforce the family unit in recognition of the institution’s centrality in the development and well-being of the individual.⁹

The formulation of Guiding Principle 17—setting forth a “right to respect of ... family life”—is most closely related to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁰ Most human rights conventions link respect of family life to protection against arbitrary or unlawful interference, articulating the right within the same article as the right to privacy.¹¹ For example, the Universal Declaration of Human Rights (UDHR) proclaims that “No one shall be subjected to arbitrary interference with his privacy, family, home or

⁸ See, e.g., UDHR art. 16(3); American Convention on Human Rights (ACHR) arts. 11(3) and 17(1).

⁹ UDHR arts. 23(3) and 25(1); International Covenant on Economic, Social and Cultural Rights (ICESCR) art. 10(1) (calling for “the widest possible protection and assistance”); African Charter on Human and Peoples’ Rights (ACHPR) art. 18(2).

¹⁰ ECHR art. 8(1) (“Everyone has the right to respect of his private and family life....”).

¹¹ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 377-78, n. 4 (2d ed. 2005).

correspondence”¹² The concept of non-interference also appears in several international instruments addressing the rights of the child. Protection of family unity is supported by the right of the child to “not be separated from his or her parents” absent compelling reasons established by law, such as abuse or neglect.¹³ The Convention on the Rights of the Child (CRC) effectively limits interference through the positive formulation of the right of the child “as far as possible ... to know and be cared for by his or her parents.”¹⁴ Notably, under both the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC), protection afforded to the family is derivative of protection of the rights of the child.

Beyond limiting direct state action, the right to respect of family life includes a duty to protect the family from interference by third parties. The International Covenant on Civil and Political Rights (ICCPR) provides that “Everyone has the right to protection against such interference or attacks.”¹⁵ The UN Human Rights Committee has interpreted this language as requiring protection “against all such interferences and attacks whether they emanate from State

¹² UDHR art. 12. *See also, e.g.*, International Covenant on Civil and Political Rights (ICCPR) art. 17(1); Convention on the Rights of the Child (CRC) art. 16 (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence....”); African Charter on the Rights and Welfare of the Child, art. 10.

¹³ CRC art. 9(1). *See also* African Charter on the Rights and Welfare of the Child (ACRWC) art. 19(1) (“Every child shall...have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interests of the child.”); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 16 (“...save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother.”).

¹⁴ CRC art. 7(1). *See also*, ACRWC art. 19(1) (“Every child shall...whenever possible, have the right to reside with his or her parents.”).

¹⁵ ICCPR art. 17(2). *See also* ACHR art. 11(3) (“Everyone has the right to protection of the law against such interference or attacks.”).

authorities or from natural or legal persons.”¹⁶ A classic state response would be preventative action to criminalize child abduction or recruitment and responsive action to investigate violations. Yet, this logic equally supports an interpretation that the state must make reasonable efforts to protect against interference to the family caused by generalized acts of man and nature (armed conflict and natural disaster). In this case, respect of family life and protection of the right of the child to “preserve his or her identity ... including family relations,” suggest proactive measures to minimize the risk of separation in case of natural disaster or armed conflict and to enhance the prospects of reunification if separation does occur. This could entail legislation establishing a birth registration scheme that includes distinct identifying characteristics such as fingerprints, or regulations suspending adoptions for a period following a natural disaster.

For families already displaced, human rights provisions further establish an affirmative right to assistance and support. These references focus on the role of the family within society, and they are articulated with the right to marry and the “right to found a family.” For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) directs that the “the widest possible protection and assistance should be accorded to the family...particularly for its establishment and while it is responsible for the care and education of dependant children.”¹⁷ The CRC indicates that the family, as “the natural environment for the growth and well-being of its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”¹⁸

While this language is conditional, the CRC contains two operative provisions which may be read as mandating the provision of assistance to the family in certain circumstances, as a safety net. This may be particularly important in

¹⁶ Human Rights Committee, *supra* note 4, at ¶ 1. See also MANFRED NOWAK, *supra* note 11, at 379.

¹⁷ ICESCR art. 10(1); see also ICCPR art. 23(1), ACRWC art. 18(1).

¹⁸ CRC preambular ¶ 5.

preserving the unity of families at risk due to their displacement. Specifically, the CRC recognizes that “Parents, or...legal guardians...have the primary responsibility for the upbringing and development of the child,”¹⁹ yet requires states to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.”²⁰ At a minimum, this suggests that when a family cannot on its own ensure the child’s enjoyment of his or her rights under the Convention, the state has an affirmative obligation to step in and provide the child’s family with the assistance it needs to do so. This general obligation—applicable to the protection and fulfillment of *all* of the rights specified in the CRC—receives special emphasis through repetition in a separate article addressing the right of every child to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”²¹ Subsequent provisions reiterate that states shall take appropriate measures to assist parents and, “in case of need,” provide material assistance and programs of support.²²

The scope of the right of the family *as an institution* to affirmative protection and assistance is vague, perhaps because it is highly contextual. The Human Rights Committee has observed that the “protection” afforded under ICCPR Article 23 entails adoption of “legislative, administrative or other measures,” but it has not discussed their possible scope or content. There is little guidance in state practice or case law. Considering the periodic report of the Hong Kong Special Administrative Region, however, the Committee suggested that the right of families to protection under Article 23 was violated by the continued separation of family members between Hong Kong and the Mainland.²³ This is

¹⁹ CRC art. 18(1); *see also* CRC art. 5. The ACRWC also recognizes the family as “custodian of morals and traditional values recognized by the community,” art. 18(2).

²⁰ CRC art. 18(2).

²¹ *Id.* at art. 27(1).

²² *Id.* at art. 27(3); *see also* ACRWC arts. 20(1)(b), 20(2)(a).

²³ Human Rights Committee, Concluding observations on Hong Kong Special Administrative Region, Apr. 21, 2006, UN Doc CCPR/C/HKG/CO/2, ¶ 15.

consistent with the Committee's observation in General Comment 19 that "the possibility to live together implies the adoption of appropriate measures...to ensure the unity or reunification of families, particularly when...separated for political, economic or similar reasons."²⁴ In other words, protection as an institution implies a right to live together and to maintain family ties, which in turn implies a duty of the state to make reasonable efforts, within its power, to facilitate the reunion of families separated against their will, regardless of the original cause of separation.

Despite the sweep of its language, ICESCR Article 10 (calling for the "widest possible protection and assistance") is both exhortatory and subject to progressive realization. Similarly, ICCPR Article 23 is subject to derogation. States likely have a wide margin of appreciation concerning their affirmative obligations in light of the context of displacement and available resources. Within this margin, however, it is reasonable to expect states to focus their obligation and resources to protect the most vulnerable families, such that these would be the first to receive assistance and support. Zambia, for example, "provides for the protection of vulnerable families through the provision of various services, which include: bursaries schemes for children whose families are unable to send them to school; medical schemes and food security packs."²⁵ The unique vulnerabilities of displaced families have been recognized by the Committee on the Rights of the Child. Noting that "many families are under pressure as a result of displacement," the Committee recommended that one state party "strengthen and fully implement its poverty alleviation program and develop programs to strengthen family unity, providing assistance to displaced families...in particular."²⁶ The Committee

²⁴ Human Rights Committee, General Comment 19, *Protection of the Family, the Right to Marriage and Equality of Spouses*, 1990, ¶ 5.

²⁵ Initial Report of the Republic of Zambia to the African Commission on Human and Peoples' Rights (40th Sess.), ¶ 485, available at www.achpr.org/english/-/info/news-en.html.

²⁶ Committee on the Rights of the Child, Concluding observations on Ethiopia, Feb. 21, 2001, UN Doc CRC/C/15/Add. 144, ¶¶ 40-41. See also Committee on the Rights of the Child, Concluding observations on Sudan, Oct. 9, 2002, UN Doc CRC/C/15/Add. 190, ¶¶ 37-38 (noting that displacement has 'seriously weakened the

also linked the practice of early and forced marriage of girls to a weakened family structure.²⁷

The right to respect of family life is observed in numerous international human right obligations that bear directly on the rights of internally displaced persons. Ultimately, the distinctions drawn—between respect and protection; between interference and assistance; between the family as a sphere of autonomy or an institution enabling individual development—are hard to draw and even harder to observe in practice. What is certain, however, is that the state should act in good faith to respect family unity through both negative and positive measures, and with attention to the needs and vulnerabilities of both the institution and its individual members in any given context. Where it does so, it should be afforded a significant degree of discretion in the interpretation of these obligations.

International humanitarian law similarly requires respect for family life, providing guidance on how that respect should be implemented in the context of armed conflict. Thus its “protection” is primarily negative (preserving unity) and remedial (tracing and reunification), rather than geared toward the provision of proactive support to the family as an institution within the context of displacement. In concept, its spirit is closest to Article 17 of the ICCPR, for its command that “protected persons are entitled, in all circumstances to respect for their...family life”²⁸ has been equated with a prohibition of arbitrary interference.²⁹ The ICRC has concluded that that the duty to respect family life is customary international law in both international and non-

family environment” and recommending “urgent action to strengthen its support to the family”).

²⁷ Committee on the Rights of the Child, Concluding observations on Ethiopia, Feb. 21, 2001, UN Doc CRC/C/15/Add. 144, ¶¶ 40-41.

²⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, art. 27.

²⁹ COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 202 (Jean Pictet ed., 1958).

international armed conflict, as based on the practice and *opinio juris* of states.³⁰ While this customary right is not absolute (it directs respect “as far as possible”), it puts the onus on each party to do what is reasonably within its power, and it binds *all* parties, imposing obligations equally upon non-state actors exercising control over a civilian population. The ICRC’s customary law study further concluded that a qualified right to family unity exists in both international and non-international armed conflicts: “In cases of displacement, all possible measures must be taken such that the civilians concerned are received under satisfactory conditions...and that members of the same family are not separated.”³¹

Content of the Right to Family Reunification in International Law

International humanitarian law provides the most detailed guidance on the right to reunification and its implementation. As for displacement in situations of generalized violence and natural disaster, global human rights instruments do not recognize a “right to reunification” *per se*, but developments in the last decade indicate that a right to reunification outside armed conflict is now well established.

The fundamental guarantees of Additional Protocol II to the Geneva Conventions require that “all appropriate steps shall be taken to facilitate the reunion of families temporarily separated,”³² and the obligation to facilitate reunification as a component of respect for family unity has been recognized

³⁰ 1 JEAN LOUIS HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 378 (2005). Rule 105 prescribes that “Family life must be respected as far as possible.”

³¹ *Id.* at Rule 131.

³² Additional Protocol II to the Geneva Conventions, art. 4(3)(b). Article 4(3) is devoted entirely to protection of children. Additional Protocol I requires parties to “facilitate in every possible way” the reunion of dispersed families. Additional Protocol I, art. 74.

as customary in both international and non-international armed conflict.³³ Thus, practical safeguards identified in Additional Protocol I—for example, concerning the evacuation of children who are nationals of another state—may be instructive should separation be required in any context of internal displacement.³⁴ Article 50 of the Fourth Geneva Convention and its commentary prescribe precautionary measures relating to the registration and identification of children, essential for successful reunification,³⁵ and commentary to Article 27 provides practical measures to facilitate family enquiries.³⁶ Provisions relating to the re-establishment of family communications are equally relevant.³⁷

International human rights law has exhibited a reluctance to guarantee an express right to family reunification because consideration of the issue has occurred largely in the context of reunification of refugees' and migrant workers' families across international borders. The term "reunification" has been used as short-hand for these situations; even the Convention on the Rights of the Child discusses reunification only in an international context.³⁸ At the time of the drafting of the *Guiding Principles*, no human rights treaty referenced a right to domestic reunification. Yet, there was no question that "traditional arguments in favor of limiting the right to family reunification in

³³ JEAN LOUIS HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 30, at 380. Even earlier, the Cairo Declaration on Human Rights in Islam supported a duty "to arrange visits or reunions of the families separated by the circumstances of war," without reference to the nature of the armed conflict.

³⁴ Additional Protocol I, art. 78(3). Article 78 provides for the evacuation of children for compelling reasons of health or safety, and it establishes an identification procedure intended to facilitate family reunification.

³⁵ Jean Pictet, *supra* note 29, at 287-291.

³⁶ *Id.* at 196-197.

³⁷ Fourth Geneva Convention arts. 25, 26, 136, 140.

³⁸ CRC art. 10(1).

situations of forced movement [across borders] cannot justify limitations in the case of internally displaced persons.”³⁹

As discussed above, the obligations to protect the family in Articles 17 and 23 of the ICCPR and Article 8 of the ECHR support a right to reunification.⁴⁰ Accepting that “effective respect” or “effective protection” of family life requires affirmative measures in some contexts, Article 17 should be read as requiring reasonable measures to facilitate family reunification. The Human Rights Committee, in a case involving the State’s failure to enforce a father’s right of access to his son following divorce, held that “[A]rticle 17 generally includes effective protection to the right of a parent to contact with his or her minor children.”⁴¹ The State was not the cause of the original separation, yet it had means at its disposal to mend the separation. Failure to exercise those means resulted in denial of the “effective protection” of the right to family life under Article 17. While the content of protective measures required may be different, a similar logic concerning state duty would be equally applicable in cases of separation caused by displacement.

The case for an implied right to family reunification under Article 23 of the ICCPR is even easier, as there is no question that the entitlement of protection accorded “requires that the State should adopt legislative, administrative or other measures.”⁴² Moreover, the Human Rights Committee has argued that the right to found a family, also guaranteed by Article 23, necessarily implies

³⁹ WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT—ANNOTATIONS 43 (1st ed. 2000).

⁴⁰ In accord with Article 8, the Council of Ministers of Europe has called upon member states to “take appropriate measures to facilitate the reunification of families which are separated by internal displacement.” Council of Europe, Recommendation, Apr. 5, 2006, ¶ 6.

⁴¹ Human Rights Committee, *L.P. v. Czech Republic*, Communication No. 946/2000, July 25, 2002, ¶ 7.3.

⁴² Human Rights Committee, General Comment 19, *Protection of the Family, the Right to Marriage and Equality of Spouses*, ¶ 3 (1990).

the possibility to live together. That possibility, in turn, “implies the adoption of appropriate measures...at the internal level...to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”⁴³

Like the ICCPR and ECHR, the CRC should be read as implicitly recognizing a right to family reunification for IDPs that would apply uniformly in times of peace, conflict and natural disaster.⁴⁴ The CRC includes “family relations” as one aspect of a child’s identity which must be respected and protected from unlawful interference. It provides “where a child is unlawfully deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”⁴⁵ By its plain language, this necessarily includes the re-establishment of family relations. The Committee on the Rights of the Child, in observations on a state party’s compliance, cited several other provisions when directing the State Party to “giv[e] particular attention to the situation of unaccompanied children and the need for effective tracing” of internally displaced children.⁴⁶ Elsewhere, citing the right of the child “not [to] be separated from his or her parents against their will,”⁴⁷ the Committee urged

⁴³ *Id.*, at ¶ 5. See also Human Rights Committee, Concluding observations on Hong Kong Special Administrative Region (Apr. 21, 2006), UN Doc CCPR/C/HKG/CO/2, ¶ 15.

⁴⁴ As mentioned above, the CRC expressly references “family reunification” only in the context of international separation, CRC art. 10(1) (requiring that state parties address applications by a child or parent “to enter or leave a State Party for the purpose of family reunion...in a positive humane and expeditious manner”). See also CRC art. 22; this is a minimum standard in a situation where separation has not been caused by the state; nor is the state dealing with its own citizens. It would be absurd should human rights law require *less* of a state *vis-à-vis* its own citizens in redressing family reunification arising in the context of internal displacement.

⁴⁵ CRC art. 8(2).

⁴⁶ Committee on the Rights of the Child, Concluding Observations on Burundi (Oct. 16, 2000), UN Doc CRC/C/15/Add. 133, ¶¶ 67-68.

⁴⁷ CRC art. 9(1).

that a state party “continue and strengthen its efforts to ensure family reunification [for those displaced by natural disasters or armed conflict], and that assistance be sought from UNICEF and the Office of the High Commissioner for Refugees in this regard.”⁴⁸

Evolution of the law since the adoption of the *Guiding Principles* is reflected in the entry into force of two African human rights instruments which impose express obligations upon state parties to facilitate family reunification. The strongest commitment is contained in the African Charter on the Rights and Welfare of the Child, requiring “all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.”⁴⁹

Content of the Right to Know the Fate of Missing Relatives in International Law

The right to know shares a common root with the right to reunification: authorities’ efforts to resolve a family separation should result in either reunification or knowledge of the fate of the missing. Yet, each right has an independent basis, and the right to know predates the right to reunification.

At the time the *Guiding Principles* were drafted in 1998, it was recognized that “[b]y guaranteeing an express right of internally displaced persons to know their whereabouts of their relatives, [this provision] fills a gap in the existing rules of international law.”⁵⁰ Human rights law on the missing

⁴⁸ Committee on the Rights of the Child, Concluding Observations on Ethiopia (Feb. 21, 2001), UN Doc CRC/C/15/Add. 144, ¶¶ 42-43.

⁴⁹ ACRWC art. 25(2)(b). *See also* Protocol on the Protection and Assistance to Internally Displaced Persons, art. 4(h) (“Member states undertake to...facilitate family reunification”), which is not limited to cases of reunification involving children. The Protocol is part of the Pact on Security, Stability and Development of the Great Lakes Region, adopted by the International Conference on the Great Lakes Region, Dec. 16, 2006.

⁵⁰ WALTER KÄLIN, *supra* note 39, at 40.

developed in the context of enforced disappearances, which, by definition, involve state action or acquiescence and wrongdoing (the subsequent refusal to acknowledge a deprivation of liberty or concealment of the fate or whereabouts of the person).⁵¹ This body of law is not directly applicable to the right to know the fate of missing relatives in the vast majority of cases of internal displacement, which instead are likely to involve the disappearance of a family member during a natural disaster or flight from violence. Because separation and disappearance is most common in times of armed conflict, international humanitarian law is the source of a “right of families to know the fate of their relatives,” although originally such a right was limited to separation in the context of international armed conflict.

As demonstrated by the aftermath of the 2004 tsunami, the 2005 South Asian earthquake, and Hurricane Katrina, the humanitarian rationale for a right of families to know the fate of the missing is equally compelling regardless of the nature of the cause of separation. Fortunately, developments since the adoption of the *Guiding Principles* have strengthened the right to know and extended its reach in both areas of law. The ICRC’s customary law study found that the right to know has become customary in all armed conflict, and that it imposes a substantial obligation to respond to the family’s rights and needs: parties to the conflict “must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.”⁵² Further, a spate of General Assembly resolutions and agreements at the international level have restated a duty to clarify the fate of the missing in the aftermath of armed conflict, and bilateral peace and other agreements between parties to a conflict often now include an obligation to search and account for the missing.⁵³

⁵¹ International Convention for the Protection of All Persons from Enforced Disappearances, art. 2.

⁵² JEAN LOUIS HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 30, at 421 (Rule 117).

⁵³ *See, e.g.*, Dayton Accords, Annex 7, art. 5.

The African Charter on the Rights and Welfare of the Child was the first human rights treaty to recognize the child's "right to essential information" concerning a missing or absent family member where separation is a result of state action.⁵⁴ The ACRWC further contains a provision providing special protection and assistance to any child separated from his or her parents for any reason, including "all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflict or natural disasters."⁵⁵ Given the interrelatedness of the right to reunification and the right to know, implementation of the special protection and assistance owed to separated children will impose a duty to investigate cases of the missing in some instances.

The European Court of Human Rights derived a duty of the state to investigate cases of missing persons by recognizing that the suffering of family members when a state fails to investigate can rise to the level of inhuman treatment. Twenty-seven years after the invasion of Cyprus by Turkish forces, the Court found that the State "failed to undertake any investigation," although "the provision of such information [concerning the missing] is the responsibility of the authorities."⁵⁶ Notably, it was not alleged that all of the missing were victims of enforced disappearance; some were merely "missing" following the mass flight caused by the invasion and subsequent hostilities. Thus, implicit in the ruling is recognition that failure to investigate can constitute disrespect of family life, specifically a failure to respect the relationship between the complaining family member and the missing. This failure of a positive obligation under Article 8 of the ECHR would constitute the primary rights violation. By de-linking the duty to investigate from the wrongdoing of enforced disappearance, this analysis suggests that the duty to investigate missing persons exists regardless of the cause of disappearance and is now equally applicable to natural disaster. The Human Rights Committee applied

⁵⁴ ACRWC art. 19(3). The Charter entered into force in 1999.

⁵⁵ *Id.*, at art. 25(2)(b).

⁵⁶ Case of Cyprus v. Turkey, Application No. 25781/94, European Court of Human Rights Grand Chamber, Judgment of May 10, 2007, ¶ 157.

similar reasoning concerning the 15,000 cases of missing persons that remained unresolved more than ten years after the conflict in the territory of Bosnia and Herzegovina. The Committee found that “the family members of missing persons have the right to be informed of the fate of their relatives,” and cautioned that “failure to investigate the cause and circumstances of death...of missing persons increases uncertainty and, therefore suffering inflicted to family members and may amount to a violation” of the prohibition of inhuman or degrading treatment or punishment.⁵⁷

By recognizing the twin duties to endeavor to establish the fate of the missing and to keep family members informed while doing so, the *Guiding Principles* direct states in their obligation to respect the right of families to know. Of course the right to know is not absolute; especially in cases of armed conflict and natural disaster, the disappearances of many individuals may never be resolved. While the state must use “best efforts,” this language acknowledges substantial discretion in determining the means to be used, considered in light of (1) the context of the displacement and disappearance, and (2) available resources. Such resources necessarily include those available through the international community; the state will engage in its own efforts, but should also cooperate with humanitarian actors with recognized mandates in the areas of tracing and reunification.⁵⁸

Content of Rights Relating to Mortal Remains and Gravesites in International Law

While humanitarian law is the source of the duty to respect the dead, the same principles are increasingly reflected in the standards and jurisprudence of human rights. Disparities in the treaty law of international and non-international armed conflict have been resolved by the ICRC’s conclusion that

⁵⁷ Human Rights Committee, Concluding Observations on Bosnia and Herzegovina (Nov. 22, 2006), UN Doc CCPR/C/BIH/CO/1, ¶ 14.

⁵⁸ The ICRC and the national Red Cross and Red Crescent societies, as well as UNICEF, UNHCR, and implementing partners such as Save the Children, all have expertise in tracing and reunification.

a number of rules are customary in all armed conflict.⁵⁹ This includes the duty to take all possible measures: (1) to search for and collect the dead; (2) to prevent mutilation or despoliation of dead bodies; (3) to endeavor to return mortal remains and personal effects of the deceased or dispose of the dead in a respectful manner; and (4) to respect and maintain their graves. To assist with subsequent identification, parties to a conflict must record all available information prior to disposal and mark the location of graves. Notably, abuse and desecration of the dead is identified as a war crime in the Rome Statute of the International Criminal Court.⁶⁰

Binding human rights instruments have not addressed the handling of mortal remains, a subject which is more often treated domestically in public health laws and criminal codes. A widely referenced humanitarian code, the *Sphere Standards*, addresses burials following natural disaster from the perspective of “mental and social aspects of health.”⁶¹ However, the jurisprudence of the Human Rights Committee has brought the treatment of mortal remains and gravesites within the scope of human rights, as pertaining to the rights of remaining family members. The Committee found that systematic failure to inform families of the burial sites of executed prisoners violates Article 7 of the ICCPR.⁶² This clearly builds on precedent that failure to investigate cases of the missing, or withholding information about their whereabouts, may amount to inhuman treatment of family members.

⁵⁹ JEAN LOUIS HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 30, at Rule 116.

⁶⁰ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998), art. 8(2) (xxi).

⁶¹ THE SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE 291-293 (3d ed. 2004).

⁶² Human Rights Committee, Concluding Observations of the Human Rights Committee, Tajikistan (July 18, 2005), UN Doc. CCPR/CO/84/TJK, ¶ 9. *See also* Concluding Observations on Bosnia and Herzegovina, *supra* note 57, at ¶ 14 (observing that failure to provide information regarding the burial sites of missing persons “may amount to a violation of article 7 of the Covenant.”).

Though non-binding, the Inter-Agency Standing Committee’s *Operational Guidelines on Human Rights and Natural Disaster* articulate the first human rights norms addressing mortal remains and gravesites. For states they are helpful in elaborating upon the basic duties established in the *Guiding Principles*. The *Operational Guidelines*’ prioritize the return of remains, where possible, indicating that only “[i]f remains cannot be returned—for example, when the next of kin cannot be identified or contacted—they must be disposed of respectfully....”⁶³ Even then, disposal should be done “in a manner [that allows] their future recovery and identification” and subsequent return. Because cremation would preclude future identification and return, as well as limit a family’s ability to conduct rites in accord with their religious traditions or preferences, it is to be avoided.⁶⁴ The *Guidelines* also elaborate on the concept of “respectful disposal” of remains: burials should “respect the dignity and privacy” of the dead and should take into account local religious and cultural practices.⁶⁵ With a focus on preserving options for future recovery of remains for their subsequent identification, the accompanying *Field Manual* identifies the type of information to be recorded and potential methods of forensic identification.⁶⁶

OVERVIEW OF OBSTACLES TO IMPLEMENTATION OF THE GUIDING PRINCIPLES

Many states expressly recognize the right to respect of family life, but with little or no elaboration as to what such respect entails at the level of state action, leaving the right rather abstract. This is in keeping with the still popular view that the right is primarily one of non-interference, and the fact that rarely would a state or humanitarian actor intentionally disrupt the family life of IDPs. As discussed below, the context of displacement illustrates the

⁶³ IASC Operational Guidelines on Human Rights and Natural Disasters, Brookings-Bern Project on Internal Displacement, § D.3.5 (2006).

⁶⁴ *Id.*, at § D.3.6.

⁶⁵ Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster, Brookings-Bern Project on Internal Displacement, § D.3.7 (2008).

⁶⁶ *Id.*, at 58-59.

threats to family integrity inherent in this view and the necessity of an appropriate policy and institutional framework for protection.

Common Challenges to IDPs' Enjoyment of the Right to Respect of Family Life

In the chaos attendant to displacement, family members can easily become separated. IDPs may face insurmountable obstacles to locating missing family members, particularly when people are widely dispersed, communications networks are disrupted, and there are legal or practical impediments to freedom of movement. Young children may be separated and their identity unknown.

In situations of mass displacement due to armed conflict or natural disaster, the chances of locating a missing family member or learning of their fate are greatly increased if there is easy and immediate access to a pre-existing central mechanism for the reporting of missing persons and the collection and coordination of data. However, there is a general lack of understanding of the right to reunification and the government's responsibilities to search for missing persons. This means that not only do victims not pursue their rights, but also governments fail to establish the appropriate institutions and mechanisms for tracing and reunification and for the handling of mortal remains. Following a disaster, critical identifying data may be lost because efforts must be focused on emergency assistance for the living, because of the overwhelming scope of the disaster, or because of carelessness or ignorance of best practices for the handling of mortal remains. In the immediate days following Hurricane Katrina in the United States, when flood waters were still high, authorities consumed with finding living victims resorted to tying bodies to telephone poles, leaving them for collection at a later date.⁶⁷

Disruption of the family increases the vulnerability of all persons concerned because the family functions as the most basic source of protection and stability for all of its members. In many countries, women are not accorded the

⁶⁷ Jere Longman, *A Suspension of Disbelief in the Lost City*, N.Y. TIMES, Sept. 11, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9A07E5D71331F932A2575AC0A9639C8B63&sec=&spon=&pagewanted=1>.

same legal capacity as men, leaving them liable to exploitation and gender-based violence. Where an adult male has gone missing or died during displacement, female heads of household experience additional difficulty maintaining the integrity of their families if they are denied access to family property or finances or must confront laws or customs that restrict or reassign custody of their children to a male relative. On the other hand, newly single fathers may have difficulty reconciling cultural expectations with a dual role as sole caregiver and provider.

When children are separated from family members, their vulnerability to sexual exploitation, trafficking, gender-based violence and recruitment increases. If not immediately identified, registered, and placed in appropriate care, such children are easily abducted or exploited. In one South Asian nation, false claims of parentage came to light two years after the 2004 tsunami. Separation of other vulnerable IDPs (e.g., the elderly or people with disabilities) from relatives who act as caregivers also raises risks to life and health.

Even if families remain together during the displacing event, the risk of separation continues throughout displacement, and separation may occur even at the time that durable solutions appear possible. In particular, families may subsequently separate as a coping strategy. Such “voluntary” separation may appear as the only solution when a parent or head of household feels unable to meet basic food or security needs. In such cases, parents may leave children with extended family, friends, or even strangers. Following the 2007 post-election violence in Kenya, hundreds of children were identified as living in newly established “charitable children’s institutions” which were both unregistered and unregulated. Early and forced marriage—offering the hope of better security or adequate food—was a well-known phenomenon among families at risk following the earthquake in Pakistan. Parents may leave the family to seek work elsewhere or send their children to work. Such coping strategies raise serious risks of exploitation for the child. If sensitive to these risks, government and humanitarian actors may proactively address them by targeting basic support and assistance to the most vulnerable families.

In some cases, the actions of government or humanitarian actors inadvertently encourage family separation. Families can be unintentionally separated during

a poorly planned mass transportation of IDPs for relocation to another camp, return or resettlement, or intentionally separated when one family member is sent for medical treatment or in order for a child to go to school. Government policies often, quite understandably, encourage IDPs to return to their place of origin as soon as conditions are deemed safe. Financial or other assistance may be conditioned upon return by a certain date. Yet, if truly sustainable conditions for return are not re-established in parallel with return—if schools and medical clinics have not re-opened, if parents do not have access to livelihoods or feel that the situation remains insecure, or if homes have been destroyed and temporary shelter is not deemed adequate—parents frequently decide to leave part of their families behind in camps or host communities. Finally, in the rush to find solutions for separated or unaccompanied children,⁶⁸ adoptions that are permitted either too quickly following a natural disaster or other mass displacement, or before all tracing mechanisms have been exhausted, may result in a permanent rupture of family life.

OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

The discussion above highlights that many of the obstacles to protection of family life in displacement are operational or programmatic. With one notable exception—discussed below—they are not legal in character. They stem from a lack of awareness of the potential threats and how they may be mitigated, an absence of institutional capacity, and a failure to establish appropriate mechanisms for protecting separated and unaccompanied children and for tracing the missing and handling the dead.

The exception lies in laws and practices that are *de jure* or *de facto* discriminatory with regard to women's rights and responsibilities in the family. A number of human rights instruments specifically address the issue. Article 23(4) of the ICCPR provides "States Parties...shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage,

⁶⁸ A *separated child* is separated from his or her parents or legal or customary caregiver. An *unaccompanied child* is separated from both parents and other adult family members and is not being cared for by an adult who is responsible for doing so, by law or custom.

during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”⁶⁹ The equal rights of parents in relation to their children are elaborated in CEDAW, CRC, ACRWC and Protocol 7 to the ECHR.⁷⁰ CEDAW indicates in particular that women shall enjoy “the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children.”⁷¹ Equality in family relations also requires “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.”⁷²

Despite these obligations and even their reflection in many national laws, there remains a substantial gap in women’s ability to exercise and enjoy these rights in many countries. Because the vast majority of IDPs are women and children, and the incidence of female-headed households increases following displacement, this disparity can have a direct bearing on the health and integrity of the family. As discussed above, even as many displaced women assume a new role as head of household, they often encounter legal, customary, or practical barriers that threaten their ability to engage in livelihoods, to access family property, and to retain guardianship of their children. Whether in statutory or customary law, women’s right to inherit property may be denied, just as customary law may support the practice of wife- or child-inheritance, usually by the husband’s or father’s brother. In other instances, women may be prevented from accessing property or other assets if they cannot produce a death certificate for a missing husband.

⁶⁹ ICCPR art. 23(4). Even before the ICCPR, the Universal Declaration of Human Rights provided that “[men and women] are entitled to equal rights as to marriage, during marriage, and at its dissolution.” UDHR, art. 16(1).

⁷⁰ CEDAW arts. 5, 16; CRC art. 18; ACRWC art. 18; ECHR, Protocol 7 art. 5.

⁷¹ CEDAW art. 16(f).

⁷² CEDAW art. 16(h). The Human Rights Committee has affirmed that the equal rights of spouses in marriage include the administration of assets. Human Rights Committee, General Comment 19, *supra* note 42, at ¶ 8.

Women heads-of-household have also encountered discrimination in regulations or administrative practices governing access to assistance. For example, it is common to distribute assistance to heads-of-household, but with a presumption that these are men. In Zambia, it took a decision of the High Court before a “single-parent family headed by a female [was] recognized as a family unit in the Zambian society.”⁷³ Simple administrative practices which seem logical, when paired with custom, may also have the unintended effect of excluding women. After the 2004 tsunami, some fisherwomen did not receive compensation, which had been distributed through the fishermen’s unions and associations. By custom, women were not members of these organizations. Likewise, customary views of gender roles may affect women’s opportunities for training and access to livelihoods.

REGULATORY FRAMEWORK

States should begin with a comprehensive review of existing legislation, policies, and regulations for their potential effects on families and compliance with international standards. Approaches differ: consistent with international human rights obligations, some states explicitly recognize the right to family life in their national constitution or legislation. But despite the existence of family laws or codes, it is rare to find a comprehensive legal framework addressing all aspects of the right to respect for family life indicated by the *Guiding Principles*. Instead, relevant aspects may be scattered through civil code provisions on child protection, adoption, inheritance, and enabling legislation for ministries or administrative departments. There may be separate laws or peace agreements addressing the missing and dead, particularly following armed conflict. Public health and safety regulations often address the collection and disposal of mortal remains, and criminal penal codes protect corpses and gravesites from mutilation and despoliation. In some societies, issues related to family law are further regulated through customary law and local practice, which may or may not be recognized or consistent with national law and international human rights standards.

⁷³ African Union, Initial Report of the Republic of Zambia to the African Commission on Human and Peoples’ Rights (40th Sess.), ¶ 499, *available at* www.achpr.org/english/-/info/news-en.html.

The following sections identify key recommendations for states covering both substantive provisions and organizational arrangements. Relevant examples of laws and policies are provided.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Against the framework described above, existing law may need to be amended to take into account particular needs or vulnerabilities related to displacement. At a minimum, however, national authorities should recognize: (1) the right of IDPs to family unity, including the right to remain together and the right to domestic reunification when separated, and (2) the right of family members to know the fate of the missing, with the corresponding duty of the state to endeavor to establish this fate. Like laws ensuring the equal rights of women with respect to rights and responsibilities in family life, these laws need not be limited to the context of displacement, but any displacement-specific legislation should incorporate these elements.

As reflected in the *Guiding Principles*, the right to respect of family life largely imposes obligations of means rather than result. Particularly during major displacing events such as natural disaster and armed conflict, there can be no guarantee of reunification, location of a missing family member, or recovery of mortal remains. Since the most effective means of pursuing these objectives are often highly contextual, states have substantial discretion in how they go about respecting, protecting, and ensuring these rights. Once the core rights are reflected in law, the focus should be on whether states have undertaken all reasonable and appropriate measures to ensure protection and realization of the rights. For example, have procedures and mechanisms for tracing the missing been established? Are the needs of the most vulnerable families specifically targeted? Incorporation of the rights will therefore most often be achieved at the level of agency or ministry regulations and particularly in programmatic considerations. A key consideration is establishment of the institutions—or the institutional recognition, if non-governmental—necessary to accomplish the work of family reunification and tracing.

Prior to Displacement

Domestic Incorporation of Fundamental Rights

Each of the rights related to respect of family life—the right to family unity; the right to domestic reunification; the right to know the fate of missing relatives—should be recognized in domestic law, either constitutional or statutory. Additional legislation, administrative regulations, or national policies may then provide context and specificity to the rights, define corresponding obligations of the state and other parties, establish procedures and guidelines for implementation, and provide for review and redress of violations of the rights.

Iraq's National Policy on Displacement, for example, expressly recognizes both the right to family unity and the right of IDPs to obtain information on missing relatives, and it equally reflects the corresponding duties of governmental authorities to “protect the integrity of the family and community” and “to provide the required information” on the missing.⁷⁴ Similarly, Uganda's National Policy for Internally Displaced Persons contains a provision on family reunification that closely tracks Guiding Principle 17(3).⁷⁵

Defining the Family

Considerations of what constitutes a family may arise at legislative, administrative, and programmatic levels. For purposes of family unity, reunification, and tracing, states should adopt a broad and flexible definition. At a minimum, any definition should take cognizance of emotional, social, and economic ties, particularly dependencies. In its national policy for resettlement of development-affected IDPs, India has specifically included “other members

⁷⁴ Iraq Ministry of Displacement and Migration, National Policy on Displacement, §6.10 (July 2008).

⁷⁵ Uganda National Policy for Internally Displaced Persons, Office of the Prime Minister, Department of Disaster Preparedness and Refugees, art. 3.7.1 (Aug. 2004).

residing with [the affected landholder] and dependent on him for their livelihood.”⁷⁶ When determining care arrangements for separated or unaccompanied children, the definition should be interpreted through the lens of the “best interests of the child,” which would include consideration of roles and relationships of non-biological care givers, including unmarried and same-sex partners as well as co-wives in polygamous marriages.

“Best interests of the child” and “Respect for family life”

Beyond a legal framework including recognition of the fundamental rights, governments may adopt principles to guide administrative action and the development of programs. Articulation of such standards is useful because protection of the family in displacement is contextual, rendering it impossible to establish rules governing all possibilities. Colombia has included the “physical, psychological and moral integrity of the family” as one of its guiding humanitarian principles for implementation of its plan of action for the displaced.⁷⁷

At a minimum, governments should formally adopt or endorse the principles of the “best interests of the child” and “respect for family life” to guide decision makers and implementing agencies. The incorporation of these standards should be reflected in all program and activities related to IDPs. For example, to address concerns identified above, “respect for family life” would be reflected in decisions about the provision of emergency and transitional shelter; in the planning of population movements; and in the planning of conditions for return.

The principle of the “best interests of the child” was adopted in the Convention of the Rights of the Child as an umbrella requirement to systematically consider the individual child’s well-being in any assessment or

⁷⁶ National Policy on Resettlement and Rehabilitation for Project Affected Families 2003, Gazette of India, Extraordinary Part I, Section 1, No. 46, § 3.1(j) (Feb. 17, 2004).

⁷⁷ Colombia Decreto No. 250, Ministerio del Interior y de Justicia, 1.1 (2005).

determination.⁷⁸ It should also govern state action affecting children more generally as a population.⁷⁹ The right to respect of family life, particularly the right to family unity and the related right to reunification, must be read within in the context of the “best interests of the child.” While criticized by some as vague, the principle is valuable for displaced, separated, and unaccompanied children precisely because it is contextual and flexible. For example, while in practice reunification is most likely to be in the child’s best interest, such a presumption cannot excuse relevant authorities from acting in the best interests of each individual child in *all* of its undertakings—including preservation of unity or reunification. The process of reintegrating former child-soldiers is another example where the best interests of the child requires careful consideration in the individual case. Likewise, at the policy level, the best interests of the child should inform the scope of the state’s obligations to trace missing persons following natural disaster.

Legislation on the Missing and the Dead

Based on its many years of experience in tracing and reunification of families affected by armed conflict, the International Committee of the Red Cross has produced a draft model law on missing persons.⁸⁰ Laws on the missing have proved particularly useful in large scale contexts of internal armed conflict, ethnic-cleansing, and other human rights abuses, including disappearances. More than 20,000 people went missing during the conflict in the Balkans, and

⁷⁸ CRC art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”). *See also* CRC art. 9.

⁷⁹ *See* UNHCR, Guidelines on Determining the Best Interests of the Child (2008); UNHCR, Children—Protection and Information Sheet, “Best Interests of the Child” (June 2007); ICRC, UNHCR, UNICEF, International Rescue Committee, SCF-UK, World Vision International, Inter-Agency Guiding Principles on Unaccompanied and Separated Children (2004).

⁸⁰ International Committee of the Red Cross, Advisory Service, Guiding Principles/Model Law on the Missing, *available at* www.icrc.org (ICRC Model Law).

the ICRC has reported that 13,000 remained missing in Bosnia as of 2007.⁸¹ While some displacement-related policies include general directives to authorities to “take appropriate measures to ensure family reunification,”⁸² when separation and disappearances happen on such a mass scale, they are likely to affect displaced and non-displaced families alike. In such cases, separate legislation on the missing can allow a more systematic and comprehensive approach such as those taken in Bosnia and Peru.⁸³

The ICRC’s model law provides an inclusive definition of a “missing person,” covering those whose whereabouts are unknown and who have been reported missing in connection with armed conflict, situations of internal violence, or natural disaster. The model law offers a framework addressing the substantive, procedural and institutional aspects of prevention, response and resolution of the problem of missing persons. It broadly covers the rights and legal status of both the missing and their relatives, the responsibilities of the state, the establishment of necessary institutions, procedures for tracing missing persons and for the recovery and treatment of the dead, and the establishment of criminal liability for certain malfeasance in an investigation, including failure to fulfill obligations toward the families of the missing, as well as for despoliation of the dead. The clear articulation the state’s duty to receive tracing requests, to investigate, and to keep family members informed of progress is particularly important.⁸⁴

⁸¹ ICRC, *Missing Persons—A Hidden Tragedy*, 4, 11 (2007).

⁸² Uganda National Policy, 2004, *supra* note 75, at art. 2.4.1, viii.

⁸³ Law on Missing Persons of Bosnia and Herzegovina, Official Gazette No. 50 (Nov. 9, 2004); Peru Law on the Creation of the National Register of Information on Missing Persons, Ley No. 28022 (Dec. 17, 2003), *El Peruano*, at 247943.

⁸⁴ *See, e.g.*, ICRC Model Law art. 7(1) (relatives’ right to know fate of missing and authorities’ duty to keep relatives informed of progress and results); Colombia’s Law No. 971 setting out regulations of the urgent search mechanism and other provisions, *Diario oficial* no. 45.970, July 15, 2005 (concerning obligation to search for missing persons).

Concerning family members left behind, the model law goes beyond mere recognition of the right to know by addressing some of the legal impediments families of the missing face. As previously mentioned, when a husband goes missing and there is no death certificate, often a woman is “considered neither widow nor wife—she has no rights over family possessions and often not even legal custody of her children. She is not entitled to a widow’s pension and cannot remarry.”⁸⁵ She may not have access to family assets held in her husband’s name. The model law responds to these concerns with provisions enabling a family member or other representative to administer the missing person’s assets, including allowance, to meet the immediate needs of the missing person’s dependents.

In addition to the model law, the ICRC maintains an Advisory Service on International Humanitarian Law to consult and support states in the drafting of national legislation. The International Commission on Missing Persons, originally established as an independent organization to support the Dayton Peace Agreement in Bosnia, also supports governments to establish effective mechanisms for identification of the missing and the dead.⁸⁶

If not included in legislation on the missing, the treatment and disposal of mortal remains is generally addressed in legislation that is not specific to the context of internal displacement. Estonia recently enacted legislation protecting the mortal remains of those who died during the Estonian war of independence.⁸⁷ Among other things, this legislation creates a war graves committee to advise the relevant ministry concerning exhumation of graves, identification and disposal of remains, and maintenance of a registry of graves. In other instances, countries have included the collection and disposal of corpses in regulations on public health and safety; and criminal penal codes often protect both corpses and gravesites from mutilation and despoliation.

⁸⁵ ICRC, *The Missing: Preventing Disappearances and Finding Answers* (interview with Renee Zellweger Monin), Aug. 27, 2007.

⁸⁶ See <http://www.ic-mp.org>.

⁸⁷ Protection of War Graves Act, Riigi Teataja I (2007).

Gender Equality

Following the above legal analysis on obstacles to implementation of the *Guiding Principles*, states must address laws and practices that inhibit women's enjoyment of equal rights in relation to the family, property and inheritance, and livelihoods. Incorporation of the relevant provisions of the ICCPR, IESCR, and CEDAW into national law is far from sufficient. Competing cultural practices must be addressed, there must be active enforcement of laws, and women themselves should be educated about their rights.

Affirmative measures may also address vulnerabilities and redress past discrimination. For example, Uganda's National Policy directs local governments to give special protection and support to female-headed households (and other vulnerable populations) in the acquisition and allocation of land pursuant to a separate Land Act or other procedures.⁸⁸ Likewise, guidelines on resettlement and integration in Burundi's Peace Agreement prioritize the allocation of available assistance for income-generating activities and calls for "special attention to women and enhancing their roles in building and sustaining families."⁸⁹

Universal Birth Registration

States can also take preventive measures to facilitate reunification if separation should ever occur. Everyone has the right to recognition as a person before the law. As discussed in Chapter 9, personal identification documents can be instrumental to the enjoyment of that right, and Article 24(2) of the ICCPR provides that "Every child shall be registered immediately after birth and shall have a name." Similarly, the CRC mandates that "the child shall be registered immediately after birth."⁹⁰

⁸⁸ Uganda National Policy, 2004. *supra* note 75, at art. 3.5.4.d.

⁸⁹ Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, Reconstruction and Development, art. 4(c).

⁹⁰ CRC art. 7(1). *See also* ACRWC art. 6(2) ("every child shall be registered immediately after birth.").

When it implements this existing and independent right of the child, the state provides a tool for tracing, reunification, and identification of mortal remains because the birth certificate contains essential information on the individual, his or her parents, and place of birth. Although birth registration campaigns need not be displacement-specific, Angola's Standard Operational Procedures for the Enforcement of Norms on the Resettlement of Displaced Populations includes a general obligation upon the Provincial Delegation of the Ministry of Justice to register births and issue personal and national identity cards.⁹¹

During Displacement

Special Protection and Assistance to Families at Risk

The family also may be supported and protected through targeted assistance. Displaced families may face significant challenges meeting the material needs of its members, particularly those of children. Targeted interventions can prevent parents from relinquishing care of their children to other families or institutions or adopting other coping mechanisms identified above. In terms of prevention, Uganda has recognized the risk of early marriage and other forms of exploitation and has called for government and humanitarian agencies to adopt special preventative measures.⁹²

In terms of targeted assistance, Nepal's National Policy on Internally Displaced Persons provides for a "program in connection with nutriment and foodstuffs for displaced families with young children."⁹³ Nepal's relief program for IDPs also recognizes that families whose traditional source of support has been killed or disabled may need transitional support: among other things, it proposes skills development and income generating projects for

⁹¹ Angola Standard Operational Procedures for the Enforcement of the "Norms on the Resettlement of the Internally Displaced Populations," Council of Ministers Decree No. 79/02, art. 12 (Dec. 6, 2002).

⁹² Uganda National Policy, 2004. *supra* note 75, at art. 3.1.

⁹³ Nepal National Policy on Internally Displaced Persons, §6.4.11 (Mar. 2006).

“women family members of deceased or disabled victims.”⁹⁴ Colombia’s law on assistance to IDPs assigns priority to “the assistance of infants, minors, especially orphans, and family groups” in the programs of the Colombia Institute of Family Welfare.⁹⁵ Georgia has also indicated that humanitarian assistance and targeted care should be prioritized for the most vulnerable groups, including single mothers and children without adequate resources.⁹⁶

Iraq’s policy goes one step further. Specifically, the Iraqi National Policy on Displacement recognizes the psychological impact displacement can have on families. In response, it calls for the establishment of “social welfare teams” to identify and follow vulnerable families and particularly to coordinate their efforts “in order to arrive at a common understanding of the needs of these displaced families to offer them the best services possible.”⁹⁷ It further identifies that displaced families may face additional challenges to meet the needs of members with physical or mental disabilities.⁹⁸

Maintaining Family Unity

If states adopt the principle of “respect for family life,” the preservation of family unity should inform all protection responses. Peru’s Law Concerning Internal Displacements, for example, provides that when involuntary displacement must occur, responsible authorities must ensure that members of

⁹⁴ Nepal Relief Program for Internally Displaced People Due to Conflict for FY 2004/05, at 5.

⁹⁵ Colombia Law 387, Diario Oficial No. 43,091, art. 19(7) (July 24, 1997).

⁹⁶ Georgia Decree #47, On approving of the State Strategy for Internally Displaced Persons—Persecuted, ch. 4.3.1(b) (Feb. 2, 2007).

⁹⁷ Iraq Ministry of Displacement and Migration, National Policy on Displacement, §6.6 (July 2008).

⁹⁸ *Id.* at §6.10.

families are not separated.⁹⁹ Effective measures to preserve unity will often be of a programmatic or operational nature. Following the post-election violence of 2007 in Kenya, young children were tagged with identifying wrist bands during the return movement. Angola's procedural directives on resettlement also impose an obligation on responsible authorities to "ensure that IDP populations not in condition to be transported for medical reasons remain in the location accompanied by their family members."¹⁰⁰

Respect for family life also suggests that to the extent possible in the existing conditions, shelter and housing programs should ensure a minimum of privacy and facilities sufficient for family life. Iraq's policy addresses this by adopting the Sphere Standards as a minimum standard for any assistance, including housing.¹⁰¹

Registration of IDPs

Registration of IDPs is often used to identify needs and to document entitlement to certain assistance. At the same time, registration may be used as a tool to assist authorities and humanitarian actors in identifying (1) separated or unaccompanied IDPs, including children; (2) families facing immediate risks; and (3) family units that must be respected in the assignment of housing or during relocation and assisted return. To enhance tracing and reunification activities, registration should be an on-going process that records essential information concerning the identity of the individual, accompanying family members, the place and date of initial displacement, and the current residence.

⁹⁹ Peru Law Concerning Internal Displacements, Law No. 28223, art. 8.2 (2004). *See also* Uganda National Policy, *supra* note 75, at art. 3.4 (instructing relevant government institutions to "make every effort to ensure that internally displaced families are returned or resettled together when they so desire.").

¹⁰⁰ Angola Standard Operational Procedures for the Enforcement of the "Norms on the Resettlement of the Internally Displaced Populations," *supra* note 91, at art. 7(j). *See also* art. 11(g) ("The provincial entity...shall...keep the family members together during the resettlement or return process.").

¹⁰¹ Iraq Ministry of Displacement and Migration, National Policy on Displacement, *supra* note 97, at §7.

Special protection of separated or unaccompanied children

Children who are temporarily or permanently deprived of their family environment, for any reason whatsoever, are entitled to special protection and assistance provided by the state. Priority should be given to identifying and registering separated and unaccompanied children. Angola's Standard Operational Procedures for the Enforcement of Norms on the Resettlement of Displaced Populations identifies a provincial entity responsible for "identify[ing] children separated from their families,"¹⁰² and further requires certain reunification activities, such as establishing a database with photographs of separated children and information-sharing with other provincial authorities.

During separation, the state must ensure alternative care, consistent with the best interests of the child. Generally, a strong preference is shown for placement with extended family or members of the child's original community, and placement in a foster home or institution is viewed as a last resort. Iraq's National Policy specifies that "those children who cannot be reunited with their families shall receive care in their original communities."¹⁰³ Guidance on temporary care arrangements, pending reunification, is available in the Inter-Agency Guiding Principles on Unaccompanied and Separated Children.¹⁰⁴ While tracing efforts continue, all temporary or interim care arrangements should be monitored. UNICEF has particular expertise in supporting governments to establish systems to register and monitor children's institutions and databases for separated and unaccompanied children.

¹⁰² Angola Standard Operational Procedures for the Enforcement of the "Norms on the Resettlement of the Internally Displaced Populations," *supra* note 91, at arts. 11(c), (d), (f).

¹⁰³ Iraq Ministry of Displacement and Migration, National Policy on Displacement, *supra* note 97, at §6.10. *See also* Uganda National Policy, *supra* note 75, at art. 3.7.2.

¹⁰⁴ ICRC, UNHCR, UNICEF, International Rescue Committee, SCF-UK, World Vision International, Inter-Agency Guiding Principles on Unaccompanied and Separated Children (2004).

Community Participation, Monitoring and Accountability

Government policies should assure that there is both consultation and participation of displaced communities and families in the development of plans and programs that are intended for or will affect them. This is not only an important procedural right; it also enhances the prospect that policies and programs will be truly responsive to families' needs and concerns. Special attention must to be paid to ensure women's participation.

Likewise, it is important to include family protection and on-going monitoring of the situation of IDPs. Angola provides for an Ad Hoc Group for Technical and Administrative Support to monitor resettlement and return. Among the indicators to be considered are family tracing and reunification activities and the establishment of birth registration databases. This group is required to submit monthly reports to a provincial commission which, in turn, reports to a national body.¹⁰⁵

In the Context of Durable Solutions

Planning the conditions for sustainable return

In an effort to allow IDPs to regain normalcy as quickly as possible, governments may hasten the process of return. In planning for return or resettlement, authorities must ensure that essential conditions for physical security are already in place, and that shelter and essential services (sanitation, health and education) are re-established *prior* to the start of any organized return movement. Sufficient humanitarian assistance must be provided to bridge the gap until families are self-sufficient. Facilitating return absent these conditions creates precisely those circumstances under which families feel they must separate. This often results in men returning to claim property and re-start livelihoods, while others, often children, remain, either for physical security or to satisfy other basic needs.

¹⁰⁵ Angola Standard Operational Procedures for the Enforcement of the "Norms on the Resettlement of the Internally Displaced Populations," *supra* note 91, at art. 20.

Intermediate and long term solutions for separated and unaccompanied children

The Convention on the Rights of the Child prioritizes the re-establishment of a family context: “the child, for the full and harmonious development of his or her personality, should grow up in a family environment.”¹⁰⁶ For children who remain separated or unaccompanied after the emergency phase, preserving the opportunity for reunification is important. Legal adoption is usually an irrevocable process that would preclude subsequent reunification. Thus, in some instances following natural disaster such as the 2004 tsunami, states have imposed moratoria against foreign adoption or against the finalization of adoption for a substantial period of time.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Prior to Displacement

Identification of institutional responsibilities

Any overall national coordination mechanism to address internal displacement should be charged with ensuring an adequate response for the respect and protection of family life, in all of its aspects. Within this realm, responsibility for specialized activities related to tracing and reunification, the care of separated and unaccompanied children, and the handling of mortal remains may be assigned to existing or concurrently established government authorities. Georgia has made a general assignment of responsibility for the rights of the displaced, including “measures of search for the graves of the dead and the missing, as well as the tracing of the missing” to the Ministry of Refugees and Accommodation.¹⁰⁷ Ideally, the identification of responsible entities and their duties should be done in advance of any displacement crisis, to allow for preventative and preparatory measures.

¹⁰⁶ CRC preambular ¶ 6.

¹⁰⁷ Law of Georgia on Forcibly Displaced—Persecuted Persons, art. 5(i).

Some governments have found it useful to specify the relationship and distribution of obligations between national and local authorities. Many of the services relevant to the family—particularly tracing of missing family members and the care of separated and unaccompanied children—are better provided at the local level (albeit with national coordination) because local officials necessarily are more sensitive to the challenges and opportunities of the local context. In these instances, national authorities retain full responsibility for compliance with their international human rights and humanitarian obligations. Accordingly, they must ensure that operational authorities have the necessary financial, human, and other resources to effectively meet their responsibilities under international and national law. Both Angola and Uganda provide examples that maintain centralized coordination but devolve responsibility for family reunification activities to provincial or district authorities.¹⁰⁸

Cooperation with national and international organizations with special competencies

The need for tracing and reunification is likely to arise in circumstances which, by definition, are exceptional and which may overwhelm any state's capacity to respond. For example, in Rwanda after the genocide more than 100,000 unaccompanied minors were identified in refugee and IDP camps.¹⁰⁹ In such circumstances, states have often called on both the expertise and capacity of specialized humanitarian organizations to assist with tracing, reunification, and the handling of mortal remains. Experience indicates that two things are crucial for such cooperation: legal authorization and a coordination mechanism.

¹⁰⁸ Angola's Norms on the Resettlement of the Internally Displaced Populations, Council of Ministers, Decree 1/01, art. 2 (Jan. 5, 2001); Uganda National Policy, *supra* note 75, at art. 2.4.1, viii.

¹⁰⁹ United Nations Office for the Coordination of Humanitarian Affairs and the Brookings Institution Project on Internal Displacement, *Handbook for Applying the Guiding Principles on Internal Displacement* 33 (1999).

The International Committee of the Red Cross and the national Red Cross and Red Crescent societies are universally recognized as experts in family tracing and reunification.¹¹⁰ Their activities can support development of a central database or registry for the collection, coordination, and protection of data on missing persons; mass tracing through, e.g., radio broadcasts, dissemination of photos in print media or community photo kiosks; and case-by-case investigation and tracing.¹¹¹ The ICRC also deploys forensics experts to provide operational support and training on the collection, identification, and management of mortal remains.¹¹² In keeping with the ICRC's mandate, it provides these services primarily, though not exclusively, in the context of armed conflict. In Pakistan, for example, its experts provided training and support for emergency responders in identifying victims of natural disaster.

Enabling legislation or other prior agreement such as a memorandum of understanding with the ICRC and national society can facilitate the quickest possible start to tracing activities. Primarily in recognition of the activities of the ICRC and national societies, as well as UNICEF and UNHCR, the *Guiding Principles* require authorities to “encourage and cooperate with” humanitarian

¹¹⁰ The General Assembly has recognized the ICRC's special competence and has invited states “to cooperate fully with the International Committee of the Red Cross in establishing the fate of missing persons and to adopt a comprehensive approach to that issue, including all practical and coordination mechanisms that might be necessary.” *Resolution Adopted by the General Assembly: Missing Person*, A/Res/59/189, ¶ 7 (Mar. 15, 2005).

¹¹¹ On the ICRC's and national societies' role in restoring family links, including reunification, as well as practical strategies, see International Committee of the Red Cross, Central Tracing Agency and Protection Division, *Restoring Family Links: A Guide for National Red Cross and Red Crescent Societies* (2000).

¹¹² *Missing Persons, Report of the Secretary-General*, A/61/476, ¶¶ 45-48 (Sept. 18, 2006). The ICRC also has two valuable publications on the subject: a legal, ethical, and practical guide on the use of DNA and the identification of human remains, and a manual for first responders managing dead bodies after natural disaster. ICRC, *Management of Dead Bodies after Disasters: A Field Manual for First Responders* (2006).

organizations engaged in tracing and reunification.¹¹³ The General Framework Agreement for Peace in Bosnia and Herzegovina provides an example, “mandating full and unrestricted access” for the ICRC, UNHCR and UNDP for tracing activities and imposing a duty upon the parties to provide information on the missing to the ICRC.¹¹⁴ The ICRC’s model law on the missing includes a provision on cooperation with both the ICRC and national societies, in accordance with their mandates, and Colombia’s law specifically grants a role and right of participation to its national society.¹¹⁵ Even where legislation is not necessary, states can nonetheless facilitate the work of humanitarian actors by recognizing their role in policy statements and administrative directives.

During Displacement

Independent institutional mechanisms to learn the fate of the missing

During a crisis of mass displacement and where the magnitude warrants, states may wish to consider establishing separate, independent, and impartial state authority responsible for tracing missing persons and identifying mortal remains. This body should have the competence and the authority to conduct investigations but also be charged with the coordination of partners, including relevant state agencies and international actors indicated above. Guatemala, for example, created a commission to coordinate all efforts at establishing the fate of individuals who disappeared between 1960 and 1996.¹¹⁶ As part of its coordination role, this body could be charged with the establishment of a

¹¹³ Guiding Principle 17(3).

¹¹⁴ The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7: Agreement on Refugees and Displaced Persons, art. 3, ¶ 2, art. 5 (1995).

¹¹⁵ Colombia Law 387 of 1997, art. 7.

¹¹⁶ Guatemala Presidential Decree No. 264, Acuerdo Gubernativo No. 264-2006. Other examples include Croatia’s Commission for Detained and Missing Persons and the State Commission of the Republic of Azerbaijan on Prisoners of War, Hostages and Missing Persons.

registry or centralized database for the management of tracing requests and the collection, coordination, and storage of data.¹¹⁷ Procedures for the collection, use, and storage of confidential or sensitive information should also be established, in accord with relevant legislation on data protection.

SUMMARY OF RECOMMENDATIONS

1. The right to family unity, including the right to remain together during displacement and the right to reunification if separated, should be recognized in national law.
2. The right of family members to know the fate of the missing should be recognized in national law, along with the corresponding duty of the state to endeavor to determine that fate.
3. States should create or assign to an existing governmental authority both the competence and the responsibility for tracing and reunification of missing family members. This body should be charged with establishing a centralized database for the collection, coordination, and protection of all information pertaining to missing persons and requests for tracing or reunification.
4. The same or another agency may be assigned responsibility for the identification and disposal of mortal remains, including responsibility for the provision of information, personal effects, and mortal remains to the family.
5. States should establish the legal basis for, and facilitate cooperation with, international and national humanitarian actors with recognized mandates and expertise in tracing, reunification, and the treatment of mortal remains such as the International Committee of the Red Cross, the national Red Cross and Red Crescent Societies, UNICEF, and Save the Children Alliance.
6. For purposes of implementing the right to respect of family life, states should adopt a definition of “family” that is flexible and that accommodates emotional, social, and economic dependencies and relationships. Similarly, states should formally adopt or endorse the principles of the “best interests of

¹¹⁷ On possible functions and structure, *see* ICRC Model Law, art. 12.

the child” and “respect for family life” to guide administrative agencies and implementing partners in their policies and programs.

7. States should institute a universal and mandatory birth registration system.
8. Programs of humanitarian assistance, including support for return or resettlement, should be designed with due regard to the preservation and protection of family life. Targeted interventions should be considered for the most vulnerable families.
9. States should ensure that appropriate protection and assistance is provided to separated and unaccompanied children. In particular, these children should be registered and appropriate arrangements made for their interim care. Temporary restrictions on adoption may be warranted in some circumstances, and legal adoption should not be considered until there is no longer any reasonable hope of successful tracing and reunification with family members.
10. States may also consider providing a legal mechanism, pending resolution of the fate of the missing, to allow for the appointment of a representative of the missing person to safeguard their assets and address the immediate needs of dependant family members (including custody, guardianship, and access to and use of assets).
11. States should undertake all measures necessary to ensure that women’s rights with respect to family life—including custody of children and control of family property—are fully respected and realized in both law and in practice.