



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

**Edited by Walter Kälin, Rhodri C. Williams,
Khalid Koser, and Andrew Solomon**

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Brookings-Bern Project on Internal Displacement

THE AMERICAN SOCIETY OF INTERNATIONAL LAW



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The Project on Internal Displacement, established in 1994, seeks to improve the international community's response to the global crisis of internal displacement by supporting the mandate of the Representative of the UN Secretary-General on Internally Displaced Persons. The Project prepares major studies and articles on internal displacement, organizes regional and country meetings to disseminate the Guiding Principles on Internal Displacement, and initiated, organized and supervised the legal process that resulted in the development of the Guiding Principles.

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Abbreviations

ADPC	Asian Disaster Preparedness Centre
AfCHPR	African Charter on Human and Peoples' Rights
ALNAP	Active Learning Network for Accountability and Performance in Humanitarian Action
ASEAN	Association of South East Asian Nations
AU	African Union
BCPR	Bureau of Crisis Prevention and Recovery (UNDP)
BiH	Bosnia and Herzegovina
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CERF	Central Emergency Revolving Fund (UN)
CESCR	Committee on Economic, Social and Cultural Rights (UN)
COHRE	Centre on Housing Rights and Evictions
CRC	Convention on the Rights of the Child
DFID	Department for International Development (UK)
ECtHR	European Court of Human Rights
EMB	Electoral Management Body
EMOP	Office of Emergency Programmes (UNICEF)
ERC	Emergency Relief Coordinator (OCHA)
ESC	European Social Charter
FAO	Food and Agriculture Organization
FRY	Former Republic of Yugoslavia
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICN	International Council of Nurses

ICRC	International Committee of the Red Cross
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IDRL	International Disaster Response Laws, Rules and Principles
IFI	International Financial Institutions
IFRC	International Federation of Red Cross and Red Crescent Societies
IGO	Intergovernmental Organization
ILO	International Labour Organization
IOM	International Organization for Migration
IPU	Inter-Parliamentary Union
IRC	International Rescue Committee
ISDR	International Strategy for Disaster Reduction
LTTE	Liberation Tigers of Tamil Eelam
MDG	Millennium Development Goal
MORA	Ministry of Refugees and Accommodation (Georgia)
NGO	Nongovernmental Organization
NHRI	National Human Rights Institution
NRC	Norwegian Refugee Council
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
PRA	Participatory Rapid Appraisal
ProCap	Protection Capacity (UN)
RSC	Refugee Studies Centre
RSG	Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons
SADC	Southern African development Community
SIDA	Swedish International Development Cooperation Agency
SFRY	Socialist Federal Republic of Yugoslavia
SMEs	Small- and Medium-Sized Enterprises

TBA	Traditional Birth Attendants
UDHR	Universal Declaration of Human Rights
UNCCD	UN Convention to Combat Desertification
UNDAC	UN Disaster Assessment and Coordination
UNDP	UN Development Programme
UNDRO	UN Disaster Relief Organization
UNEAD	UN Electoral Assistance Division
UNESCO	UN Educational, Scientific and Cultural Organization
UNFPA	UN Population Fund
UNHC	UN Humanitarian Coordinator
UNHCR	UN High Commissioner for Refugees
UNICEF	UN Children's Fund
UNMIK	UN Mission in Kosovo
UNRC	UN Resident Coordinator
VHP	Volunteer Health Personnel
WFP	World Food Programme
WHO	World Health Organization

Chapter 1

Introduction

Walter Kälin and Rhodri C. Williams*

INTRODUCTION

This volume of studies on domestic legal responses to internal displacement reflects both the gravity of the deprivations that continue to be suffered by millions of internally displaced persons (IDPs) worldwide and the dedication and resourcefulness of a growing number of states in addressing their plight. The purpose of this volume is to identify problems encountered by internally displaced persons that are typically caused by shortcomings in the legal and institutional frameworks of countries faced with internal displacement in order to better understand what is needed to protect the rights of such persons and how domestic efforts to prevent, mitigate, and end internal displacement could be strengthened.

THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

In the nearly two decades since the end of the Cold War, internal displacement has been recognized as a problem affecting virtually every region of the world and giving rise to legitimate international concern. The number of IDPs—persons forced to flee their homes due to persecution, conflict, or natural and man-made disasters but not seeking shelter in a country outside their own—outstripped the number of refugees worldwide as early as the mid-1990s. The toll of internal displacement due to conflict has remained high and steady at around twenty-five million since 2001, with returns resulting from peace processes in one part of the world often offset by new waves of flight elsewhere.¹

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¹ Jens-Hagen Eschenbacher, *Internal Displacement: Global Overview of Trends and Developments in 2006, 2007* INTERNAL DISPLACEMENT MONITORING CTR. 10.

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Natural disasters drive millions from their homes with increasing frequency. According to a joint World Bank and Columbia University 2005 study about natural disaster hotspots, “about 19 percent of the Earth’s land area...and 3.4 billion people (more than half of the world’s population) are relatively highly exposed to at least one hazard.”² Meanwhile, much remains to be done to ensure that displacement caused by large-scale development projects that are not accompanied by adequate relocation programs does not violate the human rights of affected communities.

The impact of internal displacement is not restricted to the millions of people forced to flee their homes. Internal displacement also takes a political, economic, and social toll on the general population and neighboring countries.

In view of the mounting crisis of internal displacement, the United Nations Human Rights Commission created the mandate of the Representative to the UN Secretary General (RSG) on Internal Displacement in 1992. Secretary General Kofi Annan appointed Dr. Francis Deng as the first mandate-holder. During the Cold War, international attention to displacement had primarily focused on the plight of refugees, or persons seeking protection outside of their country of origin or habitual residence. As a result, the legal status of IDPs was poorly understood and one of the most important components of Dr. Deng’s mandate as RSG would turn out to be the development of a normative framework identifying rules of international law that applied to IDPs. The resulting *Guiding Principles on Internal Displacement* (hereinafter, the *Guiding Principles*) was submitted to the UN Human Rights Commission in 1998.³

The *Guiding Principles* proceed from the conclusion that states continue to be obliged to respect the human rights of all persons on their territory without discrimination, whether they were displaced or not. Likewise, states’ existing

² Maxx Diley et al., *Natural Disaster Hotspots: A Global Risk Analysis 2* (2005), available at <http://go.Worldbank.org/PT8XJZW3K0>.

³ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4 /1998/53/Add.2 (Feb. 11, 1998) (prepared by Francis M. Deng).

humanitarian law duties to protect non-combatants in times of conflict apply to IDPs and those not displaced alike. Thus, without purporting to create new obligations, the *Guiding Principles* identify the extent to which national sovereignty—typically invoked in order to avoid scrutiny of internal displacement situations—actually entails clear, existing responsibilities to respond to the needs of IDPs. Their focus thus is on the “primary duty and responsibility of states” in assisting and protecting IDPs.

At the time of their presentation, a number of states were suspicious of the *Guiding Principles*, deeming them to represent a covert expansion rather than a restatement of their international obligations. This necessitated a period of advocacy work through dialogue with skeptical states and engagement with states that accepted their responsibilities *vis-à-vis* IDPs and began seeking ways to resolve their displacement. Ultimately, this advocacy proved to be successful. Throughout this period, as during the drafting of the *Guiding Principles*, the work of the RSG was assisted by the support of a dedicated unit headed at that time by Roberta Cohen within the Brookings Institution, a leading policy research institution based in Washington D.C.⁴ This support extended from extensive training and research activities to the dissemination of the *Guiding Principles* in numerous relevant languages.

NATIONAL LAWS AND POLICIES

The 2004 appointment of the second RSG, Dr. Walter Kälin, was another important step. By this time, the *Guiding Principles* had gained near universal acceptance and attention could now shift to their implementation, as reflected in Dr. Kälin’s mandate to focus on the “human rights of internally displaced persons.”⁵ The authority attributed to the *Guiding Principles* was reflected in their endorsement by numerous regional organizations and perhaps most notably by the unanimous consent of the UN General Assembly to the 2005 World Summit Outcome Document. This document included both an

⁴ For more information on the Brookings Institution-Bern University Project on Internal Displacement, see <http://www.brookings.edu/idp>.

⁵ For more information on the work of the RSG on the Human Rights of IDPs, see <http://www.ohchr.org/english/issues/idp/index.htm>.

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affirmation of the *Guiding Principles* as “an important international framework for the protection of internally displaced persons” and an undertaking to “take effective measures to increase the protection of internally displaced persons.”⁶

Thus, although international responses to internal displacement remain a key concern in the UN’s ongoing reform of its humanitarian programming, the center of gravity in efforts to protect and assist IDPs has now moved in both theory and practice to the national level. The response of states to this problem has been increasingly informed and systematic, and, in many cases, decisive in ending displacement or ameliorating the circumstances of those affected. About twenty states have issued laws and policies on internal displacement, many of which reference the *Guiding Principles* directly.⁷

However, as Walter Kälin noted in his first report as RSG (E/CN.4/2005/84), these laws have not always succeeded in clarifying “how the rather abstract general principles of international law articulated by the *Guiding Principles* should translate into concrete action on the ground.” In order to address this gap, the RSG proposed:

to convene a series of consultative meetings in 2005 with experts, lawmakers and IDP advocates, with the goal of clarifying the detail of how domestic law should contribute to the protection of IDPs....Based on these consultations, the Representative will develop a guidebook for legislation and executive rule and policy-making at the domestic level with regard to IDPs.

The studies presented in this volume represent an important step in the process of drawing guidance from past laws and policies on internal displacement in order to positively shape future ones. They were commissioned as part of the

⁶ G.A. Res, 60/1, ¶ 132, U.N. Doc. No. A/RES/60/1 (Oct. 24, 2005).

⁷ Walter Kälin, *The Future of the Guiding Principles on Internal Displacement*, FORCED MIGRATION REV. 5 (2006); see also Jessica Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, 14 HUM. RTS. BRIEF 7 (2006).

process of developing the October 2008 Brookings-Bern Project on Internal Displacement publication, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* (hereinafter the *IDP Law and Policy Manual*), setting out more detailed guidelines on domestic implementation of the *Guiding Principles*.

KEY ISSUES AND CHALLENGES

The studies in this volume focus on specific IDP protection issues chosen for their inherent technical complexity and demonstrated significance to the amelioration of the situation of IDPs and resolution of internal displacement. While the authors have been asked to draw on many common sources and follow a standard format, each study also reflects the opinions and conclusions of its author(s), based on their research and experience.

With minor deviations in light of the subject matter, each of the studies follows a similar structure. They start with an overview of the legal framework pertaining to the relevant issue, including identification of the most relevant provisions of the *Guiding Principles*, and an explanation of the legal basis for the cited Principles. The point here is to emphasize that the *Guiding Principles* are based on existing international human rights and humanitarian law. One of the main themes to emerge from these initial overviews in each chapter is the interrelationship among the various rights of internally displaced persons. For example, IDPs have the right to freedom of movement. Restricting that right impinges on their right to food as access to cultivatable land may be denied, their right to health where they are confined within camps with unsanitary conditions, and their right to family life where families are separated and not permitted to reunite.

Next, each chapter considers the main obstacles, both legal and practical, to implementing the *Guiding Principles*. It is striking how the same obstacles recur throughout the volume. Perhaps the main legal obstacle identified is that in light of the non-binding nature of the *Guiding Principles*, states sometimes insist on the applicability of domestic laws that are not beneficial to IDPs. Practical obstacles range from security for humanitarian workers, through a lack of documentation and identification for IDPs, to a lack of capacity of the state, especially at the local levels. One issue that recurs in almost every

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chapter is that discrimination is a major obstacle for IDPs in exercising their rights. Another recurring issue is that women, children, elderly, and disabled people are particularly vulnerable. Another legal and practical obstacle to implementing the *Guiding Principles*, which is present in each chapter but not always addressed directly, is the important role of non-state actors or de facto, as opposed to de jure, authorities.

Most chapters next review the regulatory framework in various countries. Legislative recognition of the rights of IDPs can vary from inclusion in the national Constitution or Bill of Rights to laws, decrees, or administrative regulation. Different legal instruments have varying authority, and the studies' authors tend to agree that the less authoritative the instrument used to protect a right, the greater the implication of the inferiority of that right in terms of policy priorities. Many of the chapters recommend specific inclusion of the rights of IDPs in the national Constitution or equivalent.

The next section in most chapters focuses on substantive and procedural elements of state regulation, distinguishing among regulations and procedures prior to displacement, during displacement, and in the context of durable solutions. The studies review existing provisions in a wide spectrum of countries, ranging from Azerbaijan to Zambia. While it is impossible to generalize across such a variety of experiences, a few issues stand out from the chapters. First, substantive and procedural elements of state regulation are in almost all countries and across all the issues considered, far better developed for the period of displacement, as opposed to prior to or after displacement ends. In countries prone to natural disasters, legislation on disaster management and early warning systems tend to be very poorly developed; while legislation on return often fails to distinguish the particular needs of IDPs from other populations affected by armed conflict or natural disasters. In the context of durable solutions, a particular challenge is to define when displacement ends. Second, a recurring theme is the gap between law and practice. The legislation of many of the countries surveyed in this volume contains important provisions for IDPs—in some cases specifying them as a separate category and in others focusing on the universality of human rights for all citizens—but in practice these rights are rarely fully realized, especially for IDPs.

The chapters then generally go on to review institutional elements of state regulation, again distinguishing different stages of the displacement cycle. There is a variety of institutional responses. Some are centralized, while others are localized. Some are located in the prime minister's or president's office, while others are outside the formal government structure. Some institutional responses consist of designating one responsible ministry, while others bridge ministerial responsibilities. The chapters provide detailed overviews of the more successful models found in the study countries. At the same time, they emphasize the importance of local context and the difficulty, simply, of transferring one model which works in a particular national context to a different context. Nevertheless, the two core principles of coordination between relevant government ministries and consultation with non-governmental actors, including IDPs, are suggested to underpin good practice.

Given the focus for this volume, the majority of each chapter focuses on national mechanisms. A brief section in each is also devoted to the role of the main international actors (from UN agencies to NGOs and research institutions) for each topic and their responsibilities. Again and again, the authors stress that the role of the international system should be to supplement and complement national efforts, and not supplant them.

Finally, each chapter concludes with a list of specific recommendations.

THE IDP LAW AND POLICY MANUAL

The Brookings-Bern Project launched a handbook entitled *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* in November 2008. The Manual is meant to provide guidance to national authorities seeking to prepare and enact domestic legislation and policies addressing internal displacement in their country. It has drawn on the studies in this volume, other relevant sources of expertise, and a series of regional and expert consultations. It is being widely disseminated to national policymakers, competent ministries, legislators, and civil society groups concerned with internal displacement in the hope that it will be of direct and concrete assistance in crafting laws and policies that will prevent internal displacement wherever possible and mitigate its effects on the lives of IDPs and their compatriots worldwide. The Manual will also be of use to the RSG and his

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international partners in their ongoing efforts to promote effective national laws and policies to prevent, address, and resolve internal displacement.

Chapter 2

Movement-Related Rights in the Context of Internal Displacement

J. Oloka-Onyango*

INTRODUCTION

Movement-related rights and the ability to travel freely within the territory of a state or to decide where to settle are of particular importance not only to those who are threatened with being displaced,¹ but also to internally displaced persons who have been forced or obliged to flee their homes or places of habitual residence in search of safety and security. As citizens in their own right, internally displaced persons should enjoy guarantees to the full range of movement-related rights accorded to other inhabitants of the state. They should also be able to exercise these rights on an equal basis with others and without discrimination on account of the causes or status of their displacement. As this chapter will demonstrate, movement-related rights are not only fundamental human rights; they are also an essential element in finding durable solutions to displacement.

The panoply of movement-related rights enjoyed by IDPs is centered on freedom of movement. This freedom encompasses the right to move freely and to choose one's place of residence within the borders of a state. By implication, these freedoms also guarantee the right of IDPs to move freely into, and outside of, IDP camps or other sites of their displacement. Freedom from arbitrary arrest or detention and the right to liberty and security of persons are particularly germane to confinement in camps and should be considered as a movement-related right in this and other internal displacement

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¹ This chapter does not cover protection from displacement. On this issue, see Walter Kälin, *GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 25* (2d ed. 2007), and *PROTECTING INTERNALLY DISPLACED PERSONS: A MANUAL FOR LAW AND POLICYMAKERS*, Brookings-Bern Project on Internal Displacement (2008).

contexts as well. In addition, movement-related rights include the right to leave one's own country, to return to it freely, and to seek asylum abroad.²

The principle of voluntariness is at the core of all movement-related rights. As such, freedom of movement is intended to protect IDPs and others from involuntary movement and expulsion as well as from forcible return or resettlement. Also inherent to movement-related rights is the ability of all individuals, including internally displaced persons, to freely choose to flee to another part of the country in search of protection, to travel freely and in safety within the country, and to return or resettle voluntarily.

Movement-related rights are fundamental in their own right but they also serve as a precondition or prerequisite to other fundamental rights. The importance of movement-related rights in displacement contexts should not be viewed in isolation from other fundamental rights. As previously noted, in addition to the inter-relationship with the right to liberty and security, movement-related rights can have a profound effect on other rights and freedoms. These include rights to life, health, shelter, food and water, education, religion and culture, family life, employment, property, and participation in public life and political affairs. According to the United Nations Human Rights Committee, freedom of movement is an indispensable condition for the free development of a person and is a right that interacts with other fundamental rights.³

The rights to move freely and to choose one's place of residence are inextricably linked to the health and well-being of internally displaced persons and their ability to contribute to the productivity and social fabric of their communities. Not only do restrictions on movement-related rights have adverse effects on the lives and livelihoods of internally displaced persons, and their ability to find durable solutions to their displacement, they also can negatively impact society at large. Therefore, the right of IDPs to freedom of movement and related rights—all of which are recognized under international law—should be safeguarded by national legislation and practice at the national, regional, and local levels.

² JOHAN DE WALL ET AL., *THE BILL OF RIGHTS HANDBOOK* 370 (4th ed. 2001).

³ Hum. Rts. Comm., General Comment No. 27, Freedom of Movement (1999), ¶ 1.

LEGAL FRAMEWORK

Relevant Guiding Principles

The right to freedom of movement and related rights of those who have already been displaced are clearly set forth in the Guiding Principles on Internal Displacement (the Guiding Principles).⁴ Principle 14(1) expressly affirms the rights of internally displaced persons to move freely throughout the territory of a state during their displacement. This right is essential to the personal security and well-being of persons seeking to flee the real or potential effects of armed conflict, situations of generalized violence, human rights abuse, and disasters. It also ensures the right of IDPs to voluntarily choose a place of residence, one ostensibly conducive to securing personal safety as well as access to sustainable livelihoods.

Principle 14(2) makes clear that IDPs may exercise this freedom by finding safety and security in camps and other settlements. Not only does it indicate that IDPs have the right to enter and move freely about within camps and settlements, it also affirms their right to leave these sites on their own volition. In other words, IDPs should not be confined or interned in camps against their will. Although this Principle does not oblige national authorities to take any affirmative measures to provide protection to displaced persons, it does imply an obligation not to interfere with persons seeking to exercise their freedom of movement in contexts of displacement.

The movement-related rights identified in Principle 14 and the ability of IDPs to seek safety from the causes of their displacement are given further effect in Principle 15. According to this provision, if the safety of an IDP is threatened in one part of the country, he or she may exercise his or her freedom of movement in order to find safety elsewhere. This includes moving freely to another part of the country (para. [a]) as well as the right to leave the country in accordance with international human rights law (para. [b]). Paragraph (c) also draws upon international law by affirming the right of IDPs to seek

⁴ U.N. ESCOR, Hum. Rts. Comm., *Guiding Principles on Internal Displacement*, princ. 14, U.N. Doc. E/CN.4/1998/53/Add.2 (1998) [hereinafter *Guiding Principles*]. On protection from displacement, see Principles 5-9.

asylum in another country on the basis of having a well founded fear of persecution.

Particular attention should be given to Principle 15(c), which reflects the international refugee law principle of *non-refoulement* (the prohibition against forcible return), and applies it by analogy to situations of internal displacement. By vesting IDPs with the right to protection against forcible return or resettlement to danger zones within their own country, this Principle suggests that states are obliged to ensure that internally displaced persons are not compelled to return or resettle to locations where their safety and security are at risk.

Finally, Principle 28 on voluntary return and resettlement recognizes the duty of national authorities to create conditions suitable for durable solutions as well as the means for internally displaced persons to return in safety and with dignity to their former places of residence or to resettle in another part of the country. This Principle's significance is also noteworthy for affirming the right of IDPs to choose between durable solutions available to them, i.e., return, local integration, or resettlement.

Legal Basis

The Guiding Principles do not create new law. Rather, they restate existing rights and freedoms provided for in binding international instruments as well as in customary international law. First and foremost, the legal basis of the rights, including movement-related rights, reflected in the Guiding Principles, can be found in the Universal Declaration of Human Rights (UDHR).⁵ Other international treaties that guarantee the human rights that the Guiding Principles apply to internally displaced persons include the International Covenant on Civil and Political Rights (ICCPR),⁶ the International Covenant

⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948).

⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

of Economic, Social and Cultural Rights (ICESCR),⁷ the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁸ the Convention Relating to the Status of Refugees,⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁰ and the Fourth Geneva Convention as well as the two 1977 Additional Protocols.¹¹

In addition, many of the human rights accorded to IDPs in these documents and the Guiding Principles are also guaranteed at the regional level by the following instruments: the African Charter on Human and Peoples' Rights,¹² the European Convention for the Protection of Human Rights and

⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR].

⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85, 23 I.L.M. 1027, as modified, 24 I.L.M. 535 (1985) [hereinafter Torture Convention].

⁹ See, for example, Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

¹⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See also* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978, and Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

¹² African Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

14 Incorporating the Guiding Principles

Fundamental Freedoms,¹³ the American Convention on Human Rights,¹⁴ the Organization of African Unity Refugee Convention Relating to the Specific Aspects of Refugee Problems in Africa,¹⁵ the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World,¹⁶ and the African Charter on the Rights and Welfare of the Child.¹⁷

Principle 1(1) of the Guiding Principles, which guarantees equality in the enjoyment of rights under international and domestic law is derived from Articles 1 and 2 of the UDHR, which proclaims that all human beings are born free and equal in dignity and rights and are entitled to all rights set out in the Declaration without distinction of any kind. This right is also found in the ICCPR, which requires states to respect and ensure to all persons the rights protected by the Covenant “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁸ The basis for Principle 2(1), which provides for the application of the Guiding Principles without distinction, is also derived from the provisions of Articles 1 and 2 of the UDHR. The Principles shall be observed by all authorities, groups, and persons irrespective of their individual legal status. The international basis for the aforementioned

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221. The Convention and its protocols are available at <http://conventions.coe.int/>.

¹⁴ American Convention on Human Rights, Nov. 22, 1969, OEA/Ser. K/XVI/1.1, Doc. 65, Rev.1, Corr. 1, O.A.S.T.S. No. 36 (1970), 1144 U.N.T.S. 123, 9 I.L.M. 99 (1969).

¹⁵ Convention governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, O.A.U. Doc. No. CAB/LEG/24.3.

¹⁶ Declaration on the Protection of Refugees and Displaced Persons in the Arab World, Nov. 19, 1992.

¹⁷ African Charter on the Rights and Welfare of the Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990).

¹⁸ ICCPR, *supra* note 6, art. 2(1). Article 26 takes it further with a broader non-discrimination guarantee of all persons being equal before the law and entitled to equal protection of the law.

principle can be read together with that in Principle 1(1) on non-discrimination and emerges from the realization that certain groups of people are vulnerable on account of the situations they find themselves in.

Principle 4(1), which guarantees the application of the rights found in the Guiding Principles, including movement-related rights without discrimination as to race, color, sex, and other immutable traits, also stems from Article 2 of the UDHR. Article 27 of the ICCPR is couched in almost the same language as Principle 4(1). Principle 4(2) is derived from Article 18(2) of the African Charter on Human and Peoples' Rights, which provides that the aged and disabled shall also have the right to special measures of protection in keeping with their physical or moral needs. Article 10(2) and (3) of the ICESCR calls for special protection and measures to be accorded to mothers and children and thereby, in part, supports Principle 4(2).

The right to liberty and security of the person, guaranteed by Principle 12(1), is a fundamental right that derives from a number of international instruments. For instance, Articles 3 and 9 of the UDHR, Article 9(1) of the ICCPR, and Article 6 of the African Charter on Human and Peoples' Rights, all share the same language as Principle 12(1). Principles 12(2), (3) and (4), which protect internally displaced persons from internment and confinement in camps as well as from arbitrary arrest and detention, are also derived from these instruments, specifically Articles 3 and 9 of the UDHR, Article 9(1) of the ICCPR, and Article 6 of the African Charter on Human and Peoples' Rights.

Principle 14, which guarantees rights to freedom of movement and choice of residence, along with the particular right to move freely in and out of camps or other settlements, is also based on a variety of legally binding international instruments such as Article 13(1) of the UDHR, Article 12(1) of the ICCPR, and Article 12(1) of the African Charter. Article 26 of the Convention Relating to the Status of Refugees of 1951 adopts similar wording.

Principle 15(a) on the right to seek safety in another part of the country derives from Article 13(1) of the UDHR on the right to freedom of movement and residence within the borders of each state. Freedom of movement is also guaranteed under Article 12(1) of both the ICCPR and the African Charter. The right to leave the country under Principle 15(b) derives from Article 13(2)

of the UDHR and Article 12(2) of the ICCPR and the African Charter. Furthermore, Principle 15(c) on the right to seek asylum in another country is derived from article 14(1) of the UDHR and Article 12(3) of the African Charter. The overall importance of the aforementioned provisions is that the right to seek and enjoy asylum is recognized in international law.¹⁹ In 1992, the UNHCR Executive Committee stated “...the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14 (1) of the Universal Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees.”²⁰ The right to be protected against forcible return to or resettlement in any place where lives, safety, liberty, or health of internally displaced persons would be at risk as embodied in Principle 15(d) is inspired by the principle of *non-refoulement* as provided for by Article 33 of the 1951 Convention Relating to the Status of Refugees. This article states that a refugee should not be expelled or returned to the frontiers of territories where his life or freedom would be threatened on account of *inter alia* race or religion. Similarly, Article 22(8) of the American Convention on Human Rights states that “[i]n no case may an alien be deported or returned to a country ... if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.” It is also recognized that it amounts to inhuman treatment as prohibited by Article 7 of the ICCPR and corresponding regional instruments to send someone to a country where he or she would risk particularly serious human rights violations.²¹ While

¹⁹ *Id.* at art. 4.

²⁰ See Executive Committee Conclusions on International Protection No. 82 (XLVIII), “*Safeguarding Asylum*” (1997); No. 81 (XLVIII), “*General Conclusion on International Protection*” (1997); No. 85 (XLIX), “*International Protection*” (1998); No. 94 (LIII), “*Civilian and Humanitarian Character of Asylum*” (2002); and No. 99 (LV), “*General Conclusion on International Protection*” (2004).

²¹ See, e.g., Human Rights Committee, No. 20[44], ¶ 9. See also Human Rights Committee, Charles Chitat Ng v. Canada, Communication 469/1991, Views adopted on 5 Nov. 1993, ¶ 16.1; European Court of Human Rights, Cruz Varas Case, Judgment of 20 Mar. 1991, Series A, No. 201, ¶ 69. See also European Court of Human Rights, Saadi v. Italy Case, Judgment of Feb. 28, 2008 (Grand Chamber), ¶¶ 124 - 133.

these provisions refer to returns across internationally recognized borders, the duty to protect life and security suggests applying these principles by analogy to situations of internal displacement.

Under international law, identification documents prove not only the identity of the person but also confirm that he or she is legally present in the territory so as to avoid actions like detention or expulsion. Personal documentation may also be required to pass checkpoints or establish residence in another part of the country. A passport is needed to leave one's own country lawfully. The need for identity documents outlined in Principle 20 is implicitly addressed in Article 6 of the UDHR and Article 16 of the ICCPR, both of which guarantee the right to recognition as a person everywhere before the law. Furthermore, Article 24(2) of the ICCPR specifically provides for the registration of a child immediately after birth, while Article 24(3) protects the child's right to a nationality. These provisions also imply a right to personal identification documents as reflected in Principle 20. The right to a passport under Principle 20(2) derives, as has been explicitly recognized by the Human Rights Committee,²² from Article 12(2) of the ICCPR, which provides for the right to leave the country. The right to documentation is further provided for under international instruments such as the Convention on the Elimination of Discrimination against Women (CEDAW), which addresses the registration of marriages.²³ The Convention on the Rights of the Child (CRC) also requires states parties to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without

²² Human Rights Committee, Communication No. 1107/2002, *Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya*, Views adopted Mar. 29, 2004, ¶¶ 7.1-8.

²³ *Id.* at art. 6.

unlawful interference.²⁴ Documents also enable the person to benefit from treatment at least in accordance with minimum international standards.²⁵

Finally, Principle 28 on voluntary return and resettlement derives from human rights law recognizing the right of an individual outside his or her national territory to return. See, for example, Article 13(2) of the UDHR, Article 12(4) of the ICCPR, Article 22(5) of the American Convention on Human Rights, Article 12(2) of the African Charter, and Article 3(2) of Protocol No. 4 to the European Human Rights Convention. In contrast, there is presently no general rule in human rights law that explicitly affirms the right of internally displaced persons to return to their original place of residence or to move to another safe place of their choice within their own country. However, such a right can be deduced from the right to liberty of movement and the right to choose one's residence as embodied in Article 12 of the ICCPR. The right to return is explicitly reflected in the International Labor Organization (ILO) Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries, which, in Article 16, paragraph 3, expressly states that "whenever possible these people (IDPs) shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist." In refugee law, Article 5(1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa emphasizes that voluntary repatriation should be respected in all cases and that no refugee shall be repatriated against his or her will. Article 5(2) of the Convention provides that the country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the return of refugees who request repatriation. Article 5(3) provides that the country of origin shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country.

²⁴ Convention on the Rights of the Child, art. 8, G.A. Res. 44/25, U.N. GAOR 61st plen. mtg. at 166, U.N. Doc. A/44/736 (1989), *reprinted in* 28 I.L.M. 1448 (1989), with corrections at 29 I.L.M. 1340 (1990).

²⁵ The Office of the UN High Commissioner for Refugees [UNHCR], *Identity Documents for Refugees*, ¶¶ 2-3, U.N. Doc. EC/SCP/33 (July 20, 1984) [hereinafter UNHCR].

OVERVIEW OF OBSTACLES TO IMPLEMENTATION OF THE GUIDING PRINCIPLES

Implementation of the *Guiding Principles* is faced with a number of obstacles. The primary one is that the Principles are not a legally binding instrument.²⁶ As a result, many states have not incorporated into national regulatory frameworks many of the provisions for guaranteeing the human rights of internally displaced persons, such as the right to freedom of movement, that are enshrined in the *Guiding Principles*. However, in Africa, the member states of the International Conference of the Great Lakes Region (ICGLR) that have ratified the Protocol on the Protection and Assistance to Internally Displaced Persons, which entered into force in June 2008, are obliged to incorporate the *Guiding Principles* into their domestic legal systems.

Moreover, the fact that some national laws are contrary to the letter and spirit of the *Guiding Principles* have, in many instances, also had a negative impact on the enjoyment of the right to freedom of movement along with other fundamental rights and freedoms. In addition, as discussed below, there are a number of practical obstacles IDPs face in realizing their movement-related rights as set forth in the *Guiding Principles*.

Insecurity and Human Rights Abuse

Among the most significant impediments to freedom of movement is insecurity, especially in situations where the displacement has been triggered by armed conflict or situations of generalized violence. In some instances, IDPs may be viewed as belonging to or being sympathetic to a party to the conflict, such as a counterinsurgency group or the political opposition, simply because they are seeking safety in a new location. As a result, they may be subject to human rights violations by one or more parties to the conflict, including government troops who may seek to “protect” them by restricting their movement within designated security areas. In some instances, IDPs may also be held as human shields. It may therefore be dangerous for individuals or groups of displaced persons to exercise their right to freedom of movement by

²⁶ See *id.*

fleeing their homes in search of safety or by venturing outside the perimeters of secured areas.

Designated Security Areas

In addition, it is not uncommon during situations of conflict and generalized violence for governments and other armed groups to encourage or force civilian populations to evacuate from zones of conflict and emergency. Persons who refuse to do so, for whatever reason, also risk being regarded as sympathizing with the opposing force. Moving to “protective” camps and designated security areas—which is essentially an infringement on exercising the right of freedom of movement—may be the only way for one to prove they are not a threat. The imposition of curfews can also limit the ability of IDPs, especially those living in camps and security zones, to exercise their right to freedom of movement.

Internment and Confinement in IDP Camps

IDPs may also face internment in camps or other IDP settlements without the ability to leave despite cessation of the conflict on account of security measures. IDPs may also be confined or have their movement within the camp limited or curtailed by allegations of misconduct that can result in administrative segregation in a separate facility inside or outside the camp. In such cases, the victim typically has no mechanism of redress, let alone being informed of the charges or duration of the disciplinary period and may not enjoy the right to challenge the legality of the detention.

Lack of Documentation

Lack of documentation and identification also threatens the right to freedom of movement. It is not uncommon for IDPs to lose their documents while fleeing from zones of conflict and areas of insecurity. In situations involving natural disasters as well as armed conflict, these documents and other public records can also be destroyed. In addition, documents may sometimes be confiscated at military or police checkpoints that are established to curb the movement of opposing forces. Without any form of identification, such as an internal or external passport, IDPs may not be able to move freely within the country or

leave the country in search of safety or an adequate livelihood. Those civilians, including IDPs, who have either lost or had their documentation confiscated—especially those located in camps or conflict-affected areas—may decide not to exercise their right to freedom of movement as a means of protecting themselves from real as well as perceived risks associated with traveling without the appropriate identity documents.

Security and Law and Order Measures

Following armed conflict and other emergency situations, checkpoints and other security measures may be imposed in a bid to maintain law and order. For instance, certain areas may be cordoned off by the military or law enforcement and residential searches conducted. These measures can negatively impact the willingness or ability of internally displaced persons to exercise their right to freedom of movement as well as negatively infringe upon their right to liberty and security. Those suspected of posing a security threat or having aided and abetted an opposing force may be questioned and held in detention centers known only to the military and therefore outside the protection of civilian law.

Physical Insecurity in Areas of Return or Resettlement

It is also important to note that in many post-conflict situations, areas designated for return or resettlement may not be secure or safe for internally displaced persons. In many instances, anti-personnel landmines and unexploded munitions prove to be a stumbling block to displaced persons who want to return to their communities or resettle elsewhere. IDPs seeking to exercise their freedom of movement by returning or resettling to areas controlled by another ethnic group may also face threats to their personal safety. In situations like these, freedom of movement might be restricted by ethnically motivated harassment by the military or local police and threats of petty violence at the hands of members of the community.²⁷ IDPs, particularly women and children and other vulnerable members of the community, may

²⁷ JOAN FITZPATRICK, HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM SEEKERS, AND INTERNALLY DISPLACED PERSONS: A GUIDE TO INTERNATIONAL MECHANISMS AND PROCEDURES 525 (2002).

also be unwilling or unable to move within the country on account of both petty and organized criminal activity.

REGULATORY FRAMEWORK

Many regulatory frameworks, including constitutions, laws, other normative acts, and policies, can guarantee basic movement-related rights. However, constitutional provisions, in particular, are often general in nature and do not give special attention to the needs and vulnerabilities of IDPs. Where constitutions may be general or vague regarding the needs and vulnerabilities of the displaced, additional safeguards and specificity as to the rights of IDPs should be added. The *Guiding Principles on Internal Displacement* can be very helpful in this regard. Governments should adopt laws and decrees that are consistent with the constitution while also outlining, in considerable detail, provisions for the protection of the movement related rights of the IDPs. Particular attention should also be given to ensuring consistency and coherence among the various elements of the regulatory framework.

Unfortunately, many regulatory frameworks can directly or indirectly restrict freedom of movement and related rights despite constitutional guarantees and other measures designed to protect these freedoms. In the case of Azerbaijan, where the Constitution has officially abolished the *propiska* system (a Soviet-era internal residence system), a variety of laws have continued to refer to it. As a result, the system effectively remains in place along with the restrictions and hardships it can foster. Other post-Soviet states that inherited the *propiska* face similar situations. All states should endeavor to address any inconsistencies that exist between constitutional and legislative sources for protecting the movement rights of the internally displaced. Laws that infringe upon freedom of movement and that are contrary to the letter and spirit of the *Guiding Principles on Internal Displacement* should be amended so as to bring them into conformity with internationally-accepted norms as well as with constitutional and other regulatory provisions that guarantee movement-related rights.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

During Displacement

Freedom of movement encompasses the right of everyone, including all internally displaced persons, to move freely and to choose a place of residence within the borders of the country without hindrance. It also includes the right of citizens to exit from the country and return to it without facing unreasonable obstacles. As a general rule, states should guarantee these rights at all times, including during displacement. These rights and freedoms, including movement-related rights, should be guaranteed and respected irrespective of the displacement context. Usually, these rights are embodied in some fundamental law of the land, typically the constitution. In addition, other national laws and policies that guarantee the substantive rights of persons during their displacement, including movement-related rights, should exist or be developed.

In addition to guaranteeing the movement-related and other rights of internally displaced persons, states should not impose any procedural obstacles that directly or indirectly give rise to displacement or otherwise infringe on the rights of those already displaced. Where displacement has occurred, it is particularly important to ensure that procedural aspects of state regulation do not negatively affect the rights of IDPs but rather facilitate durable solutions to their displacement. In Angola, in order to ensure the voluntary nature of the resettlement process, the Norms on the Resettlement of Internally Displaced Populations provide that the Sub-Group on Displaced Persons and Refugees must reach agreement with representatives of IDPs who are resettling, as well as with the traditional authorities in host communities. This instrument also stipulates that the Sub-Group must include the displaced persons in the planning and management of their resettlement.²⁸

²⁸ Council of Ministers Decree No. 1 /01 (2001), art. 5(1) (Angola).

Freedom of Movement and Residence

The right to freedom of movement, as embodied in Principles 14 and 15 of the Guiding Principles on Internal Displacement, has been incorporated into various regulatory frameworks, including constitutions. Where these frameworks do not expressly incorporate the rights of IDPs, as reflected by the Guiding Principles, in a specific constitutional provision or other binding norm, guarantees for IDPs may be inferred from more general rights protections. For example, Article 29(2)(a) of the Constitution of Uganda guarantees the freedom of everyone to move freely throughout Uganda and to reside and settle in any part of the country. The Constitutions of the Republic of Sudan,²⁹ Azerbaijan,³⁰ India,³¹ Sri Lanka,³² Bosnia and Herzegovina,³³ Ethiopia,³⁴ and Armenia³⁵ have similar provisions relating to freedom of movement, the right to choose one's residence, the right to leave the country

²⁹ CONST. OF THE REPUBLIC OF SUDAN, art. 23, *available at* <http://www.sudan.net/government/constitution/english.html>.

³⁰ CONST. OF AZER. REPUBLIC, art. 28, *available at* <http://www.un-az.org/doc/constitution.doc>.

³¹ INDIA CONST., *available at* <http://lawmin.nic.in/coi/coiason29july08.pdf>.

³² CONST. OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, art. 14(1)(h), *available at* <http://www.constitution.gov.lk/constitutionSL1978.shtml>.

³³ CONST. OF BOSN. & HERZ., *available at* http://www.ccbh.ba/public/download/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf. Under Article 1(4), the two Republics have the duty not to impede full freedom of, *inter alia*, persons through their territory and shall not establish controls at the boundaries between the Entities.

³⁴ CONST. OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETH., art. 23, *available at* <http://www.ethiopiafirst.com/Election2008/Constitution.pdf>.

³⁵ CONST. OF THE REPUBLIC OF ARM., art. 22, *available at* <http://www.armeniaforeignministry.com/htms/constitution.html>.

and return to it, the right to liberty, and the right to travel documents.³⁶ Notably, the Constitution of Bosnia and Herzegovina takes a different approach by giving special attention to the movement-related rights of refugees and internally displaced persons, including their right to freely return to their homes of origin.³⁷

In this context, the Ugandan National Policy for Internally Displaced Persons is noteworthy for its specific recognition of the freedom of choice of residence and the right of displaced persons to move freely in and out of camps or other settlements.³⁸ The policy seeks to ensure that all displaced persons enjoy the freedom to move and obtain access to areas of the country where various economic and social activities take place. In regard to return and resettlement, the Ugandan Government has also committed itself to promoting the right of IDPs to return voluntarily in safety and dignity to their homes or habitual residences or to resettle voluntarily in another part of the country. To assist IDPs in making an informed choice as to whether to return, resettle, or integrate locally, the Government has undertaken to use appropriate means to provide IDPs with objective and accurate information.³⁹

The Right to Leave the Country and Return

All citizens, including internally displaced persons, should be able to leave their country of origin and return to it without any arbitrary limitations. The Constitutions of Sudan, Angola, Eritrea, Azerbaijan, India, Sri Lanka, Bosnia and Herzegovina, Ethiopia, Armenia, and Iraq contain provisions on the right to leave the country and to return to it. Article 14 of the Constitution of Iraq, for instance, provides that a citizen cannot be prevented from traveling abroad or outside the country, nor prevented from returning home to the country. In

³⁶ See, e.g., CONST. OF UGANDA, art. 29; INDIA CONST., *supra* note 31, art. 19; CONST. OF BOSN. & HERZ., *supra* note 33, art. 2(3).

³⁷ General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, available at <http://www.oscebih.org/overview/gfap/eng/> (Dec. 15, 1995).

³⁸ See Guiding Principles, *supra* note 4, Principle 14.

³⁹ See *id.* at ¶ 3.4.

Azerbaijan, the right to leave the country is also constitutionally guaranteed. Although the right of individuals, including IDPs, to seek refuge in other countries or the right not to be forcibly returned or resettled are not explicitly guaranteed in the legislation of Azerbaijan, it does not expressly restrict these rights for IDPs.⁴⁰ In the case of Uganda, the right to leave the country and return to it can also be implied from constitutional provisions that guarantee the freedom to enter, leave, and return.⁴¹ Similarly, the right to be protected against forcible return to, or resettlement in, any place where one's life, liberty, and or health would be at risk can be implied from provisions that guarantee the right to life,⁴² the right to liberty,⁴³ and the right to health.⁴⁴ This situation illustrates the gap that exists in the regulatory framework of many countries that do not specifically safeguard the movement rights of IDPs and the right to *non-refoulement* in national legislation.

The Right to Freedom of Liberty

The right to freedom of liberty and security of the person is fundamental to all individuals and is an important movement-related right that should be guaranteed by law. Protection from arbitrary arrest and detention and other unnecessary restrictions of this right by public officials and others should be applied at all times. Considering the heightened risk of detention that IDPs may face on account of their displacement, regulatory frameworks should consider including special safeguards to protect IDPs from arbitrary and prolonged detention.

⁴⁰ Law of the Republic of Azerbaijan, On Status of Refugees and Forcibly Displaced Persons (persons displaced within the country) (1999), art. 6.

⁴¹ See, e.g., CONST. OF UGANDA, *supra* note 36, art. 29(2)(b).

⁴² *Id.* at art. 22.

⁴³ *Id.* at art. 23.

⁴⁴ *Id.* at arts. 39, 45.

The Constitution of Bosnia and Herzegovina protects the right to liberty and security of the person. Freedom from arrest is also guaranteed, except for situations set forth by law.⁴⁵ Moreover, the individual under arrest enjoys the right to be informed of the charge at the time of arrest.⁴⁶ In Angola, preventive detention must follow appearance before a judge and a fair trial within the period provided by law.⁴⁷ The right to *habeas corpus* is also recognized as a safeguard against illegal detention.⁴⁸ The Constitution of Georgia also prohibits arrest or other kinds of restrictions on personal liberty and security without a court decision. In Georgia, detention is only permissible by an official designated by law and the detained person enjoys rights that include, but are not limited to, being brought before a judge within forty-eight hours.⁴⁹ The Constitution of Eritrea guarantees the right to liberty and where such liberty is deprived, it should be done pursuant to the law.⁵⁰ Arrests and detentions may only be made pursuant to law, and arrested or detained persons have the right to be informed of the grounds for the arrest or detention.⁵¹ The Constitution of Azerbaijan also guarantees the rights of persons subject to arrest or detention to be immediately informed of his or her rights and the reason for their arrest or detention.⁵²

⁴⁵ CONST. OF BOSN. & HERZ., *supra* note 33, art. 36(1).

⁴⁶ *Id.* at art. 39.

⁴⁷ CONST. OF ANGL., art. 38, *available at* <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN002502.pdf>.

⁴⁸ *Id.* at art. 42.

⁴⁹ CONST. OF GEOR., art. 18.

⁵⁰ CONST. OF ERI., art. 15.

⁵¹ *Id.* at art. 17.

⁵² CONST. OF AZER. REPUBLIC, *supra* note 30, art. 67.

Restrictions of Movement-Related Rights

Regulatory frameworks that guarantee movement-related rights, including the right to freedom of movement, choice of residence, and the right to leave and return to the country along with other rights, often stipulate that they are not absolute rights. Substantive and procedural restrictions on the right to freedom of movement may be legitimately imposed in a number of situations. These include situations of armed conflict and where public order, national security and public health are under threat. Circumstances like these may create a legitimate justification for limiting movement rights in order to protect the general welfare of the population and the rights of others. However, the restriction of movement-related rights under these circumstances and others should ideally be set forth by national law. Similarly, international law requires that any limitation on these rights must not go beyond what is acceptable and demonstrably justifiable in a free and democratic society.

In Sri Lanka, for example, the National Framework for Relief, Rehabilitation and Recognition demands that security-related restrictions on the movement of persons and goods shall be applied “...in a manner consistent both with the need to ensure the basic security of all citizens and with the aim of minimizing hardships among the affected populations.”⁵³ This means that an internally displaced person does not have the right to move freely throughout the country if her or his movements pose a threat to the public interest or if they interfere with the fundamental rights or freedoms of others. Under the Constitution of Uganda,⁵⁴ freedom of movement and the right to liberty and the right to life are all rights that may be derogated in the interests of the fundamental, or other, human rights and freedoms of others or of the public interest.⁵⁵

Restrictions on movement-related rights may also be imposed in order to protect public health. In situations involving the outbreak of disease, for

⁵³ National Framework for Relief, Rehabilitation and Recognition (Triple R Framework) 15 (2002) (Sri Lanka).

⁵⁴ CONST. OF UGANDA, *supra* note 36.

⁵⁵ *Id.* at art. 43(1).

instance, the State may be justified in limiting the right to freedom of movement, especially the rights of those suffering the direct effects of such outbreaks. This has occurred in relation to Ebola hemorrhagic fever and cholera outbreaks, among other contagious and life-threatening epidemics. In highly populated areas where there is a need to prevent the spread of infectious disease, relocation or resettlement may be a legitimate measure to allow public health authorities to adequately remedy the threat. Like in other situations where limiting movement-related rights may be legitimate, the limitation or suspension of movement-related rights in this situation should be carried out within the ambit of the law and in accordance with measures deemed acceptable and necessary in a democratic society. For example, Article 4(1) of the ICCPR permits a state party to temporarily suspend certain rights in times of a public emergency which threatens the life of the nation and the existence of which is officially proclaimed and when they are limited to the extent strictly required by the exigencies of the situation.

National security concerns may be used to justify restrictions of movement-related rights. In such cases, the restriction of these rights should be preceded by the declaration of a state of emergency or martial law in accordance with established legal procedures. It is not inconceivable that situations may arise where the national security interests of the State and the rights of everyone to live in security take precedence over those of IDPs. However, these situations should not be confused with or be used to justify or disguise deliberate policies of forcibly moving civilian populations and resettling them as part of a counterinsurgency strategy or a policy to deny dissident forces a perceived social base or logistical support. In instances where national authorities seek the movement of IDPs to “protected” or secure areas, ostensibly for their own safety, it may be designed to isolate civilians from the insurgency and cutting off its food supplies.⁵⁶ Regulatory frameworks should contain provisions to guard against this type of situation.

⁵⁶ Zachary Lomo, *The Struggle for the Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT’L L. (2000).

In Eritrea, freedom of movement may be limited during a state of emergency which can be declared, according to the Constitution, throughout—or in any part of—the country when public safety or the security or stability of the State is threatened by civil disorder or natural disaster.⁵⁷ Measures to ensure that this authority is not abused include the requirement that any measures undertaken, or laws enacted, pursuant to a declaration of emergency shall not suspend Article 26(3) of the Constitution,⁵⁸ which regulates limitations on fundamental rights and freedoms and the introduction of martial law when no external invasion or civil disorder exist. The Constitution of Bosnia and Herzegovina also reflects good practice in that it safeguards against the amendment of the Constitution to permanently limit the rights and freedoms specified in Article 2, which include movement-related rights.⁵⁹

During displacement, IDPs may find themselves resettled into camps, rural settlement schemes, or agricultural settlements. IDPs may find that their ability to move freely will vary depending on where they find themselves. Camps have been described as generally “large...crowded sites” and “holding tanks” that are “dependent on assistance.” The conditions there are far different from small, open settlements where displaced persons have been able to maintain a village atmosphere.⁶⁰ They are typically administered or controlled by the government or by the non-governmental organizations that render assistance to IDPs. If under the direct control of the State, camps can have rules that restrict the freedom of movement of IDPs in ways not experienced by those living in rural and agricultural settlements, where IDPs generally experience only minimal restrictions of their freedom of movement.

The Law Concerning Internal Displacement Ordinance no. 267 in Peru establishes the procedure for special authorization to provide public service for the regular transport of passengers within the province of Lima. According to

⁵⁷ CONST. OF ERI, *supra* note 50, art. 27.

⁵⁸ *Id.* at art. 26(3).

⁵⁹ CONST. OF BOSN. & HERZ., *supra* note 33, art. 10(2).

⁶⁰ Richard Black, *Putting Refugees in Camps*, 2 FORCED MIGRATION REV. (1998).

the law, a call for proposals for return should be made. Such proposals must take into consideration the promotion of human rights⁶¹ and the organized transfer of the communities.⁶² Furthermore, the competent authorities shall make available and provide to international humanitarian organizations and to other competent agencies, in exercising their respective mandates, rapid and unimpeded access to internally displaced persons so that they may provide them assistance in their return or resettlement and reintegration.⁶³ Finally, the treatment given to displaced persons by the State and by civil society must be reviewed in order to find mechanisms favoring return, resettlement, and reintegration.

The National Strategy for Resolving the Problems of Refugees and Internally Displaced Persons in Serbia and Montenegro recognized, *inter alia*, that the process of repatriation directly depends on the creation of conditions for return in the countries of origin (Bosnia and Herzegovina and the Republic of Croatia).⁶⁴ The measures and activities aimed at creating conditions for return that the Federal Government and the Government of the Republic of Serbia pursued included the establishment of the Coordinating Centre for Kosovo and Metohija. One of the main tasks of the Centre was coordination of state actors and agencies in resolving the problems of Kosovo with full observance of United Nations Security Council Resolution 1244 and insisting on the consistent implementation of the joint United Nations Mission in Kosovo (UNMIK)-Federation Republic of Yugoslavia (FRY) document signed in November 2001.

⁶¹ Republic of Peru, Law No. 28223 Concerning Internal Displacements, art. 15(e), May 19, 2004, *available at* http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

⁶² *Id.* at art. 15(f).

⁶³ *Id.* at art. 16.

⁶⁴ For a draft of the National Strategy for Resolving the Problems of Refugees and Internally Displaced Persons, see <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=3c6250207>.

In the Context of Durable Solutions

For durable solutions to displacement to be realized, the rights of internally displaced persons to freedom of movement and choice of residence must be guaranteed by law. IDPs should enjoy the right to voluntarily choose between returning to their place of origin, integrating into the community where they are displaced, or to resettle elsewhere. National authorities should guarantee these rights, create conditions conducive to their realization, and enact policies and administrative procedures to facilitate voluntary return and resettlement. This includes putting in place measures to address property ownership disputes, scarcity of land, personal safety and insecurity, and minority tensions and discrimination, all of which can affect the extent to which IDPs are willing and able to exercise their right to freedom of movement and choice of residence.

Displacement is regarded as a temporary event, the hope being that sooner or later the IDPs will be able to go back to their homes. Thus, reference to durable solutions such as return and resettlement become catch phrases, especially for humanitarian workers or governments which are responding to internal displacement. However, in many instances such as post-conflict situations, the conditions for return and resettlement may not be favorable. In the event a peace agreement has been signed, it may only put a formal end to the conflict. Unresolved issues, latent tensions, and other inexplicable factors may continue to undermine the return of the IDPs. In assessing conditions for return, attention should be paid to the definitions of “return” and “voluntary return” as provided in the UNHCR’s handbook on voluntary repatriation, which indicates that return should only take place under conditions of “legal safety and dignity,” “physical security,” and “material security.” This entails access to land or to a means of livelihood.⁶⁵

Robert Muggah notes three stages of resettlement, including a period of relief assistance and transportation to the settlement areas where the IDPs build themselves temporary shelter. This is followed by the physical settlement on

⁶⁵ See UNHCR, “Handbook—Voluntary Repatriation: International Protection,” (1996).

the land which may be purchased, leased, exchanged, or granted for the establishment of basic services if there is any humanitarian organization in place.⁶⁶ The plan and mode of resettlement is important and mainly depends on the cause of the displacement. Development-induced displacement is mostly planned with detailed procedures as established in law (at least in some countries) with specific obligations of the state or agency acquiring the property or land. Usually, the process of resettlement leads to permanent relocation. Resettlements arising out of civil war or unrest can often be uncoordinated and abrupt. Thus, they can be said to be temporary; a situation reflective of no guarantees of human rights, the right to freedom of movement included.

Such resettlement may be voluntary and take place based on the free will of IDPs to move to find new opportunities favorable to their survival. Resettlement may also be involuntary and be pursued on the pretext that IDPs have no right whatsoever to remain in their present location despite their wish to do so and therefore must be transferred to another area. The conditions of return must also be favorable to act as incentives for IDPs to do so voluntarily. Different governments have applied different techniques of ensuring the return of the IDPs. Accordingly, treatment of the issue of return varies from one state to the next. To the extent possible, internally displaced persons should be included in the planning and management of their return or of their resettlement and reintegration.⁶⁷ This includes being informed of the conditions that exist in areas of return and resettlement in order to make an informed and voluntary decision for their future.

The most extensive obstacle to return is interference with the rights of IDPs to land, property, and housing through laws, decrees, and administrative practices that prevent displaced persons from repossessing their property. In some cases, the property rights of IDPs may be nullified altogether and transferred permanently to members of the ethnic majority, including those

⁶⁶ Robert Muggah, *A Tale of Two Solitudes: Comparing Conflict and Development-Induced Internal Displacement and Involuntary Resettlement*, 41 INT'L MIGRATION 5, 17 (2003).

⁶⁷ *Id.*

who themselves are displaced. This was most prevalent in Bosnia and Herzegovina, although mechanisms have subsequently been developed to provide compensation to those deprived of their property. Decisions regarding return can often depend on the manner in which property ownership and land scarcity are handled. When the displaced do return, they may have no means of livelihood if they find that their land has either been occupied by others or fraudulently sold.

Many times, the conditions in areas of return and resettlement are not conducive to physical safety. As previously noted, anti-personnel landmines and unexploded munitions may remain active both during and in the aftermath of hostilities. This often makes movement impossible or highly dangerous. In Bosnia, landmines proved to be a major threat to those seeking to go home after the end of the fighting. In Mozambique, mines killed more than ten-thousand displaced people during the course of the return and resettlement program.⁶⁸ Other countries that are similarly affected by this problem include Angola, Burundi, Congo, Eritrea, Ethiopia, Mozambique, Senegal, Sudan, and Uganda.⁶⁹ Although forty-eight African states have signed up to the 1997 Ottawa Convention that calls for the banning of the use of anti-personnel landmines and their destruction, the commitment to implementation of the obligations under this instrument is yet to be fully manifested. Until such a time that landmines are banned and no longer in use, they will continue to threaten IDPs and have a deadly effect on those seeking to return or resettle.

Conditions in some areas may not be conducive to return or resettlement on account of discrimination, including discrimination based on ethnicity. Those at the receiving end of such discrimination are unable to access employment or pension funds and other equally vital social amenities. In Sarajevo, for example, minorities faced discrimination in access to humanitarian assistance and social services. For instance, some IDPs who constructed their own

⁶⁸ Jan Borgen, *Institutional Arrangements for Internally Displaced Persons*, NORWEGIAN REFUGEE COUNCIL 18 (1995).

⁶⁹ Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2005, 2006*, INTERNAL DISPLACEMENT MONITORING CTR. 26 [hereinafter IDMC Global Overview].

houses were not permitted to reconnect to electricity and telephone services. Conditions like these can even include the violation of political rights, where minority returnees are unable to enjoy their freedoms of expression or their rights to political participation.

According to the Integrated Strategy Document of Turkey,⁷⁰ the Government's key responsibilities include ensuring the voluntary return of IDPs to their former settlements in safety and developing a more balanced settlement pattern in rural areas. In Sri Lanka, the Joint Strategy Document creates an integrated program to cope with the immediate and initial reintegration of spontaneous returnees into their home communities, while protecting and assisting vulnerable groups, both IDPs and those in the community who remain *in situ*.

In Colombia, the interpretation and application of Law 387 of 1997 is based on the principle that families of the forcibly displaced shall benefit from the right to return to their place of origin. However, the law has a major shortcoming in that it only covers persons displaced by means of violence.⁷¹ Furthermore, the National Government of Colombia is under an obligation to support displaced populations seeking to return to their places of origin in areas of protection and socioeconomic stabilization and integration.⁷²

The Peruvian Law Concerning Internal Displacement Ordinance no. 267 is noteworthy for providing that IDPs enjoy the same rights and liberties pursuant to international law and national law as other inhabitants of the country do. They are not to be discriminated against in any way whatsoever in

⁷⁰ Measures on the Issue of Internally Displaced Persons and the Return to Village and Rehabilitation Project in Turkey, ¶ 11, Aug. 17, 2007, *available at* http://www.brookings.edu/projects/idp/Laws-and-Policies/~//media/Files/Projects/IDP/Laws%20and%20Policies/Turkey/Turkey_StrategyDoc_2005.pdf.

⁷¹ República de Colombia, Ley 387 de 1987, Diario Oficial No. 43.091, art. 2, July 24, 1997, *available at* http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

⁷² *Id.* at art. 16, sec. 5.

the enjoyment of their rights and liberties for the simple fact of being internally displaced.⁷³ The same law provides that competent authorities have the obligation and responsibility to establish and provide the means to permit the safe, dignified, and voluntary return of internally displaced persons to their homes or to their place of permanent residence, or their voluntary resettlement in another part of the country. The authorities are also responsible for assuring the full participation of internally displaced persons in the planning and management of their return or of their resettlement and reintegration.⁷⁴ Under this law, return to places of habitual residence must be voluntary (so as to guarantee freedom of movement and choice of residence).⁷⁵

In Serbia, the National Strategy on internal displacement aims at offering IDPs durable solutions by ensuring conditions for their homes and by providing conditions for local integration. In Armenia, assistance programs for the return and resettlement of the population from the frontier areas have been elaborated.⁷⁶ In general, the State covers the costs involved related to the protection of IDPs. Pursuant to the Law on Population Protection in Emergency Situations (Chapter VIII), the material and technical support for organizing the activities aimed at the protection of populations is being provided by various institutions and financed through the state and community budgets. In the Federation of Bosnia and Herzegovina, the 2000 Law on Displaced, Expelled Persons and Repatriates obliges the authorities to promote the right to return by ensuring freedom of movement, increasing security conditions, implementing the property legislation, and providing necessary information to potential returnees on the conditions of return, etc.⁷⁷

⁷³ Republic of Peru, Law No. 28223, *supra* note 61, art. 3.

⁷⁴ *Id.* at art. 14.

⁷⁵ *Id.* at art. 15.

⁷⁶ THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT AND THE LAW OF THE SOUTH CAUCASUS: GEORGIA, ARMENIA, & AZERBAIJAN (Roberta Cohen, et al. eds., 2003).

⁷⁷ See art. 21, Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina, (FBiH Official Gazette,

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Prior to Displacement

In addition to enacting a regulatory framework to address internal displacement, one that guarantees the movement-related rights of all citizens, including internally displaced persons, states are obliged to put in place the institutional elements necessary to give effect to these rights and to establish the means to facilitate durable solutions to displacement. The institutional elements for implementing this framework may include a combination of government ministries, departments, inter-ministerial committees, and task forces. Courts may also be included along with a variety of humanitarian assistance providers, non-governmental organizations, and academic institutions, both domestic and international.

In identifying these institutional elements, national authorities should ensure that mandates for protecting and assisting IDPs clearly delineate roles and responsibilities of the various actors. If a variety of institutions share responsibility for addressing internal displacement, the government should consider designating an institutional focal point for developing policies and coordinating resources and activities at the national and local level. It is also imperative that this focal point be trained on displacement issues, including on the substantive and procedural aspects of movement-related rights.

In Colombia, Article 6 of Law 387/97 identifies the National Council for Comprehensive Assistance to Populations Displaced by Violence as one of the institutional organs of government for the implementation of the law.⁷⁸ The Council was established as an advisory and planning body responsible for formulating policy and ensuring budgetary allocations for the programs administered by the entities responsible for the functioning of the National System for Comprehensive Assistance to Populations Displaced by Violence. When the nature of the displacement calls for it, other ministers,

no. 15/05 of 16 Mar. 2005), available at http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

⁷⁸ República de Colombia, Ley 387 de 1987, *supra* note 71.

administrative department chiefs, directors, presidents, managers of decentralized entities at the national level, or representatives from organizations for the displaced, are invited to participate.

In Uganda, the Department of Disaster Preparedness and Refugees in the Office of the Prime Minister is a principle organ for internal displacement, with its Minister bearing overall responsibility for all matters relating to IDPs.⁷⁹ This includes responsibility for establishing the Inter-Ministerial Policy Committee (IMPC) which is charged with policy formulation and overseeing internal displacement matters. It consists of the Ministers of Internal Affairs, Finance, Planning and Economic Development, Agriculture, Animal Industry and Fisheries, Health, Lands, Water and Environment, Defense, Education, Local Government, Gender, Labor and Social Development, Justice and Constitutional Affairs, Works, Housing and Communications, and the Minister of Information. The IMPC may invite the UN Resident Humanitarian Coordinator, heads of relevant humanitarian and development agencies, and representatives of the donors to participate in its deliberations.⁸⁰

During Displacement

In Uganda, the National Policy on internal displacement provides for the District Disaster Management Committee which is tasked with ensuring that appropriate measures to guarantee the physical security of the internally displaced are established and maintained as well as coordinating the registration of IDPs who opt to return, resettle, or reintegrate, paying particular attention to the most vulnerable, including widows, the elderly, children, and the disabled, who may require special assistance. They are also responsible for preparing and implementing plans for the safe return and resettlement of IDPs, including the identification of safe sites, monitoring their overall resettlement

⁷⁹ The Department of Disaster Management and Refugees, Office of the Prime Minister, *Uganda National Report and Information on Disaster Risk Reduction Efforts for the World Conference on Disaster Reduction*, Kobe, Japan, Jan. 19-22, 2005, ¶ 2.1.1, available at <http://www.unisdr.org/eng/mdgs-drr/national-reports/Uganda-report.pdf>.

⁸⁰ *Id.* at ¶ 2.2.1.

and reintegration, verification of the voluntary nature of return and resettlement in collaboration with humanitarian agencies, and determination of transportation needs of IDPs. This body is also responsible for ensuring family reunification and the safety and dignity of internally displaced persons during movements from camps to resettlement sites.⁸¹

Law 387 of 1997 in Colombia provides that when discharging its responsibility in the Comprehensive Assistance to Displaced Populations, the Colombian Institute of Family Welfare shall give priority in its programs to the assistance of infants, minors, especially orphans, and family groups, connecting them with the community and family social assistance project in the settlement zones of the displaced.⁸² In addition, according to Article 7(1) of the Georgian Law on IDPs, the relevant structures of the executive and local authorities—including the Ministry of Refugees and Accommodation—are responsible for *inter alia* ensuring the realization of the rights of internally displaced persons returning to their place of residence.

In the Context of Durable Solutions

In Angola, the Standard Operational Procedures for the Enforcement of the Norms on the Resettlement of Displaced Populations sets forth the institutional elements of state regulation and the different tasks they are responsible for performing. According to Article 3(1), the process of resettlement and return of IDPs is led by the following entities: (a) the National Commission for Social and Productive Reintegration of Demobilized Personnel and Displaced Populations (CNRSPDD); (b) The Provincial Commission (CP), and (c) The Ad Hoc Group for Technical and Administrative Support (GADH). Under Article 3 (2), CP and GADH report to CNRSPDD in accordance with Article 4 of the Presidential Dispatch no.5/02. Under Article 5(1), the Provincial Commission evaluates the provincial plan for the resettlement or return of the displaced populations on a

⁸¹ Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons*, ¶ 2.4. (Aug. 2004), available at http://www.brook.edu/fp/projects/idp/idp_policies_index.htm.

⁸² *Id.*

monthly basis and submits a monthly report on the resettlement or return of the IDP populations to the National Commission for Social and Productive Reintegration of Demobilized Personnel and Displaced Populations, among other tasks.

In Turkey, the competent authorities responsible for implementation under the Integrated Strategy Document include *inter alia*: ministries, public institutions, and organizations which give priority to the views and suggestions of the relevant governorships while drafting their investment programs. The Ministry of Interior is responsible for the implementation, monitoring, and evaluation of fundamental policies on these issues, as well as consultation and coordination with NGOs that take part in the implementation, monitoring, and evaluation process.⁸³

INTERNATIONAL ROLE

Although there is no international agency with a formal and exclusive mandate to aid and protect IDPs, there are specific international bodies or agencies with mandates and particular expertise with regard to protecting the movement-related rights of IDPs. Displacement as a result of conflict and human rights violations generally arouses the concern of the international community. It is mostly the overwhelming need of these people for protection that moves the international community to address their plight through these bodies and agencies.⁸⁴

Representative of the Secretary General on the Human Rights of Internally Displaced Persons

The Representative of the Secretary General on Human Rights of Internally Displaced Persons serves as the United Nation's principal advocate for the

⁸³ Measures on the Issue of Internally Displaced Persons and the Return to Village and Rehabilitation Project in Turkey, ¶ 11, Aug. 17, 2007, available at http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Turkey/Turkey_StrategyDoc_2005.pdf.

⁸⁴ UNHCR, *The State of the World's Refugees, Human Displacement in the New Millennium*, at 154 (2006).

internally displaced. The Representative's mandate calls upon him to engage in dialogue and advocacy with governments and other actors concerning the rights of IDPs; strengthen the international response to internal displacement; and mainstream work to protect the human rights of IDPs, including movement-related rights throughout the UN system. In exercising this mandate, the Representative monitors displacement problems worldwide; promotes the dissemination and application of the Guiding Principles on Internal Displacement; works with governments, regional bodies, international organizations, and civil society to strengthen the normative framework and create more effective policies and institutional arrangements for IDPs; and convenes international seminars on internal displacement.

UNHCR

The United Nations High Commissioner for Refugees (UNHCR) responds to humanitarian emergencies that effect displaced populations. UNHCR's primary mandate is to offer protection to refugees and it does this by assisting them integrate in countries where they have been granted asylum, repatriate to their countries of origin, or resettle in third countries. In some instances, UNHCR has gone beyond its mandate of protecting refugees and extended it to protecting and assisting internally displaced persons. States can work with UNHCR to ensure the movement-related rights of IDPs are guaranteed and to facilitate IDP returns, resettlement, and other forms of movement. For example, in Liberia in 2003, UN troops helped UNHCR relocate thousands of IDPs from public buildings in Monrovia to proper camps or settlements.⁸⁵ In situations of displacement, states may also call upon UNHCR for assistance in transporting materials and providing assistance in establishing and maintaining camps for the displaced. UNHCR also organizes workshops to educate government officials on fundamental principles of refugee law, especially on the right to *non-refoulement*, and on the normative framework for the protection of internally displaced persons. UNHCR can also strengthen the protection regime through documentation campaigns, human rights training and other education-oriented activities, and integration initiatives.

⁸⁵ *Id.* at 173.

Other UN Agencies and International Actors

The primary role of the United Nations Children’s Fund (UNICEF) is the protection of children, including internally displaced children. This includes addressing the needs of children who are internally displaced and working to assist in their reunification with other family members. UNICEF may work closely with other agencies like the International Committee of the Red Cross, Food for the Hungry, and Save the Children (UK) as well as other NGOs to trace missing children and family members. In addition, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and its Inter-Agency Internal Displacement Division works to ensure that UN agencies in the field, under the leadership of United Nations Resident and Humanitarian Coordinator (UNRC/HCs), develop and implement strategic initiatives to meet the needs of internally displaced persons, including their movement related rights.

African Union

The mandate of the African Union allows it to address the security situation in member states by monitoring and responding to human rights violations and by pursuing other activities, including peacekeeping operations. It may enhance the protection of civilians, including internally displaced persons, by deploying police and military units to provide security in IDP camps and in areas of return. Through this presence, the African Union can deter armed groups from committing hostile acts against displaced persons and facilitate their movement. The African Union can also deploy resources and assist with mine and ordinance disposal in order to facilitate the safe return of IDPs. Finally, the African Union has elaborated a binding Convention on Assistance and Protection for Internally Displaced Persons in Africa.⁸⁶

SUMMARY OF RECOMMENDATIONS

1. States should establish the appropriate legal framework to guarantee all movement-related needs of IDPs and abolish any legal impediments that may

⁸⁶ At the time of this writing, the draft text to be adopted at an African summit in Kampala, Uganda in October 2009 was not available.

cause limitations on movement rights that go beyond internationally recognized restrictions. This may require harmonization or revision of existing laws or the introduction or simplification of certain procedures for IDPs (e.g., residence/registration requirements). More specifically, states that have not domesticated important norms relating to the movement rights of IDPs, particularly those enshrined in the Guiding Principles on Internal Displacement are encouraged to do so through legislation.

2. Restrictions on freedom of movement should only be imposed in cases of an emergency declared in accordance with the provisions of existing law. Areas where this freedom is restricted should be declared a “disaster” or “disturbed” area in the Official Gazette or via a similar official pronouncement. Where restrictions of movement rights are necessary during national emergencies and threats to the general population, they should be introduced for only a limited period of time and regularly reviewed. IDPs should be kept well informed on these measures and the reasons for their enactment. To borrow the wording of Article 4 of the Great Lakes Protocol On the Protection And Assistance to Internally Displaced Persons, states “... should undertake to ensure freedom of movement and choice of residence within designated areas of location, except when restrictions on such movement and residence are necessary, justified, and proportionate to the requirements of maintaining public security, public order and public health.”

3. States should identify existing obstacles that hinder IDPs from effectively accessing their rights and design policies that address these problems in a meaningful way. In particular, where there are circumstances that necessitate the restriction of the right to movement of the IDPs, such circumstances should be addressed as soon as possible. Furthermore, states should provide security, take measures against harassment by local authorities or communities where IDPs reside, return or resettle, and facilitate access to areas where economic and social activities take place.

4. The human rights of internally displaced persons should be guaranteed and protected by national mechanisms, such as national human rights institutions and non-governmental organizations that monitor the human rights situation, help to raise awareness of IDPs about their rights, offer assistance on issues of law and policy, provide legal assistance, and act on formal complaints.

5. States should avoid assertions that IDPs who exercise their right to choose their residence do so at their own peril. IDPs are still citizens of the state and should not be deprived of their right to exercise their freedom of movement or choice of residence because of the situation in which they find themselves. States should instead fulfill their duty to create a safe haven in new areas IDPs find themselves to enable them to exercise their freedom of choice of place of residence.

6. States should adopt laws and policies that guarantee the principle of family unity, assign responsibility for the protection of the family, and create mechanisms for family reunification of IDPs during all phases of displacement. In particular, states should guarantee support for establishing the whereabouts of missing relatives.

7. State legislation and policies should offer alternatives for durable solutions, i.e., return to place of origin in safety and with dignity, resettlement to another part of the country or integration at the place of displacement, and ensure that IDPs receive the necessary information so that decisions are made on a voluntary and informed basis. States should also clearly define the roles and duties of the authorities concerned with addressing displacement and ensure that IDPs are included in the planning and management of any relocation and the provision of assistance.

8. Internally displaced persons should be involved in decision making, especially when it comes to making the policies that govern their movement. Their insight and knowledge should be taken into consideration especially through formal and informal representatives and the non-governmental organizations that are well equipped to articulate IDPs rights and needs. IDPs should be active participants in protection programs and be equipped with information about human rights and humanitarian standards and relevant domestic mechanisms that they may access to promote their rights.

9. States should establish procedures for the issuance of new documents or the replacement of lost or destroyed documents. States should also make arrangements to avoid requirements for IDPs to return to their places of origin in order to obtain certain documentation. IDPs should have the possibility to have documents issued at their place of permanent, temporary or factual

residence. If specific offices are created for the issuance of documentation, they should be placed in areas that are easily accessible for IDPs, including the vulnerable among them.

10. Reconstruction and recovery programs that follow armed conflict and disasters should include rule of law promotion strategies that facilitate access to justice and respect for human rights, including the right to freedom of movement. Demilitarization of areas of return and reinstatement of civilian justice and police systems should also take place.

11. Internally displaced persons should be trained in mine awareness and clearance programs in order to safeguard their personal security and to facilitate movement related to finding durable solutions.

12. States should maintain the civilian character of IDP camps and limit the presence of the military once security and protection measures are in place and functioning. Continued military presence may lead to the infringement of the right to freedom of movement and also increase the likelihood that camps will be targeted by insurgents and other armed actors.

13. States should provide for the issuance of certificates which entitle IDPs to receive benefits and make use of the privileges made available to them.

14. When applying security restrictions, states should ensure that the rights of all citizens, including IDPs, are protected and that access to goods and services is guaranteed without discrimination. Security measures must be taken in accordance with the law and through legal means. They should be introduced for a limited period of time and periodically reviewed, including judicial review.

15. States should avoid invoking sovereignty as a justification for resisting or obstructing international humanitarian assistance. States should be encouraged to cooperate with international and regional organizations when national capacity is insufficient. States should also comply with UN resolutions to provide security, which, in the long run, fosters freedom of movement.

16. International humanitarian efforts to protect IDPs should never be allowed to substitute for domestic solutions to internal displacement. Sovereignty demands that states should assume their responsibilities to protect IDPs who are still citizens and thus have a right to be protected by the state.

17. States should train government officials, military, police, immigration and local authorities on the Guiding Principles, including the movement related rights of IDPs. The focus on immigration authorities is particularly important in cases where there is an eminent need for a displaced person to seek asylum outside her or his country. States should also designate an institutional focal point for coordination within the government and with local and international partners.

18. Disaster risk reduction should be emphasized among states as a means of combating the effects of natural disasters on the right to freedom of movement in particular and other human rights generally. The Hyogo Declaration adopted at the World Conference on Disaster Reduction held in Kobe, Japan, in 2005 should be adapted into local legislation.

Chapter 3

The Right to Humanitarian Assistance

David Fisher*

INTRODUCTION

It would seem a relatively straightforward matter for the *Guiding Principles on Internal Displacement*¹ (hereinafter the *Guiding Principles*) to assert that internally displaced persons (IDPs) have the right to request and receive humanitarian assistance and to point to duties of states and humanitarian actors to provide it. This issue is, however, more legally complex than it first appears, both with regard to the scope of the right to humanitarian assistance in international law and its implementation in national law.

“Humanitarian assistance” is not defined by any of the major humanitarian or human rights instruments, including the *Guiding Principles*. For purposes of this chapter, the term will apply to items essential to survival such as food, water, medical supplies, clothing, and related “non-food items” (e.g., water containers, cooking utensils, soap, etc.) or the means to immediately obtain any such items (e.g., cash assistance). It will also apply to essential services such as emergency medical care. Access to humanitarian assistance must also necessarily include not only access to relief goods, but also access to and for the personnel and equipment, such as vehicles and telecommunications or information technology items, needed to carry out humanitarian operations. This chapter will assume that humanitarian assistance arrives in the wake of some calamitous event such as an armed conflict or natural disaster. But it will also devote some brief attention to issues and standards related to providing for the survival needs of persons displaced by development projects.

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¹ U.N. Econ. & Soc. Council [ECOSOC], Comm’n. on Hum. Rts., *Guiding Principles on Internal Displacement*, U.N. Doc. No. E/CN.4/1998/53/Add.2 (1998) (prepared by Mr. Francis M. Deng) [hereinafter *Guiding Principles*].

At the international level, the existence of a general right to humanitarian assistance has been contested by some legal scholars. In fact, aside from the Geneva Conventions and their additional protocols, whose scope is limited to situations of armed conflict, the right is barely mentioned in existing treaty law. Moreover, even within the framework of the Geneva Conventions, the guarantees of the right to humanitarian assistance in internal conflict are expressed far less forcefully than those applicable in international conflict. Existing law concerning the rights and duties of international humanitarian actors is similarly patchy.

Nevertheless, the status of the right to humanitarian assistance articulated by the *Guiding Principles* is not as shaky as the foregoing might suggest. A number of human rights treaties guarantee the component rights to life, food, clothing, shelter, emergency medical care, and other necessities. The remaining gaps in law on the right to humanitarian assistance are being filled with a growing number of “soft law” instruments, of which the *Guiding Principles* is one important example, as well as with the consistent practices of states and humanitarian organizations. Strong arguments have been made about the development of customary law in this area. Moreover, there is an important number of international instruments on humanitarian assistance in the field of disasters known under the rubric of International Disaster Response Laws, Rules and Principles (IDRL), that do not express themselves in terms of rights but are aimed at ensuring speedy access to effective assistance when it is needed.² Finally, regional protocols are currently being developed in Africa to codify the *Guiding Principles* into binding law.

At the national level, it is rare to find states with comprehensive legal frameworks concerning humanitarian assistance for IDPs or anyone else. Whether this flows from a desire to maintain maximum flexibility or a simple failure to plan ahead, the result is uneven application of the rights articulated in the *Guiding Principles* as well as technical difficulties for the governments

² The International Federation of the Red Cross and Red Crescent Societies (the Federation) established the IDRL Programme in 2001. On November 30, 2007, the Federation adopted the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (the IDRL Guidelines), available at <http://www.ifrc.org/Docs/pubs/idrl/guidelines.pdf>.

themselves. Plainly, legislation cannot resolve all of the common barriers to humanitarian assistance. For instance, legal eligibility for aid from the national government would mean little to IDPs located in territory controlled by rebel forces. Similarly, if a state lacks the means to provide humanitarian assistance in massive situations of displacement, a dedicated law cannot manufacture the funds.

Yet, there are a number of legal steps that some states have been able to take to implement international norms on humanitarian assistance. These include laws related to eligibility, institutional frameworks, and budgetary mechanisms associated with humanitarian assistance from state resources; means to hold individuals accountable for criminal obstruction of humanitarian assistance; as well as rules designed to expedite, facilitate, and regulate humanitarian relief efforts.

This chapter will discuss issues at both the international and national levels. At the international level, it will survey the legal basis for the *Guiding Principles*' provisions on humanitarian assistance. In so doing, it will acknowledge the complexities of the current framework and, in particular, the different regimes operating in armed conflict and non-conflict situations. But the chapter will also conclude that the *Guiding Principles*' basic assertions about the right to humanitarian assistance are in line with the trends of international law and are therefore a good guide for the development of national law. This chapter will seek to identify the greatest barriers at the national level to implementing the rights and duties articulated by the *Guiding Principles* and provide ideas and examples as to how states might address them.

LEGAL FRAMEWORK

Relevant Guiding Principles

There are a number of provisions of the *Guiding Principles* that are directly relevant to humanitarian assistance and the associated issues examined here. These can be roughly divided into three categories: (1) those concerning the existence and scope of the right to humanitarian assistance; (2) those concerning specific measures of facilitation and regulation of humanitarian

assistance, and (3) those concerning assistance for particularly vulnerable groups.

The Existence and Scope of the Right to Humanitarian Assistance

The *Guiding Principles* are emphatic that it is the primary duty and responsibility of governments to provide humanitarian assistance to IDPs, stating so in both Principles 3(1) and 25(1). Moreover, pursuant to Principle 7(2), any “authorities” (whether state or non-state actors) responsible for intentionally displacing persons should ensure “proper accommodation” to those affected, including satisfactory conditions of nutrition, health, and hygiene.

Principle 25(2) provides that humanitarian organizations and “other appropriate actors” have the right to offer their services to IDPs and such an initiative will not be regarded as an unfriendly or interfering act. Authorities are enjoined from arbitrarily withholding consent for such offers, particularly when they are themselves unable or unwilling to provide the aid needed.

However, humanitarian assistance is more than just a duty according to the *Guiding Principles*. Principle 3(2) asserts that IDPs have a right to humanitarian assistance and are entitled to request it without fear of reprisal or persecution. Some of the components of that right are identified in other provisions. Principle 10 sets out the right to life. Principle 18 sets out the right to an adequate standard of living, including essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services, and sanitation. Principle 19 sets out the right to medical care, including psychological and social services and efforts to prevent contagious and infectious diseases. Pursuant to Principle 4(1), the right to humanitarian assistance is to be applied “...without discrimination of any kind, such as race, color, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.”

Facilitation and Regulation of Humanitarian Assistance

The *Guiding Principles* also address the facilitation and regulation of humanitarian assistance. Authorities are required to grant and facilitate free passage of humanitarian assistance, including associated personnel (Principle 25(2-3)), and not to divert it for non-humanitarian purposes (Principle 24(2)). They must also protect humanitarian personnel, transport and supplies, including from violence (Principle 26).

For their part, the providers of humanitarian assistance must ensure that their activities are carried out in accordance with the principles of humanity and impartiality (Principle 24(1)). They should also give “due regard” to the protection needs and human rights of IDPs, and respect “relevant international standards and codes of conduct” (Principle 27(1)).

Humanitarian Assistance for Particularly Vulnerable Groups

Moreover, Principle 4 notes that certain IDPs, including unaccompanied children, expectant mothers, mothers with young children, female heads of household, persons with disability, and elderly persons, are entitled to “protection and assistance required by their condition and to treatment which takes into account their special needs.” This includes special attention to the health needs of women (Principle 19 (2)), and special efforts to ensure the full participation of women in the planning and distribution of relief or basic supplies (Principle 18(3)).

Legal Basis

The Existence and Scope of the Right to Humanitarian Assistance

Explicit reference to the right to humanitarian assistance appears very sparingly in existing treaties outside of the domain of international humanitarian Law. As a result, a number of legal scholars have reached pessimistic conclusions about the existence of a general right to humanitarian

assistance.³ However, the *Guiding Principles* are nevertheless justified in asserting that there is such a right, both in war and peacetime disasters. Discussion here begins with sources of international law relevant to any situation and then turns to sources specifically relevant to situations of armed conflict, disasters, and development-induced displacement.

Sources Relevant to Any Situation

There is only one human rights treaty currently in force that specifically refers to IDPs' right to receive humanitarian assistance. Article 23 of the African Charter on the Rights and Welfare of the Child of 1990 (hereinafter the African Children's Charter) provides that states shall take "all appropriate measures" to ensure that refugee children as well as internally displaced children "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties."⁴ It also specifically provides that states should "undertake to cooperate with existing international organizations ... in their efforts to protect and assist such a child."⁵

The African Children's Charter may soon be joined by two other regional instruments in Africa. In December 2006, eleven countries of the Great Lakes region of Africa adopted a binding Pact on Security, Stability and Development in the Great Lakes region with ten separate protocols, including

³ Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR C. REV. 77 (2000); Peter MacAllister-Smith, *The Right to Humanitarian Assistance in International Law*, 66 REVUE DE DROIT INTERNATIONAL DE SCIENCE DIPLOMATIQUES ET POLITIQUES 211, 224-25 (1998); Rohan Hardcastle & Adrian T. L. Chua, *Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters*, 325 INT'L REV. OF THE RED CROSS, 589-609 (1998).

⁴ African Charter on the Rights and Welfare of the Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990).

⁵ This provision is similar to Article 22 of the Convention on the Rights of the Child, but the latter refers only to refugee children.

the Protocol on the Protection and Assistance to Internally Displaced Persons. The Protocol requires member states to adhere to the *Guiding Principles*, including by enacting them into local law.⁶ It entered into force in 2008 after eight of the eleven signatories had ratified it. As of the date of writing of this chapter, the African Union was also considering the adoption of its own draft convention on the assistance and protection of internally displaced persons in Africa.⁷

Beyond these relief-specific provisions, however, there are a number of other human rights treaties and instruments that address what can be seen as component rights of the right to humanitarian assistance. Those component rights include the rights to life, food and water, housing, clothing, and medical care.

*The Rights to Food and Water*⁸

The right to food is articulated in Article 25 (1) of the Universal Declaration of Human Rights (UDHR)⁹, Article 11 (1) of the International Covenant on Economic Social and Cultural Rights (ICESCR)¹⁰, and Article 27 (1) of the

⁶ Protocol on the Protection and Assistance of Internally Displaced Persons, arts. 3(6), 3(7), 4(1)(f), available at http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Great%20Lakes/GreatLakes_ID_Pprotocol_2006.ashx.

⁷ Draft Programme of Work of the AU Consultative Meeting on the Draft AU Convention of the Protection and Assistance of Internally Displaced Persons in Africa, Addis Ababa, May 10-11, 2007, available at <http://www.africa-union.org/root/au/Conferences/2007/May/PA/11/programme.doc>.

⁸ See chapter 4 in this volume on the rights of IDPs to food and water.

⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948) at 71 [hereinafter Universal Declaration].

¹⁰ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (1966), 6 I.L.M. 368 (1967).

Convention on the Rights of the Child (CRC)¹¹, as an element of the right to an adequate standard of living.¹² ICESCR Article 11(2) goes on to specify the “fundamental right of everyone to be free from hunger,” and Article 24(2)(c) of the CRC requires states to combat child malnutrition, “through, inter alia, ...the provision of adequate nutritious foods and clean drinking-water.” With a more specific frame of reference, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979¹³ provides that states must ensure “adequate nutrition during pregnancy and lactation” (Article 12(2)), and that women in rural areas must “enjoy adequate living conditions, particularly in relation to... water supply” (Article 14(2)). The right to food and/or water have also been repeatedly reaffirmed in the resolutions and declarations of international conferences¹⁴ and United Nations bodies.¹⁵

¹¹ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

¹² Walter Kälin, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 45 (2d ed. 2007) [hereinafter ANNOTATIONS].

¹³ Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

¹⁴ Universal Declaration on the Eradication of Hunger and Malnutrition, ¶ 1, U.N. Doc. E/CONF.65/20 (1974), U.N. Doc. ST/HR/Rev. (1974), endorsed by the General Assembly, G.A. Res. 3348 (XXIX), ¶ 3, U.N. Doc. A/RES/3348 (Dec. 17, 1974), available at <http://www.ohchr.org/english/law/malnutrition.htm>; United Nations World Water Conference, Mar del Plata Declaration, U.N. Doc. E/CONF.70/29 (1977); Vienna Declaration and Programme of Action, World Conference on Human Rights, June 25, 1993, ¶ 31, U.N. Doc. No. A/CONF.157/23 (1993), 32 I.L.M. 1661 (1993); Programme of Action of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13/Rev.1 (1995); U.N. Report on the Forth World Conference on Women, Beijing Declaration and Platform for Action, ¶¶ 147(j) and 149(f), U.N. Doc. A/CONF.177/20 (1995); Rome Declaration on World Food Security, World Food Summit, ¶ 1 (1996); The Declaration of Marrakech, World Water Council, First World Water Forum (1997), available at

At the regional level, the right to food is expressly recognized by the Protocol of San Salvador to the American Convention on Human Rights of 1988 in Article 12, which provides that “[e]veryone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.”¹⁶ The rights to both food and water are recognized by the African Children’s Charter as an element of the right to health in Article 14(2)(c).¹⁷ Moreover, the European Charter on Water Resources adopted by the Council of Europe Committee of Ministers in 2001 acknowledges that “[e]veryone has the right to a sufficient quantity of water for his or her basic needs.”¹⁸

http://www.worldwatercouncil.org/fileadmin/wwc/Library/Official_Declarations/Marrakech_Declaration.pdf; United Nations Millennium Declaration, ¶ 19, U.N. Doc. No. A/RES/55/2 (2000); *Food and Agriculture Organization of the United Nations [FAO], Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, reprinted in Report of the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Rome, Sept. 23, 2004, F.A.O. Doc. CL 127/10-Supp.1, annex 2.

¹⁵ United Nations Commission on Human Rights Resolutions 1997/8, 1998/23, 1999/24, 2000/10, 2001/25, 2002/25, 2003/25, 2004/19, 2005/18; U.N. Doc. E/CN.4/RES/1997/8 (1997); E/CN.4/RES/1998/23 (1998); E/CN.4/RES/1999/24 (1999); E/CN.4/RES/2000/10 (2000); E/CN.4/RES/2001/25 (2001); E/CN.4/RES/2002/25 (2002); E/CN.4/RES/2003/25 (2003); E/CN.4/RES/2004/19 (2004); E/CN.4/RES/2005/18 (2005). United Nations Human Rights Council Resolution A/HCR/S-7/1 (2008).

¹⁶ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, O.A.S.T.S. No. 69 (1988), *entered into force* Nov. 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

¹⁷ African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁸ Council of Europe Doc. No. CO-DBP 8 (2001), available at <http://www.coe.int>.

The Committee on Economic, Cultural and Social Rights (hereinafter the Committee) has construed the right to food and water under ICESCR Article 11 in several general comments. General Comment No. 3 on “the nature of States parties obligations” concluded that the ICESCR implies a minimum core obligation to address survival requirements including “essential foodstuffs” and asserts that a state must “demonstrate that it has made a maximum effort to use all the resources at its disposal” to ensure that these minimum needs are met.¹⁹ In General Comment No. 14, the Committee reiterated this assertion, stating that states have an obligation “to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone” as well as “an adequate supply of safe and potable water.”²⁰

In General Comment No. 12 on the right to adequate food, the Committee similarly determined that the right to food itself includes a core right to be free of hunger as well as a broader right to “adequate” food.²¹ States cannot plead that they lack resources to address hunger on their territory if they cannot show that they have made “every effort” to address it immediately, including by seeking international assistance.²² Moreover, “the prevention of access to humanitarian food aid in internal conflicts or other emergency situations” is

¹⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3, *The Nature of States Parties Obligations*, ¶ 10, U.N. Doc. E/1991/23, Annex III (1990), reprinted in U.N. Doc. HRI/GEN/1/Rev.7 (2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/189/63/pdf/G9418963.pdf>.

²⁰ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14, *The Right to Highest Attainable Standard of Health*, ¶ 43(b)-(c), U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment No. 14].

²¹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12, *The Right to Adequate Food*, ¶ 6, U.N. Doc. E/C.12/1999/5 (1999) [hereinafter General Comment No. 12].

²² *Id.* at ¶ 17.

also necessarily a violation of the right.²³ “Adequate” food implies “[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.”²⁴

In General Comment No. 15, the Committee wrote that the right to water is intrinsic to the rights to food and health, and that it should also be independently implied as a component of an “adequate standard of living.”²⁵ To ensure the right to water, states must guarantee its availability in suitable quantity, its quality, and its accessibility (including physical and economic accessibility as well as non-discrimination).²⁶ States are also required to make special efforts on behalf of certain groups that have historically had difficulty exercising this right, including IDPs.²⁷

*The Rights to Essential Medications, Medical Care and Sanitation*²⁸

A number of instruments provide for a right to health, from which one can infer rights to essential medications, medical care, and sanitation.²⁹ These include UDHR Article 25(1), ICESCR Article 12, CRC Article 24(1), Revised European Social Charter of 1996 (ESC) Article 11, African Charter on Human and Peoples Rights (AfCHPR) of 1981 Article 16(1), American Declaration of the Rights and Duties of Man of 1948 (the American Declaration) Article XI,

²³ *Id.* at ¶ 19.

²⁴ *Id.* at ¶ 8.

²⁵ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, *The Right to Water*, ¶ 3, U.N. Doc. E/C.12/2002/11 (2002) [hereinafter General Comment No. 15].

²⁶ *Id.* at ¶ 12.

²⁷ *Id.* at ¶ 16(f).

²⁸ See chapter six of this volume on the rights of IDPs to health and basic services.

²⁹ ANNOTATIONS, *supra* note 12, at 47, 144.

and Protocol of San Salvador Article 10. The right can also be found in the preamble of the 1946 Constitution of the World Health Organization, which proclaims that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

Some of these instruments refer specifically to a right to medical care. For example, ICESCR Article 12(2) requires states to take steps for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases” as well as “[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.”³⁰ Article XI of the American Declaration and Article 14(2)(h) of CEDAW also make specific reference to a right to sanitation as an element of the right to health and the right to adequate living conditions, respectively. The right to medical care has likewise been asserted in numerous international conference resolutions and declarations.³¹

³⁰ Others include: Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., art. 25(1), U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, art. 12(2), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]; CRC arts. 24(1), 39; Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, art. 12, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW]; the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, art. 5(e)(iv), U.N. Doc. A/6014 (1966) [hereinafter CERD]; African Convention for Human and People’s Rights, AFCHPR, art. 16(2); American Declaration on Human Rights, Nov. 22, 1969, art. XI, OEA/Ser. K/XVI/1.1, Doc. 65, Rev.1, Corr. 1, O.A.S.T.S. No. 36 (1970), 1144 U.N.T.S. 123; 9 I.L.M. 99 (1969) [hereinafter American Convention].

³¹ Declaration of Alma Ata, Int’l Conf. on Primary Health Care, USSR, Sept. 6-12, 1978, *available at* http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf; Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex, princ. 1, at 188-92, U.N. Doc. A/46/49 (1991); International Conference on Population and Development, Report of the International Conference on Population and

In construing the right to health under Article 12 of the ICESCR, the Committee on Economic, Cultural and Social Rights' General Comment No. 14 directly addressed humanitarian assistance to IDPs as follows:

States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.³²

It also identified, as core obligations under the right to health, providing essential primary health care, adequate sanitation, and “essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs.”³³ With regard to the latter reference, since 1977, the World Health Organization has been periodically updating a Model List of Essential Medicines, most recently updated in 2005.³⁴ In collaboration with other

Development, princ. 8, U.N. Doc. No. A/CONF.171/13 (1994); Report of the World Summit for Social Development, U.N. GAOR, 50th Sess., at 18, U.N. Doc. No. A/CONF.166/9 (1995); Report of Habitat: United Nations Conference on Human Settlements (Habitat II), U.N. GAOR, 51st Sess., ¶ 36, U.N. Doc A/CONF. 165/14 (1996).

³² ECOSOC, General Comment No. 14, *supra* note 20, at ¶ 40.

³³ *Id.* at ¶ 43.

³⁴ World Health Organization, *Model List of Essential Medicines* (2007), available at http://www.who.int/medicines/publications/08_ENGLISH_indexFINAL_EML15.pdf.

agencies, it has also developed an Inter-Agency List of Essential Medicines for Reproductive Health³⁵ and an Inter-Agency Emergency Health Kit, setting out the core medicines and medical devices needed for ten-thousand people for three months.³⁶

The Rights to Adequate Clothing and other Necessities

The right to adequate clothing is explicitly addressed as an element of an adequate standard of living in UDHR Article 25(1), ICESCR Article 11(1), and CRC Article 27(3).³⁷ Although it is not expressly mentioned in the text of the AfCHPR, the African Commission on Human and Peoples' Rights also asks states to report on the right to adequate clothing in their periodic reports, as an element of the rights to health and protection of the family, as provided for in AfCHPR Articles 16 and 18.³⁸

This right has not been widely construed. In its Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies of 2002, the Office of the High Commissioner for Human Rights states that:

The right to adequate clothing forms an important part of the general right of everyone to an adequate standard of living. The type of clothing States shall make available to those in need, in particular the poor, depends on the respective

³⁵ WORLD HEALTH ORGANIZATION, INTER-AGENCY LIST OF ESSENTIAL MEDICINES FOR REPRODUCTIVE HEALTH, Doc. No. WHO/PSM/PAR/2006.1 (2006), *available at* http://www.who.int/reproductive-health/publications/essential_medicines/essential_medicines.pdf.

³⁶ WORLD HEALTH ORGANIZATION, THE INTERAGENCY EMERGENCY HEALTH KIT, Doc. No. WHO/PSM/PAR/2006.4 (2006), *available at* <http://www.who.int/medicines/publications/mrhealthkit.pdf>.

³⁷ ANNOTATIONS, *supra* note 12, at 47.

³⁸ African Commission on Human and Peoples' Rights, Guidelines for Periodic Reports under the African Charter (1998), ¶ 33, *available at* http://www.chr.up.ac.za/hr_docs/themes/theme02.html.

cultural, climatic and other conditions in the country concerned. As a minimum, poor people are entitled to clothes that enable them to appear in public without shame.³⁹

In General Comment 5, the Committee on Economic, Cultural and Social Rights further noted that “[t]he right to adequate clothing...assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society.”⁴⁰

The Committee has also stated that the catalogue of rights listed in ICESCR Article 11(1) as component parts of the right to an adequate standard of living is not intended to be exclusive.⁴¹ Thus, other necessary and common relief items such as blankets, cooking and water carrying utensils, tools, and the like ought also to be included in this provision.

The Right to Life

The right to humanitarian assistance can also be derived from the right to life, guaranteed by UDHR Article 3, International Covenant on Civil and Political Rights (ICCPR) Article 6(1), CRC Article 6(1), American Declaration Article I, American Convention on Human Rights Article 4(1), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 2(1), and AfCHPR Article 4.⁴² As the Human Rights Committee has

³⁹ Office of the High Commissioner for Human Rights, Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies (2002).

⁴⁰ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 5, *Persons with Disabilities*, ¶ 33, U.N. Doc. No. HRI/GEN/1/Rev.7 (2004).

⁴¹ General Comment No. 15, *supra* note 25, at ¶ 3.

⁴² Ruth Stoffels, *Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps*, 48 INT’ REV. OF THE RED CROSS & RED CRESCENT, 515-46, 517 (2004).

affirmed, the right to life requires states not only to refrain from perpetrating violence, but also to adopt positive measures such as eliminating malnutrition and epidemics.⁴³

Likewise, the right to humanitarian assistance is supported by developments in international criminal law. Deliberately depriving civilians of food or other necessities by refusing or blocking humanitarian aid, whether in a situation of conflict or not, may amount to an act of genocide⁴⁴ or the crime against humanity of extermination.⁴⁵

Sources Specific to Armed Conflict

When the parties to an armed conflict are themselves the direct cause of the displacement of persons, they have an express duty to provide for the necessities of those affected. In the context of international conflict, Article 49 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereinafter the Fourth Geneva Convention) specifies that such parties “shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, [and] that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition[.]” Article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (hereinafter the Second Additional Protocol) extends this same requirement to internal armed conflicts. According to a recent study by the

⁴³ Human Rights Committee, General Comment No. 6, ¶ 5, *The Right to Life*, reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. No. HRI/GEN/1/Rev.7 (2004), at 129.

⁴⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), art. 2.

⁴⁵ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998), arts. 7(1)(b)-(2)(b) [hereinafter ICC Statute]; Christa Rottensteiner, *The Denial of Humanitarian Assistance as a Crime under International Law*, 835 INT’L REV. OF THE RED CROSS, 555-582 (1999).

International Committee of the Red Cross (ICRC), this requirement has now also become a norm of customary law in both types of armed conflict.⁴⁶

Even when a particular party is not directly responsible for displacement, a general duty nevertheless exists to provide humanitarian assistance to civilians in need when in the context of international armed conflict. Article 55 of the Fourth Geneva Convention provides that occupying powers have the duty, “to the fullest extent of the means available,” to “ensure the food and medical supplies of the population” in occupied territories. Pursuant to Article 56, they must likewise ensure “medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.” To this list of items occupying powers must supply, Article 69 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (hereinafter the First Additional Protocol) adds “clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.”

No similar general duty of armed parties to directly provide humanitarian assistance is articulated with respect to a party’s own territory in an international or internal armed conflict. However, the Second Additional Protocol does provide that civilians are to be protected from “the dangers arising from military operations,” (Art. 13), that children must be provided “the care and aid they require” (Art. 4(3)), and that the sick and wounded must be provided medical care (Art. 7(2)) in internal armed conflicts. Moreover, the human right norms discussed above would normally continue to apply.

The Duty to Allow Access to Humanitarian Assistance

Regardless of an occupying power’s efforts along the lines of the obligations described above, it is also obligated to allow others to provide relief, both as a

⁴⁶ INT’L COMM. OF THE RED CROSS, CUSTOMARY INT’L HUM. LAW, rule 131 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Vols. I & II, 2005) [hereinafter ICRC CUSTOMARY LAW STUDY].

matter of positive and customary law. Article 59 of the Fourth Geneva Convention states that, “if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population and shall facilitate them by all the means at its disposal.”

Such relief schemes include, but are not limited to, “the provision of consignments of foodstuffs, medical supplies and clothing.” As pointed out by the ICRC’s *Commentary* to the Fourth Geneva Convention, this provision is absolute. “In all cases where occupied territory is inadequately supplied the Occupying Power is bound to accept relief supplies destined for the population.”⁴⁷ On the other hand, those providing the relief must either be states or “impartial humanitarian organizations such as the International Committee of the Red Cross.”⁴⁸

This duty is also extended to non-occupied territories in situations of armed conflict (i.e., an armed party’s own territory) by Article 70 of the First Additional Protocol, but with the qualification that any such relief operation is “subject to the agreement of the Parties concerned.” However, the *Commentary* asserts that the consent of the parties may normally not be withheld, in light of the prohibition in Article 54 of starvation as a method of warfare.⁴⁹

Both the parties to an international armed conflict and other transit states are further required by Article 23 of the Fourth Geneva Convention to allow free passage of “medical and hospital stores and objects necessary for religious

⁴⁷ Comm. of Red Cross, *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 320 (Jean S. Pictet ed., 1958) [hereinafter *Commentary to GC IV*].

⁴⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287, art. 59 [hereinafter *Fourth Geneva Convention*].

⁴⁹ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 820 (Yves Sandoz et al, eds., 1987) [hereinafter *Additional Protocols Commentary*].

worship intended only for civilians of another High Contracting Party” as well as “consignments of essential foodstuffs, clothing and tonics” but, in the latter case, only if they are “intended for children under fifteen, expectant mothers and maternity cases” and not reasonably likely to be diverted, particularly for military purposes. Article 23 specifies that, subject to “technical arrangements,” such consignments must be forwarded as quickly as possible. The *Commentary* to the Fourth Geneva Convention interprets this caveat to allow the state party in question to “check the consignments and arrange for their forwarding at prescribed times and on prescribed routes.”⁵⁰

While the foregoing provisions are expressed in terms of the duties of parties to the conflict to provide or allow for relief, Article 30 of the Fourth Geneva Convention makes clear that humanitarian assistance is also a right that belongs to protected persons, providing that “protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.” The *Commentary* notes, “[t]he fact that the new Convention grants civilian war victims a formal and absolute right to appeal to supervising and relief agencies, a facility which up till then had depended solely on the goodwill of the Parties to the conflict, is of great significance[.]”⁵¹ Similarly, Article 62 provides that “[s]ubject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.”⁵²

With regard to internal armed conflict, common Article 3 of the Geneva Conventions does not expressly mention humanitarian assistance, but it does provide that parties are required to treat protected persons, including civilians, “humanely,” that “wounded and sick” are to be “collected and cared for” and that “[a]n impartial humanitarian body, such as the International Committee of

⁵⁰ *Id.* at 184.

⁵¹ *Commentary to GC IV, supra* note 47, at 215.

⁵² Fourth Geneva Convention, *supra* note 48, art. 142 (providing for a right to access to humanitarian relief by detained persons).

the Red Cross, *may* offer its services to the Parties to the conflict” (emphasis added). Article 18(1) of the Second Additional Protocol adds to this that domestic “relief societies,” including the national Red Cross or Red Crescent Society, may “offer their services” as may the civilian population itself. International relief is addressed in Article 18(2), which states that where the civilian population “is suffering undue hardship” due to lack of necessities for survival “such as foodstuffs and medical supplies,” relief actions “of an exclusively humanitarian and impartial nature” carried out without adverse distinction “shall be undertaken subject to the consent of the High Contracting Party concerned.” In its *Commentary*, the ICRC concludes, as in the case of Article 70 of the First Additional Protocol, that consent may not be arbitrarily withheld here, again, due to the prohibition of starvation as a method of warfare.⁵³

In its customary law study, the ICRC derived a general rule from existing state practice, applicable in both international and internal armed conflicts. The ICRC concluded that “[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without adverse distinction, subject to their right to control.”⁵⁴ It further concluded that “[t]here is practice which recognizes that a civilian population in need is entitled to receive humanitarian relief essential to its survival, in accordance with international humanitarian law.”⁵⁵

*Starvation as a Method of Warfare*⁵⁶

As noted above, the starvation of civilians as a method of warfare is prohibited by international humanitarian law, both in international armed conflict, pursuant to Article 54(1) of the First Additional Protocol, and in internal

⁵³ Additional Protocols Commentary, *supra* note 49, at 1479.

⁵⁴ ICRC Customary Law Study, *supra* note 46, Rule 55 at 193.

⁵⁵ *Id.* at 199.

⁵⁶ See chapter four of this volume on the rights of IDPs to food and water.

conflict, pursuant to Article 14 of the Second Additional Protocol. According to the ICRC, this prohibition has also become a requirement of customary law.⁵⁷

The *Commentary* to the additional protocols notes that “the term ‘starvation’ is generally understood by everyone. To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.”⁵⁸ It also notes the clear link between this rule and provisions concerning relief actions described above.⁵⁹ These provisions have also been strengthened by the codification of starvation as a prohibited method of war and as a war crime in the statute of the International Criminal Court.⁶⁰ Thus, the denial of access to food aid in conflict settings is clearly prohibited where it is likely to lead to starvation.

Other Sources of Law on Humanitarian Assistance in Conflicts

The duty of governments to provide and/or allow IDPs access to humanitarian assistance in situations of armed conflict has also been articulated in resolutions of the UN Security Council,⁶¹ the General Assembly,⁶² the Commission on Human Rights,⁶³ the International Conference of the Red

⁵⁷ ICRC Customary Law Study, *supra* note 46, Rule 53 at 186.

⁵⁸ Additional Protocols Commentary, *supra* note 49, at 652.

⁵⁹ *Id.* at 1457.

⁶⁰ ICC Statute, *supra* note 45, art. 8.2(b)(xxv).

⁶¹ U.N. Doc. No. S/RES/361 (1974), at ¶ 4; U.N. Doc. S/RES/688 (1991), at ¶ 5.

⁶² U.N. Doc. No. A/RES/60/168 (2005), at ¶ 12; U.N. Doc. No. A/RES/58/177 (2004), at ¶ 11.

⁶³ Report of the High Commissioner for Human Rights on Human Rights and Mass Exoduses, Addendum, Thematic compilation of relevant reports and resolutions of the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. No. E/CN.4/2005/80/Add.1 (2005), at 11

Cross and Red Crescent,⁶⁴ and other bodies.⁶⁵ Many more such resolutions assert the general obligation to provide or allow humanitarian assistance to persons in need.⁶⁶

Sources Specific to Disasters

There is no treaty relating to humanitarian issues in disasters comparable to the Geneva Conventions and their additional protocols. Those treaties that do exist focus on issues of facilitation and regulation of assistance, as discussed below. However, there are a number of “soft law” authorities pertinent to the right to humanitarian assistance in disasters. Some of these apply equally to disaster and conflict settings.

As in the laws of war, the primary instruments relevant to disasters emphasize the primary role and responsibility of states to provide humanitarian assistance. Thus, for instance, UN General Assembly Resolutions 46/182 of 1991, 45/100 of 1990, and 43/131 of 1988 all affirm the responsibility of each state “first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory.”⁶⁷ However, these instruments are also at pains to emphasize the sovereignty of the affected state vis-à-vis

(citing U.N. Doc. Nos. E/CN.4/RES/2003/52, E/CN.4/RES/2000/55; E/CN.4/RES/2004/55; E/CN.4/RES/2003/51, E/CN.4/RES/2001/54; E/CN.4/RES/2000/53, E/CN.4/RES/2002/19, E/CN.4/RES/2001/19) [hereinafter Compilation].

⁶⁴ Principles and Action in International Humanitarian Assistance and Protection, Resolution 4 of the 26th International Conference of the Red Cross and Red Crescent Societies (1995), at 1(c).

⁶⁵ ICRC Customary Law Study, *supra* note 46, Vol. II, Part 2, at 2975-80.

⁶⁶ *Id.* Vol. II, Part 1, at 1189-1243.

⁶⁷ Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, U.N. GAOR, 78th plen. mtg., U.N. Doc. A/RES/46/182 (1991), annex, ¶ 4.

external aid providers. Thus, in contrast to the mandatory acceptance language of Article 59 of the Fourth Geneva Convention, Resolution 46/182 provides that “humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.”⁶⁸ This is a consistent theme since the first General Assembly resolution on disasters was adopted in 1965.⁶⁹ These and other General Assembly resolutions have tended to refer to the “importance” rather than the “right” of humanitarian assistance in disaster settings.⁷⁰

However, the same member states have not always been so coy. In 1995, the 26th International Conference of the Red Cross and Red Crescent (comprised of all components of the Red Cross/Red Crescent Movement as well as all state parties to the Geneva Conventions) amended (by consensus) its Principles and Rules for Red Cross and Red Crescent Disaster Relief to state, *inter alia*, that “[t]he Red Cross and Red Crescent...considers it a fundamental right of all people to both offer and receive humanitarian assistance.”⁷¹ That same International Conference also “welcomed”⁷² the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,⁷³ which provides in Article 1 that “the right to receive humanitarian assistance, and to offer it, is a fundamental

⁶⁸ *Id.* at ¶ 3.

⁶⁹ See Arjun Katoch, *International Natural Disaster Response and the United Nations*, in INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES (Victoria Bannon et al. eds., 2004).

⁷⁰ See U.N. Doc. Nos. A/RES/46/182 (1991), annex, ¶ 1; A/RES/45/150 (1990), ¶ 1; A/RES/43/131 (1988), ¶ 1.

⁷¹ See Report of the Twenty-Sixth International Conference of the Red Cross and Red Crescent Societies (1995), annex IV, ¶ 2.1.

⁷² *Id.* at 128.

⁷³ See Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, available at <http://www.ifrc.org/Docs/idrl/I259EN.pdf>.

humanitarian principle which should be enjoyed by all citizens of all countries.”

Similarly, participants at an international law conference organized by the State of Qatar and the inter-governmental Asian-African Legal Consultative Committee in 1994 declared that “the right of victims to humanitarian assistance should be reaffirmed as a basic human right. This right ensures respect for other basic human rights to life, health and protection against cruel and degrading treatment” and also “implies the right of access of victims to potential donors and access of qualified national and international organizations and other donors to the victims in conformity with the relevant international instruments.”⁷⁴ A general right to humanitarian assistance, whether in situations of conflict or disaster, has also been posited by declarations and similar documents by a number of prominent academic, legal, and humanitarian organizations.⁷⁵

⁷⁴ Doha Declaration on Priorities for Progressive Development of International Law in the United Nations Decade of International Law to Meet the Challenges of the 21st Century (Mar. 25, 1994), *reprinted in* American Society of International Law Newsletter No. 5 (June 1994), *available at* <http://www.lawschool.cornell.edu/library/asil/5qatar.htm>. *See also* The Secretary General, Report of the Secretary General on the United Nations Decade of International Law, ¶ 87, delivered to the Security Council and the General Assembly, U.N. Doc. No. A/49/323 (1994).

⁷⁵ Council of the International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance, princ. 1 (Apr. 1993); Institute of International Law, *Resolution of the Institute of International Law on Humanitarian Assistance (Bruges Session 2003)*, art. II(2); *see generally* ISOBEL MCCONNAN, *THE SPHERE PROJECT: HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE* (2000) [hereinafter the SPHERE PROJECT]; *see also* Jon M. Ebersole, *The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance*, 17 HUMAN RTS. QTRL 192, 195 (1995); Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) [hereinafter *Turku Standards*]; International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, art. 5, 63 INSTITUT DE DROIT INT'L ANNUAIRE 338 (1989).

*Sources Specific to Development*⁷⁶

There are few international instruments specific to development-induced displacement, and most of those that do exist are focused on long-term resettlement issues. However, World Bank Operational Policy 4.12 on Involuntary Resettlement (the Policy) provides that any persons displaced by projects funded by the Bank should be assisted to “improve their standards of living” or at least to restore them to “pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.”⁷⁷ Such displaced persons are also to be “meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.”⁷⁸

More closely related to the topic of this chapter, the Policy further notes that, immediately after displacement, affected persons should be provided with “assistance (such as moving allowances) during relocation,” and adequate alternative housing and, as appropriate, agricultural sites.⁷⁹ “Where necessary to achieve the purposes of the [resettlement policy]” they are also to receive “support after displacement, for a transition period, based on a reasonable estimate of the time likely to be needed to restore their livelihood and standards of living.”⁸⁰ Similar provisions on the care of persons post-

⁷⁶ See chapter fifteen in this volume on development-induced displacement.

⁷⁷ World Bank Operational Policy on Involuntary Resettlement 4.12, ¶ 2(c) (2001), available at <http://www.chinaeol.net/wbi/chinacourse/documents/BP%204.12.pdf>.

⁷⁸ *Id.* at ¶ 2(b).

⁷⁹ *Id.* at ¶ 6(b).

⁸⁰ *Id.* at ¶ 6(c).

displacement can be found in the Involuntary Resettlement Policies of the Asian Development Bank⁸¹ and the Inter-American Development Bank.⁸²

In his 2007 report to the Human Rights Council, the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living presented an expert-developed Basic Principles and Guidelines on Development-Based Evictions, which provides in relevant part that:

competent authorities shall ensure that evicted persons or groups, especially those who are unable to provide for themselves, have safe and secure access to: (a) essential food, potable drinking water and sanitation; (b) basic shelter and housing; (c) appropriate clothing; (d) essential medical services; (e) livelihood sources; (f) fodder for livestock and access to common property resources previously depended upon; and (g) education for children and childcare facilities.⁸³

The Facilitation and Regulation of Humanitarian Assistance

In both armed conflict and disaster settings, there are also international laws and standards specifically concerning the facilitation and regulation of humanitarian assistance. In the context of armed conflict, it is somewhat difficult to disentangle this obligation from the right to humanitarian assistance. In disaster settings, however, the distinction is easier to make as

⁸¹ See Asian Development Bank, *Involuntary Resettlement Policy*, ¶¶ 34(iii), VII (1995), available at http://www.adb.org/Documents/Policies/Involuntary_Resettlement/involuntary_resettlement.pdf.

⁸² See Inter-American Development Bank, *Sectoral Operational Policy, Involuntary Displacement*, 10/98, IND-103 (1998), available at http://www.iadb.org/sds/ind/publication/publication_138_102_e.htm.

⁸³ The Special Rapporteur, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 52, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (prepared by Miloon Kothari).

most of the relevant instruments focus much more on the “how” of humanitarian assistance as opposed to whether it will be allowed.

Sources Specific to Armed Conflict

As mentioned above, in the context of armed conflict, Article 23 of the Fourth Geneva Convention requires states to allow free passage of medical goods and some other items. Article 61 requires that relief consignments be “exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory” and that the occupying power “facilitate the[ir] rapid distribution[.]” It also calls on contracting parties to “endeavor to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.”

Article 30 provides that “the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist” protected persons “shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.” It further provides that states must facilitate “visits to protected persons by the representatives of...organizations whose object is to give spiritual aid or material relief to such persons.” According to the *Commentary to the Fourth Geneva Convention*, these provisions mean that it is not enough for authorities to merely authorize relief work, they must also “facilitate and promote” it, for example through “the provision of facilities for delegates to move about and carry on correspondence, to have free access to all places where protected persons are living, transport facilities and facilities for distributing relief, etc.”⁸⁴

This obligation is expressed more broadly in Article 70(2) of the First Additional Protocol, which states that “[t]he Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.” Likewise, Article 81 provides that the ICRC and

⁸⁴ Commentary to GC IV, *supra* note 47, at 218.

national Red Cross and Red Crescent Societies, as well as other humanitarian organizations authorized to intervene, shall receive “all facilities within their power so as to enable [them] to carry out” their humanitarian functions pursuant to the Convention. The *Commentary on the First Additional Protocol* notes that:

[t]he intention of these words is to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous. Customs officials and the police in particular should receive instructions to this effect. The passage referred to may take place over land, water, or by air. However, the speed of the passage and whether it takes place unimpeded depends on local circumstances. Thus the obligation imposed here is relative: the passage of the relief consignments should be as rapid as allowed by the circumstances.⁸⁵

While the Second Additional Protocol does not include specific language on facilitating access, the ICRC’s customary law study found enough practice to justify extending a requirement that, subject to a right of control, the “parties to the conflict must allow and facilitate rapid and unimpeded passage for humanitarian relief for civilians in need” to both international and internal conflicts.⁸⁶ It likewise specifically found that the parties to the conflict “must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions” subject only to temporary restrictions due to military necessity.⁸⁷

As a corollary to these duties to facilitate humanitarian assistance and ensure freedom of movement of humanitarian personnel, international humanitarian law requires states to protect humanitarian personnel, goods, and equipment from attack and diversion from their intended beneficiaries. Article 70(3) and

⁸⁵ Additional Protocols Commentary, *supra* note 49, at 823.

⁸⁶ ICRC Customary Law Study, *supra* note 46, Vol I, at 193-200.

⁸⁷ *Id.* at 200.

(4) of the First Additional Protocol provides that relief consignments shall not be diverted or delayed except “in cases of urgent necessity in the interest of the civilian population concerned” and must also be “protected.” Article 71(2) similarly provides that relief personnel shall be “protected and respected.”

No specific provisions of this kind are included in the Second Additional Protocol; however, the ICRC customary law study again found the above-described rules to be customary for both international and internal armed conflict.⁸⁸ This conclusion is buttressed by the protections for humanitarian personnel and objects articulated in the Convention on the Safety of United Nations and Associated Personnel of 1994⁸⁹ and the inclusion of deliberate attacks against “personnel, installations, material, units or vehicles involved in a humanitarian assistance” as a war crime in both international and internal armed conflict in the Rome Statute of the International Criminal Court.⁹⁰

Sources Relevant to Disasters

In the absence of a centralized treaty regime, international law on the regulation of humanitarian aid in disasters has appeared in a plethora of instruments. Many of these are bilateral treaties. However, there are also some important multilateral treaties and crucial “soft law” documents that help set the regulatory “stage” for humanitarian assistance in disaster settings.⁹¹

Relevant bilateral treaties range in subject matter from technical assistance to mutual assistance and agreements regulating humanitarian and/or recovery relief between the two state parties. The latter two categories tend to set out

⁸⁸ *Id.* at 105-111.

⁸⁹ Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), 34 I.L.M. 482 (1994).

⁹⁰ ICC Statute, *supra* note 45, arts. 8(2)(b)(iii), 8(2)(e)(iii), 8(2)(b)(xxiv), 8(2)(e)(ii).

⁹¹ International Federation of Red Cross and Red Crescent Societies, INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES (Victoria Bannon et al. eds., 2003).

formal rules for the initiation and termination of assistance, require the designation of focal points on both sides for the exchange of relevant information, and set out modalities for instructions to emergency teams. They also “reflect a general intention to ensure that frontier-crossing formalities are minimized,” in particular with respect to visas and work permits for the assisting states’ relief personnel⁹² and for customs controls on relief goods and equipment. Many bilateral treaties also require receiving states to assume liability for claims related to the assisting state’s assistance and some of them additionally require that assisting state personnel be provided with physical protection.

Some of the relevant multilateral treaties are specifically concerned with particular types of disasters. These include environmental treaties,⁹³ treaties concerning industrial or nuclear accidents,⁹⁴ and weapons control agreements.⁹⁵ Others are focused on a particular sector of assistance operations such as sea or air transport,⁹⁶ telecommunications,⁹⁷ satellite imaging,⁹⁸ health

⁹² Agreement between Denmark and the Federal Republic of Germany on Mutual Assistance in the Event of Disasters or Serious Accidents of 1985, art. 4.

⁹³ Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances, art. 7, Official Journal of the European Communities, No. L 188/9 (July 16, 1984).

⁹⁴ Convention on the Transboundary Effects of Industrial Accidents, 2105 U.N.T.S. 460 (1992); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1457 U.N.T.S. 134 (1986).

⁹⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. 8, 32 I.L.M. 804 (1993); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 7, 26 U.S.T. 583 (1972).

⁹⁶ Convention on Facilitation of International Maritime Traffic, annex 1, sects. 5.11-5.12, 591 U.N.T.S. 265; 4 I.L.M. 502 (1965); Convention on International Civil Aviation of 1944, Annex 9, sect. 8.8, *reprinted in International Civil Aviation Organization, International Standards and Recommended Practices: Facilitation—Annex 9 to the Convention on International Civil Aviation* (12th ed., 2005).

emergencies,⁹⁹ civil defense,¹⁰⁰ food aid,¹⁰¹ and customs.¹⁰² At the regional level, mutual disaster assistance treaties have also been adopted in the Americas, Asia, and Europe.¹⁰³ The instruments with the broadest scope are non-binding recommendations, declarations, and guidelines, such as General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Measures to Expedite Emergency Relief adopted by both the International Conference of the Red Cross and the UN General Assembly in 1977 and the International Conference of the Red Cross' Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations of

⁹⁷ Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, June 18, 1998 [hereinafter Tampere Convention].

⁹⁸ Charter On Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (2000), *available at* http://www.disasterscharter.org/charter_e.html.

⁹⁹ Revised International Health Regulations, 58th World Health Assembly, Agenda Item 13.1, Doc. No. WHA58.3 (2005).

¹⁰⁰ Framework Convention on Civil Defense Assistance (2000), *available at* http://untreaty.un.org/unts/144078_158780/16/2/7149.pdf.

¹⁰¹ Food Aid Convention of 1999, *available at* <http://untreaty.un.org/english/notpubl/notpubl.asp>. The 1999 version of the Food Aid Convention formally expired in 2003, but has been temporarily extended several times, most recently in 2005 for a two year period.

¹⁰² International Convention on the Simplification and Harmonization of Customs Procedures, TIAS 6633 (1973) and its 1999 Protocol of Amendment, at annex J.5.

¹⁰³ Inter-American Convention to Facilitate Assistance in Cases of Disaster (1991); Agreement on Disaster Management and Emergency Response (2005) [hereinafter ASEAN Agreement]; Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters (1998).

1969.¹⁰⁴ Some of the human rights instruments mentioned above also have provisions related to the facilitation of disaster relief.¹⁰⁵

While the resulting cohort of multilateral instruments is rather fragmented—both in terms of scope and geographic coverage, it is possible to discern many of the same themes addressed in the bilateral treaties discussed above, and in particular the primary concern with reducing barriers to the entry and efficient operation of international disaster relief actors, when they are needed, as highlighted by operative paragraph 6 of General Assembly Resolution 46/182: “States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential.”

With regard to the entry of relief personnel, many of the relevant instruments accord with Recommendation E of the Measures to Expedite International Relief, which recommends “that all Governments waive requirements for transit, entry and exit visas for relief personnel acting in their official capacity as representatives of internationally-recognized relief agencies.”¹⁰⁶ Most of the relevant instruments also echo the 1970 Recommendation of the Customs Cooperation Council (predecessor to the World Customs Organization) that all states expedite and minimize customs inspections and documentation and to waive any otherwise applicable duties or restrictions on export, transit, or import of relief goods and equipment.¹⁰⁷ The Tampere Convention on the

¹⁰⁴ Resolution XXVI, XXIst International Conference of the Red Cross (1969).

¹⁰⁵ See, e.g., Turku Standards, *supra* note 75, at ¶¶ 14-15.

¹⁰⁶ G.A. Res. 57/150, ¶ 3, U.N. Doc. A/RES/57/150 (Dec. 16, 2002); see also Tampere Convention, *supra* note 97, art. 9(2)(c); see generally International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: Entry of International Disaster Relief Personnel* (2006).

¹⁰⁷ Recommendation of the Customs Co-operation Council to expedite the forwarding of relief consignments in the event of disasters, Doc. No. T2-423 (1970). See generally, International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: International Standards on Customs and Disaster*

Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998 reiterates these principles with respect to telecommunications equipment and operating personnel, calling also for reduction of other regulatory barriers (such as licensing requirements) to the use of such equipment for disaster relief.¹⁰⁸ The Council of Europe's Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and other Medical Institutions for Purposes of Diagnosis or Treatment of 1960¹⁰⁹ contains parallel provisions with regard to medical equipment. Several instruments also call for the facilitation of transport of relief personnel, goods and equipment, particularly with regard to overflight, landing, and berthing rights.¹¹⁰

International protection for the security of disaster relief personnel took a step forward in 2005, when the General Assembly adopted the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel,¹¹¹ extending the original Convention's protections to peace building and "emergency humanitarian assistance" operations. The scope of this instrument is still rather limited, inasmuch as it only covers United Nations personnel and NGOs officially operating under agreement with the United Nations and

Relief (2006), available at <http://www.ifrc.org/docs/pubs/idrl/idrl-visas-background.pdf>.

¹⁰⁸ See Tampere Convention, *supra* note 97.

¹⁰⁹ 376 U.N.T.S. 111 (1960), reprinted in Official Journal of the European Communities L 131, at 48-49 (May 17, 1986).

¹¹⁰ See *supra* note 96 and accompanying text. See generally International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: Standards in Transport in International Disaster Operations* (2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp> [hereinafter IFRC Principles and Rights].

¹¹¹ U.N. Doc. No. A/C.6/60/L.11 (2005).

contains an express “opt out” clause with respect to natural disasters;¹¹² however, it sets a helpful precedent that security obligations can extend beyond the context of armed conflict.

The provisions of these instruments were recently reaffirmed at the 30th International Conference of the Red Cross and Red Crescent in 2007. At that conference, the state parties to the Geneva Conventions adopted a new set of non-binding *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (hereinafter the *IDRL Guidelines*)¹¹³ designed to assist governments to integrate international norms and best practice on international relief into domestic law.

Sources Concerning the Quality of Aid

International legal regulation of the quality of humanitarian assistance is rather weak. This has resulted from a combination of states’ reluctance to create legal frameworks that might be threatening to plenary control over their borders, and concern within the humanitarian community that any regulation of its activities could lead to a loss of independence and freedom of action.

The principles of humanity, impartiality, and neutrality are widely accepted as cornerstones of the quality of humanitarian action. They are codified for the Red Cross/Red Crescent Movement in its Fundamental Principles (found in its statutes) and have also been endorsed by the UN General Assembly as well as UN agencies.¹¹⁴ They have also been incorporated in the most widely used documents on quality in the humanitarian community, the Code of Conduct of the Red Cross Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,¹¹⁵ drafted in 1994 and the *Sphere Project Humanitarian*

¹¹² *Id.* at art. II(3).

¹¹³ Resolution IV, XXXth International Conference of the Red Cross and Red Crescent Societies (2007).

¹¹⁴ See IFRC Principles and Rights, *supra* note 110.

¹¹⁵ Annex VI to the resolutions of the XXVIth International Conference of the Red Cross and Red Crescent Societies, Geneva, 1995.

Charter and Minimum Standards in Disaster Response, first published in 2000 and updated in 2004 (hereinafter the *Sphere Handbook*).¹¹⁶ Although both refer to disaster in their titles, their text makes clear that they were meant for use both in disaster and conflict settings, and this has indeed been the practice. Both were created by humanitarian actors and are non-binding.

The Code sets out ten principles of conduct for aid organizations, calling on them to provide aid without discrimination, on the basis of need, without furthering a particular political, religious or governmental viewpoint, and in a manner respectful of the dignity, perspective and active role of beneficiaries and domestic relief actors. It also includes three annexes with recommendations for recipient state and donor governments and inter-governmental organizations to facilitate a propitious “working environment” for humanitarian assistance, including facilities for entry and operation of relief operations.

The *Sphere Handbook* includes a brief “charter” based on human rights, humanitarian and refugee law as well as a detailed set of quantitative and qualitative standards organized by sector, including water and sanitation, food, shelter and non-food items and health services. The Handbook makes clear that measures to increase the protection of beneficiaries are a crucial element of their quality, noting that “[t]he form of relief assistance and the way in which it is provided can have a significant impact (positive or negative) on the affected populations security.”¹¹⁷ It therefore includes standards on issues such as prevention of sexual abuse and exploitation, and beneficiary registration.¹¹⁸ Additional guidance on protection issues widely cited in the humanitarian community have been developed and/or adopted by the Inter-Agency Standing

¹¹⁶ SPHERE PROJECT, *supra* note 75.

¹¹⁷ *Id.* at 12.

¹¹⁸ *Id.*

Committee, a policy-making body of the United Nations (which also includes the participation of the ICRC, IFRC and several NGO networks).¹¹⁹

Another common theme of many of the documents and initiatives mentioned above is the importance of adequately informing and involving beneficiaries in the planning and execution of humanitarian assistance operations. This imperative is supported in the field of human rights by the right to receive information, as articulated by, inter alia, UDHR Article 19, ICCPR Article 19(2), AfCHPR Article 9, American Convention Article 13, and ECHR Article 10. The principles of the foregoing instruments were also reaffirmed in the recently adopted IDRL Guidelines, as discussed above.

Other important quality initiatives include the Principles and Practice of Good Humanitarian Donorship of 2003,¹²⁰ a donor document that mirrors the standards being developed by the humanitarian actors the Humanitarian Accountability Partnership International,¹²¹ the Interaction PVO Standards,¹²² the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP),¹²³ and People in Aid.¹²⁴ These mechanisms

¹¹⁹ Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters of 2006; Implementing the Collaborative Response to Situations of Internal Displacement: Guidance for UN Humanitarian Coordinators and Country Teams of 2004; Growing the Sheltering Tree: Protecting Rights Through Humanitarian Action of 2002; Plan of Action and Core Principles of Codes of Conduct on Protection from Sexual Abuse and Exploitation in Humanitarian Crisis of 2002, all *available at* <http://www.humanitarianinfo.org/iasc/>.

¹²⁰ Meeting Conclusions, International Meeting on Good Humanitarian Donorship, Stockholm, June 16-17, 2003.

¹²¹ Humanitarian Accountability Partnership, <http://www.hapinternational.org>.

¹²² InterAction, <http://www.interaction.org>.

¹²³ ALNAP, <http://www.alnap.org>.

¹²⁴ People In Aid, <http://www.peopleinaid.org>.

aim to increase understanding and effective evaluation of quality issues in humanitarian operations.

For the most part, the quality of disaster aid is not directly addressed in the major multi-lateral instruments on disaster relief. One exception is the Food Aid Convention, as revised in 1999, which sets out a number of progressive quality standards in the design and implementation of food aid operations.¹²⁵ The other is the Association of South East Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response of 2005, which provides that relief goods provided by relief providers under the treaty should “meet the quality and validity requirements of the Parties concerned for consumption and utilization.”¹²⁶ On the other hand, a number of bilateral treaties provide that relief personnel must be properly trained and qualified.¹²⁷

Sources Concerning the Treatment of Vulnerable Groups

Another important aspect of the regulation of humanitarian assistance is the imperative to be responsive to the special needs of particularly vulnerable groups. This involves not only avoiding discrimination but also positive measures to ensure that they are not left out in relief operations.

Article 23 of the Fourth Geneva Convention specifically provides for free passage of “essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.” Moreover, Article 24 obliges parties to ensure the “maintenance” of children under fifteen who are orphaned or separated from their parents and Article 16 requires that “[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.”

¹²⁵ The Food Aid Convention is one of two components of the International Grains Agreement of 1995, available at <http://www.igc.org.uk/en/downloads/brochure/iga1995.pdf>.

¹²⁶ ASEAN Agreement, *supra* note 103, art. 12(4).

¹²⁷ International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: International Standards of Quality in Disaster Relief* (2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

Article 70(1) of the First Additional Protocol adds that, “[i]n the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.” Other protections for women and children in particular are provided in Articles 76-78. Likewise, Article 4(3) of the Second Additional Protocol provides, as a “fundamental guarantee” of humane treatment that “[c]hildren shall be provided with the care and aid they require[.]” The ICRC has also found a more generalized customary norm of international law for both international and internal conflicts, that provides that children and “[t]he elderly, disabled and infirm” who are affected by armed conflict are “entitled to special respect and protection.”¹²⁸

The CRC, CEDAW, African Children’s Charter, and other human rights instruments also call for positive measures to ensure that needs of children and women are met. The Compilation notes that General Comment No. 5 of the Committee on Economic Cultural and Social Rights¹²⁹ stated that the denial of reasonable accommodation on the basis of disability can negate the full enjoyment of economic, cultural, and social rights—and the rights of the elderly to be free of discrimination and to live in dignity and security has been recognized by the UN General Assembly.¹³⁰ More recently, the Committee on Economic Cultural and Social Rights has highlighted that priority in food aid and distribution of water in emergency situations should be given to the “most vulnerable or marginalized groups.”¹³¹

¹²⁸ ICRC CUSTOMARY LAW STUDY, *supra* note 46, rules 135 & 138, at 489.

¹²⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 5, *Persons with Disabilities* (1994).

¹³⁰ United Nations Principles for Older Persons, princ. 18, U.N. Doc. A/RES/46/91 (1991); Compilation, *supra* note 63, ¶¶ 54, 57.

¹³¹ See General Comment No. 12, *supra* note 21, ¶ 38; General Comment No. 15, *supra* note 25, ¶ 60.

In December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (the Disabilities Convention).¹³² The Disabilities Convention entered into force on 3 May 2008 and presently has fifty states parties.¹³³ Article 11 of the Convention provides that “States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”

The Sphere Handbook also identifies the needs of children, older people, and disabled people as well as gender issues as “cross-cutting issues” requiring special attention with regard to each sector of humanitarian assistance.¹³⁴ Similarly, in 2002, an international conference adopted the Madrid International Plan of Action on Ageing, which noted the particular vulnerabilities of the elderly in disaster and other emergency situations, and called upon states to take a number of specific measures to ensure them “[e]qual access...to food, shelter and medical care and other services.”¹³⁵

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

There are many common obstacles to the implementation of the provisions of the *Guiding Principles* and their underlying international law relevant to humanitarian assistance at the national level. Those in situations of armed conflict are the most obvious and familiar. They also tend to be the most acute, leading to intense deprivation and death in an alarming number of situations

¹³² G.A. Res. 61/106, U.N. Doc. No. A/RES/61/106 (Jan. 24, 2006).

¹³³ Status of ratifications and accessions as of 26 Mar. 2009. See the table at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=1&chapter=4&lang=en>.

¹³⁴ See SPHERE PROJECT, *supra* note 75, at 10-12.

¹³⁵ Madrid International Plan of Action on Ageing, *reprinted in* Report of the Second World Assembly on Ageing, U.N. Doc. No. A/CONF.197/9, ¶¶ 55, 56 (2002).

around the world. However, important obstacles to obtaining humanitarian assistance also exist with regard to disaster- and development-induced displacement, ranging from outright denial to more subtle legal, regulatory, and logistical barriers that delay or impede the effectiveness of relief.

Obtaining Humanitarian Assistance

From All Providers

Several common obstacles arise regardless of the source from which IDPs seek humanitarian assistance.

Violence and Intimidation against IDPs

Violence and intimidation often impede IDPs from obtaining humanitarian assistance in conflict and post-conflict settings. In some cases, they are blocked from traveling to distribution points by order of an armed party, or by fighting, lawlessness, or other hazards (such as landmines or unexploded ordnance) in the area.¹³⁶ Sexual violence is a particular risk and barrier for many displaced women and girls.¹³⁷ In others, they are reluctant to accept assistance from one side in the fighting for fear of direct reprisal by the other or of inviting greater military involvement in their community, with its accompanying risks of abuses and/or attracting attack.¹³⁸ This is particularly

¹³⁶ Internal Displacement Monitoring Centre, *Somalia: Window of Opportunity for Addressing One of the World's Worst Internal Displacement Crises* (Jan. 10, 2006).

¹³⁷ Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2005, 2006* INTERNAL DISPLACEMENT MONITORING CTR. 26 [hereinafter IDMC Global Overview].

¹³⁸ Representative of the Secretary-General, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, submitted pursuant to Commission on Human Rights resolution 2002/56: Addendum Profiles in Displacement: Mexico, ¶ 26, U.N. Doc. No. E/CN.4/2003/86/Add.3 (2003); see also Project Counseling Services, *Deteriorating Bogota: Displacement and War in Urban Centers* (Dec. 2002).

common when camps and other places of refuge have become militarized by one of the parties to the conflict.

The same problem arises with regard to assistance from humanitarian organizations when they are perceived by one side of a conflict as favoring the other, or when it appears to be in the military interest of a party to weaken a portion of the population. IDPs may also hesitate to openly receive assistance from any source for fear that it will lead to attack by armed forces seeking to appropriate the aid for themselves.

Inaccessibility and Lack of Information

IDPs affected by disaster and conflict are often geographically remote from national capitals where both national and international aid operations tend to be based, making them difficult to reach. Another important logistical challenge occurs when IDPs are difficult to locate—for instance if they are nomadic, dispersed in the homes of families or friends, or merging into pre-existing migration streams, such as to urban areas.¹³⁹

Lack of information can be an important barrier both with regard to IDPs and aid providers. Where IDPs are not adequately informed about available assistance they do not know to seek it out. For providers, reliable data on the location, numbers, and needs of IDPs is frequently unavailable and difficult to obtain. Likewise, baseline population data is inadequate or sorely outdated in many countries, greatly complicating the process of determining and planning for humanitarian needs.¹⁴⁰

¹³⁹ Internal Displacement Monitoring Centre, *Armenia: General Lack of Attention Given to People Displaced as a result of the Conflict* (2000), available at <http://www.internal-displacement.org>; *Ethiopia: Poor Communication Hampering Flood Response*, REUTERS (Aug. 16, 2006), available at <http://www.alertnet.org>.

¹⁴⁰ Les Roberts & Charles-Antoine Hoffman, *Assessing the Impact of Humanitarian Assistance in the Health Sector*, 1 EMERGING THEMES IN EPIDEMIOLOGY 3 (2004), available at <http://www.pubmedcentral.gov>.

Discrimination

Discrimination is a major barrier to some IDPs in obtaining humanitarian assistance. In some cases, it is an overt element of official policy. More often, however, discriminatory results occur in humanitarian assistance operations notwithstanding facially neutral policies, due to the ways in which they are carried out. Thus, for example, a human rights assessment of the response to the 2004 tsunami by ActionAid identified numerous instances of discrimination against ethnic minorities, migrants, and other disfavored populations by both governments and humanitarian organizations.¹⁴¹ Likewise, a UN survey found that persons displaced by the tsunami in Indonesia received much less humanitarian assistance if they were living with host communities rather than government-run camps, but that the tsunami-affected overall received much more assistance than the conflict displaced.¹⁴²

Vulnerable Groups

Women, children, elderly, and disabled persons have traditionally found it more difficult to access humanitarian assistance. Displaced women and girls face high rates of sexual violence, limiting their ability to travel to receive aid. Moreover, sexual exploitation of IDP women and girls by both domestic and international providers of assistance in so-called “food for sex” schemes is disturbingly common.¹⁴³ In general, according to UNICEF, “displaced women and girls are worse off than men: they receive an unequal ration of food, eat

¹⁴¹ ActionAid, *Tsunami Response: A Human Rights Assessment*, at 49-52 (Jan. 2006), available at http://www.reliefweb.int/library/documents/2006/tsunami_HR01.pdf.

¹⁴² Office of the United Nations Recovery Coordinator for Aceh and Nias, *Sample Survey on IDPs Living with Host Communities: Findings and Analysis* (2006), available at <http://www.internal-displacement.org>.

¹⁴³ IDMC Global Overview, *supra* note 137, at 27; Save the Children U.K., *From Camp to Community: Liberia Study on Exploitation of Children* (2006).

less and eat last.”¹⁴⁴ Female-headed households also tend to receive lesser allocations of food in emergency situations, particularly when distribution systems are controlled by men.¹⁴⁵ They also suffer particularly low rates of participation in the planning and execution of assistance operations.¹⁴⁶

The special needs of the elderly and disabled tend to be forgotten in emergency situations. For instance, HelpAge International has noted that the elderly may have more difficulty sourcing fuel and water, greater difficulty accepting donated clothes different from those they traditionally wear, limited mobility (and ability to stand in queues, for instance), problems digesting some foods (due to general and dental health issues), and greater need for medicines and health services.¹⁴⁷

Corruption and Fraud

The social disruption caused by a disaster or armed conflict can greatly exacerbate the problem of corruption.¹⁴⁸ Programs to distribute humanitarian assistance to IDPs can become targets of those seeking to divert funds for their private gain. There has been little systematic study of this problem; however, it is generally recognized among humanitarians that external corruption is an important drain on their resources and a factor undermining the image of their operations both with beneficiaries and donors. At the same time, false

¹⁴⁴ See Judy A. Benjamin & Khadija Fancy, *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography*, 1998 WOMAN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN 21.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 23.

¹⁴⁷ Helpage International, *Older People in Disasters and Humanitarian Crises: Guidelines for Best Practice* (2005), at 4.

¹⁴⁸ Barnaby Willitts-King & Paul Harvey, *Managing the Risks of Corruption in Humanitarian Relief Operations* (Overseas Development Institute, 2005), at 13, available at <http://www.adb.org/Documents/Events/2005/Tsunami-Relief/harvey.pdf>.

accusations of corruption can also be a potent political weapon against government or non-governmental aid providers.¹⁴⁹

Corruption risks appear at every stage of the humanitarian process, from needs assessment to procurement and distribution.¹⁵⁰ At the same time, as experienced humanitarian organizations are well aware, applicants for aid also resort to fraud, for example, by falsely claiming displaced status and/or filing double claims.¹⁵¹

Lack of Consultation

The primary dilemma with regard to implementing the *Guiding Principles* is the traditional lack of influence of beneficiaries. IDPs and other consumers of humanitarian assistance do not normally pay for the products and services they receive and thus have little influence over providers. While recent years have seen a great deal of discussion and new initiatives within the humanitarian community to increase consultation of beneficiaries in program planning and execution, recent evaluations of the sector indicate that real participation is still rare.¹⁵² Most importantly, many IDPs lack any accessible mechanism to address complaints about problems with the assistance they receive.

Lack of Coordination

The lack of coordination of domestic and international relief providers is among the most difficult problems in humanitarian assistance. Within governments, many ministries and departments may be involved in assistance

¹⁴⁹ Pete Evans et al. for Transparency International, *Mapping the Risks of Corruption in Humanitarian Action* (2006), 67.

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.* at 66.

¹⁵² TEC Synthesis Report, *infra* note 186, at 10; Humanitarian Accountability Partnership International, *Humanitarian Accountability Report 2005 11* (2006) [hereinafter Humanitarian Accountability Report], available at <http://www.hapinternational.org>.

operations for IDPs, as well as multiple branches of national government and local and provincial authorities, and it is still rare for countries to have comprehensive IDP policies. Thus, for instance, the Internal Displacement Monitoring Centre (the IDMC) reported that, in Cote d'Ivoire, where more than 700,000 persons have been internally displaced by internal conflict between 2002 and 2006, there was "no central government coordination mechanism for humanitarian response and no state body with overall responsibility for IDPs."¹⁵³ The same is reportedly true in forty-two out of the fifty-two countries monitored by the IDMC.¹⁵⁴

Likewise, there are many states that either lack comprehensive national legislation and/or policy on disaster response, or whose institutional arrangements have proven too weak to handle the pressure of a major disaster. For instance, when the Pakistan earthquake struck on October 8, 2005, Pakistan lacked a disaster management agency or policy and new institutions and plans had to be created immediately to respond to the nation's worst natural calamity.¹⁵⁵

Moreover, few governments have well-adopted and centralized systems for registering, monitoring, and facilitating the work of international humanitarian organizations. International actors thus frequently find that they seek assistance and permission of various types from multiple bureaus and officials who are not necessarily in communication or agreement with each other.

For its part, the international humanitarian community's mechanisms of coordination also have weaknesses.¹⁵⁶ Governments of affected states have often complained about the failure to respect their overall coordination role,

¹⁵³ Internal Displacement Monitoring Centre, *Cote d'Ivoire: Need for Coherent Response* (2006), available at <http://www.internal-displacement.org>.

¹⁵⁴ See IDMC Global Overview, *supra* note 137, at 17.

¹⁵⁵ F.A. Khan, *The Response to the Earthquake in Pakistan: The View from the Federal Relief Commission*, 34 HUMANITARIA EXCH. 2 (2006).

¹⁵⁶ Constanza Adinolfi et al., *Humanitarian Response Review* (2005).

the changing mandates and activities of international actors, and the unrealistic expectations and demands placed on government agencies, particularly at the local level.¹⁵⁷

Problems Specific to Obtaining Assistance from the Government or Other Relevant Authorities

Blanket Denials

The failure to obtain support from the government or other duty-bearing party sometimes results from a refusal to acknowledge any obligation towards the displaced. This is particularly common where the government or an insurgent group is the cause of displacement in a conflict setting. Many insurgent groups, and even some government forces, directly prey on civilian populations rather than providing them with the sorts of assistance contemplated by international humanitarian law. According to IDMC, IDPs received insufficient or no humanitarian aid from their governments in three-quarters of the situations where humanitarian needs existed due to conflict in 2005, affecting nearly six million persons.¹⁵⁸

Blanket denials of assistance also occur in some development-induced displacement settings—particularly when the displaced lack formal title to their land.¹⁵⁹ For instance, in May 2005, the Government of Zimbabwe launched a “clean up exercise” called Operation Murambatsivina, evicting the residents of fifty-two informal settlements and demolishing their homes,

¹⁵⁷ See Piero Calivi-Parsett, *International Disaster Response Law Project: Report on Findings from South Asia, Southern Africa and Central America*, Mar. 2003, at 17, available at <http://www.ifrc.org/idrl>.

¹⁵⁸ See IDMC Global Overview, *supra* note 137, at 16.

¹⁵⁹ Courtland Robinson, *Risks and Rights: The Causes, Consequences and Challenges of Development-Induced Displacement*, Brookings Institution-SAIS Project on Internal Displacement Occasional Paper (2003).

eventually resulting in the displacement of over 569,000 persons.¹⁶⁰ As a result, it was reported that “[m]ost did not have enough food to feed their families and many families could not afford to send their children to school anymore.”¹⁶¹ Nevertheless, the Government reportedly provided no humanitarian assistance.¹⁶²

Lack of Allocated Resources and Capacity

In many cases of massive displacement, governments make at least some effort to provide assistance to displaced persons. However, the result is often inadequate to meet the needs due to a lack of allocated resources or capacity. This problem is often acute in the cases of sudden, massive displacement, such as in the wake of a sudden-onset disaster—by which a government’s own personnel and infrastructure may be as deeply affected as the general population. For example, the December 26, 2004 tsunami that displaced over 566,000 in Aceh, Indonesia, also dealt over USD 80 million in damage to the regional government, with over 21 percent of its personnel directly affected, and 21 percent of public buildings and 19 percent of publicly-owned equipment destroyed.¹⁶³

¹⁶⁰ Internal Displacement Monitoring Centre, *Zimbabwe: Government Obstructs Humanitarian Access to Displaced as New Evictions Loom*, May 5, 2006 [hereinafter IDMC Zimbabwe Report], available at <http://www.internal-displacement.org>.

¹⁶¹ International Federation of Red Cross and Red Crescent Societies, *Interim Final Report: Assistance to the Population Affected by the ‘Clean-up’ Exercise*, Appeal No. 05E016 (July 31, 2006) [hereinafter Federation Zimbabwe Report], available at <http://www.ifrc.org>.

¹⁶² *Id.*; see also IDMC Zimbabwe Report, *supra* note 160.

¹⁶³ BAPENAS, *Indonesia: Preliminary Damage and Loss Assessment—The December 26, 2004 Natural Disaster* (Jan. 2005), at 64; Elisabeth Scheper, Arjuna Parakrama, Smruti Patel, *Impact of the Tsunami Response on Local and National Capacities* (Tsunami Evaluation Coalition, 2006), 23 [hereinafter TEC Local and National Capacities Report].

Governments also lack the resources adequately to respond in many situations of chronic displacement. Nearly half of the states monitored by the IDMC are included on the UN's list of "least developed countries."¹⁶⁴

In some cases, however, the scarcity of domestic funds for assistance programs may be at least partially attributed to political decisions with regard to budgeting. For example, although the Ugandan government adopted a progressive national policy on the assistance, protection, and rehabilitation of IDPs in February 2005, it had reportedly failed to allocate any budgetary resources to implement it as of March 2006.¹⁶⁵ Similarly, a January 2004 judgment of the Colombian Constitutional Court held that the Colombian government had violated the constitutional and statutory rights of IDPs by failing to allocate adequate resources to their assistance and protection.¹⁶⁶

Moreover, capacity-related problems do not only arise in developing countries. As a "lessons learned" report of the United States federal government acknowledged in February 2006, government relief efforts failed, mainly for institutional reasons, to adequately meet urgent needs for food, water, ice, and other necessities of persons displaced by Hurricane Katrina in August 2005.¹⁶⁷

¹⁶⁴ See IDMC Global Overview, *supra* note 137, at 78-79; United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *List of Least Developed Countries*, available at <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

¹⁶⁵ Internal Displacement Monitoring Centre & Refugee Law Project, 'Only Peace Can Restore the Confidence of the Displaced'—Update on the Implementation of the Recommendations made by the UN Secretary-General's Representative on Internally Displaced Persons following his visit to Uganda, at 18-19 (Mar. 2006) [hereinafter IDMC Uganda Update].

¹⁶⁶ Corte Constitucional de Colombia, Sentencia N° T—025/04. Abel Antonio Jaramillo y otros v Red de Solidaridad Social y otros (2004).

¹⁶⁷ United States Department of Homeland Security, *The Federal Response to Hurricane Katrina: Lessons Learned*, 44-45 (Feb. 2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned>.

In some cases, the question of capacity is related to the level of government. In many countries, local and provincial governments are delegated great responsibility for emergency response and humanitarian assistance, but control over the majority of public revenue is in the hands of national governments and is not disbursed consonant with the former responsibilities.¹⁶⁸

Lack of Documentation

Another common barrier to obtaining humanitarian aid from governments is the lack of identity or other necessary personal documents. In some countries, a high percentage of the entire population lack identity documents. For those who have such documents, they are frequently lost or destroyed in the process of displacement.

Problems Specific to Obtaining Assistance from Humanitarian Organizations

Refusal of Entry, Restricted Movement, and Expulsion

Sometimes, governments and/or rebel groups refuse to allow the entry and/or free movement of humanitarian assistance organizations to assist IDPs. For example, the United Nations Emergency Relief Coordinator accused the Israeli military of severely restricting humanitarian access for over a month after its incursion into Lebanon beginning on July 12, 2006.¹⁶⁹ The IDMC reported that governments had restricted humanitarian access in one quarter of the countries it monitored in 2005.¹⁷⁰ In other cases, international humanitarian

¹⁶⁸ Comisión Colombiana de Juristas, *Principales preocupaciones sobre el decreto 2131 de julio 2003 para el disfrute del derecho a la salud y a la atención médica de la población desplazada* (2003), at 3, available at <http://www.internal-displacement.org>.

¹⁶⁹ *UN Attacks Lebanon Aid 'Disgrace,'* BBC News, Aug. 10, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/4778591.stm.

¹⁷⁰ See IDMC Global Overview, *supra* note 137, at 16.

organizations, particularly NGOs, already in the country have been expelled or threatened with expulsion for their activities and/or statements.¹⁷¹

Technical Entry Problems

Even where international assistance has been officially requested by a government, technical barriers can intervene to block or delay its entry. One such barrier is obtaining necessary visas and working permits for international personnel.¹⁷² Another obstacle is customs clearance of relief goods and equipment. Particularly in sudden-onset situations, relief consignments are frequently blocked in customs due to slow procedures, ambiguous regulations, the need for approval by multiple ministries, an influx of inappropriate and/or insufficiently documented aid shipments, and lack of inspection capacity. A further frequent issue is whether, and to what extent, customs duties and other charges will be imposed on relief goods and equipment.¹⁷³

Problems with Originating and Transit States

A lesser known aspect of the problem of access begins well before humanitarian organizations reach the borders of the affected state. Obstacles range from deliberate sanctions regimes to every-day visa and customs rules ill-suited to facilitating emergency transit. Sanctions regimes, whether

¹⁷¹ Internal Displacement Monitoring Centre, *Eritrea: Uncertain Future for Thousands of Returning IDPs* (June 13, 2006), available at <http://www.internal-displacement.org>; *Niger says no Food Crisis, Threatens to Expel NGOs*, REUTERS, Nov. 29, 2005, available at <http://www.reliefweb.int>.

¹⁷² International Federation of Red Cross and Red Crescent Societies, *Report on the European Forum in International Disaster Response Laws, Rules and Principles, Antalya, Turkey, May 25-26, 2006*, at 3, available at <http://www.ifrc.org/idrl> [hereinafter European IDRL Forum Report].

¹⁷³ Internal Displacement Monitoring Centre, *Angola: Relief Food Held up by Bureaucratic Obstacles*, Oct. 2002, available at <http://www.internal-displacement.org>; *Oxfam Pays \$1 million Tsunami Aid Duty*, BBC NEWS, June 17, 2005, available at http://news.bbc.co.uk/2/hi/south_asia/4103054.stm.

originating from the multilateral or national level, can block or greatly delay the delivery of aid, even though exemptions for humanitarian assistance are generally allowed. As noted in a 1998 expert conference on sanctions hosted by the Overseas Development Institute:

The case studies illustrated that exemptions policies use too restricted definitions of what is required for “humanitarian” purposes. Vaccines may be allowed but cold chain equipment or educational materials not. Certain medicines may be exempted but the water and sanitation infrastructure of the country is allowed to collapse, because pumps, spare parts, chlorine and generators are embargoed as supposedly non-humanitarian or potentially “dual-use” items. But maintaining or restoring health in large populations requires more than basic medicines.¹⁷⁴

Similarly, a 1999 report on sanctions by OCHA noted other examples, including how regional embargoes on Burundi and Sierra Leone, approved by the Security Council, delayed the importation of food, seeds, fertilizers, and fuel for the distribution of humanitarian relief for months.¹⁷⁵

In the United States, past sanctions against Iraq, North Korea, and other countries have restricted the action of American humanitarian NGOs.¹⁷⁶

¹⁷⁴ Koenrad Van Brabant, *Can Sanctions be Smarter? -- The Current Debate: Report of an Overseas Development Institute Conference held in London, 16-17 Dec. 1998*, at 25 (1999), available at <http://www.odihpn.org/pdfbin/sanconf.pdf>.

¹⁷⁵ Claude Bruderlein, *Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective* (UN Office of Humanitarian Affairs, 1999), available at http://www.reliefweb.int/ocha_ol/pub/sanctions.html.

¹⁷⁶ International Rescue Committee, *American Aid Groups Are Being Shut Out of Iraq by U.S. Sanctions, says International Rescue Committee; President Bush Could Fix Problem With Stroke of a Pen* (2003), available at http://www.theirc.org/news/american_aid_groups_are_being_shut_out_of_iraq_by_us_sanctions_says_international_rescue_committee_president_bush_could_fix_problem_with_stroke_of_a_pen.html; Report of the Church World Service and Witness

Additional restrictions have impeded American NGOs from exporting necessary equipment for use in the field.¹⁷⁷

Transit states also sometimes erect barriers, particularly to aid from disfavored sources. For instance, Pakistan was accused in 2006 of blocking transit of shipments of aid from India to Afghanistan.¹⁷⁸ Obtaining overflight permission for humanitarian purposes has also been a problem over time.¹⁷⁹

Visa restrictions in neighboring states may also obstruct humanitarian aid. In April 2004, the Government of Kenya ceased accepting Somali passports after the reported discovery of a significant number of such passports “pre-stamped” with fraudulent Kenyan entry visas.¹⁸⁰ As the hub of many humanitarian agencies intervening in Somalia, Nairobi thus became off limits to Somali staff, significantly hampering operations.

[CWSW] Unit Committee Study Group on the Humanitarian Impact of Economic Sanctions: Implications for the Ministry of Church World Service and Witness (1998), available at <http://www.nccusa.org/98ga/sancpol.html>.

¹⁷⁷ United States Department of Commerce Bureau of Industry and Security, *2005 Report on Foreign Policy-Based Export Controls*, Appendix I: Summary of Public Comments on Foreign Policy Export Controls (Nov. 16, 2004 Comment of Interaction), available at <http://www.bis.doc.gov/PoliciesAndRegulations/05ForPolControls/Appendix1.htm>.

¹⁷⁸ *Transit Denial by Pak Hampering Afghan Reconstruction*, Islamic Republic News Agency, Aug. 9, 2006, available at <http://www.irna.ir/en/news/view/menu-236/0608097142181634.htm>.

¹⁷⁹ *Sudan Refuses Overflight Rights for Humanitarian Chief to visit Chad*, AFP, Apr. 4, 2006, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/VBOL-6NJGBH?OpenDocument>; Mohamed el Baradei, *Model Rules for Disaster Relief Operations*, at 29-30 (1982).

¹⁸⁰ Internal Displacement Monitoring Centre, *Symptoms of Complex Emergencies Hamper Humanitarian Work in Most of Southern and Central Somalia* (2004), available at <http://www.internal-displacement.org>.

Insecurity and Attacks on Humanitarians

In conflict settings, insecurity is usually the largest barrier to humanitarian organizations seeking access to provide assistance to IDPs. For instance, nearly one-half million needy persons in Darfur were out of the reach of international humanitarian assistance due to insecurity in August 2006.¹⁸¹ Increasingly, aid workers are also direct targets of combatants,¹⁸² as demonstrated by murders in Sudan and Sri Lanka.¹⁸³ Insecurity can also be an issue in disaster settings when the rule of law is not assured.

Domestic Legal Personality

Difficulties obtaining domestic legal personality are a substantial problem for NGOs and national Red Cross or Red Crescent Societies responding internationally to disasters, leading to delay and additional expense in their aid operations.¹⁸⁴ In most countries, the time required for formal registration under domestic law is substantial. Thus, the emergency operations of foreign organizations not already present in a country are often carried out in a situation of at least ambiguous legality.

Scarcity/Proliferation of Responders

The flip side of the access issues discussed above comes from the supply side of international humanitarian assistance. First, in many major displacement situations, international funding and actors are extremely scarce. IDMC has noted ten major IDP situations worldwide where in 2005 the UN was not

¹⁸¹ Office for the Coordination of Humanitarian Affairs, *Sudan: Half a Million Darfurians Cut off from Aid*, Aug. 16, 2006, available at <http://www.reliefweb.int>.

¹⁸² *Aid by Numbers: Violence is Top Cause of Aid Worker Deaths*, REUTERS, Feb. 8, 2006, available at <http://www.alertnet.org/thefacts/reliefresources/113941858325.htm>.

¹⁸³ *Global Aid Workers Walking a Tricky Tightrope*, REUTERS, Aug. 9, 2006, available at <http://www.alertnet.org/thenews/newsdesk/COL213773.htm>.

¹⁸⁴ European IDRL Forum Report, *supra* note 172, at 4.

involved in providing assistance or protection to IDPs.¹⁸⁵ On the other hand, in some high-profile disasters, a proliferation of international actors has greatly impaired coordination, encouraged duplication and competition, increased costs, impeded the delivery of needed aid, and increased the incidence of inappropriate types of aid.¹⁸⁶ For example, after the December 2004 tsunami, it was reported that there were twenty-two medical NGOs working in the health sector on one part of the west coast of Aceh, eighty-five working on shelter, and more than sixty working in education.¹⁸⁷ In disaster settings, many governments have been unable or unwilling to track, monitor, and coordinate the work of so many actors.

Unneeded, Unprofessional and Inappropriate Assistance

Related to the issue of proliferation of actors is the growing phenomenon of unneeded, unprofessional and/or inappropriate aid. This problem is closely linked with media attention to disaster situations: the so-called “CNN effect.” In response to high-profile disasters, governments and international humanitarian actors sometimes vie with each other to publicly “plant their flag” with a sponsored project in the affected country, leading to supply-driven aid. Greater public attention also tends to mobilize inexperienced actors unfamiliar with humanitarian operations and local conditions. While this problem is more common in disaster settings, it has also been reported in some conflict situations.¹⁸⁸

¹⁸⁵ See IDMC Global Overview, *supra* note 137, at 19.

¹⁸⁶ John Telford & John Cosgrave, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report*, TSUNAMI EVALUATION COAL., at 55-61 (2006) [hereinafter TEC Synthesis Report].

¹⁸⁷ *Id.* at 56.

¹⁸⁸ Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, *International Response to the Conflict and Genocide: Lessons from the Rwanda Experience—Synthesis Report*, at 29 (Mar. 1996).

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

What are governments to do in light of these varied and serious obstacles? Legislation is plainly not a complete answer, but there are some legal steps that can make an important difference.

During Displacement

Domestic Right to Humanitarian Assistance

Domestic law should clearly provide all civilians—whether displaced or not—with the right to assistance in case of humanitarian need. This may be partially accomplished through incorporating the human rights to an adequate standard of living and health into national law. Many states have taken long strides down this path. For example, twenty states have reportedly enshrined the right to food in their national constitutions and at least thirteen have similarly codified the right to health (or at least a state duty to provide health care).¹⁸⁹ However, it is also important to separately articulate and elaborate upon an entitlement (whether in constitutional, statutory, or other law) to humanitarian assistance in crisis situations, such as armed conflict and disaster, because of the peculiar exigencies of these circumstances. A good example is Indonesia's recently-adopted law on disaster management, which provides that “every person affected by a disaster is entitled to assistance fulfilling basic needs.”¹⁹⁰

While the right to assistance is independent of the cause of displacement, national law should also clearly provide that when the state itself displaces civilians (e.g. for military or development reasons), it must provide them with

¹⁸⁹ Food and Agricultural Organization, *Focus—Food: A Fundamental Human Right*, available at <http://www.fao.org/FOCUS/E/rightfood/right7.htm>; Iain Byrne, *Making the Right to Health a Reality: Legal Strategies for Effective Implementation*, Paper presented at the Commonwealth Law Conference (Sept. 2005), available at <http://www.interights.org/doc/health%20paper.doc>.

¹⁹⁰ Law Concerning Disaster Management, arts. 1(1), 26(2), adopted Mar. 31, 2007 (Indonesia) (unofficial translation on file with Author).

adequate food, clothing, medical care, and other humanitarian needs. Many military manuals already provide for this in the conflict context.¹⁹¹

Laws and regulations implementing the right to assistance should be made as concrete as possible, without sacrificing all flexibility, in order to ensure transparency and equity in distribution. For example, Article 23 of the Japanese Disaster Relief Act of 1947 (as amended in 1985) provides that prefectural governors shall ensure, among other things:

- 1) Provision of accommodations (including emergency temporary housing);
- 2) Distribution of cooked rice and other foods, supplies of drinking water;
- 3) Distribution and/or loan of clothing, bedding, and other basic necessities;
- 4) Medical and natal care;
- 5) Rescue of disaster victims;
- 6) Emergency repairs of housing subject to disaster;
- 7) Distribution and/or loan of funding, equipment, and materials required to maintain livelihoods;
- 8) Distribution of school supplies
- 9) Interment;
- 10) Other matters in addition to those in the preceding sub-paragraphs as specified by government ordinance.¹⁹²

With even greater detail, the Thai Ministry of Finance has issued a very detailed set of Criteria and Practice of Providing Assistance for Disaster Victims in Case of Emergency setting forth rules and amounts of cash assistance to be provided to victims of natural disasters, with precise amounts to cover meals, kitchen utensils, purchase of clean water, bedding, soap, washing powder, toothpaste, buckets, gasoline, and a great number of other items—but also including a savings clause stating that “[i]n case it is

¹⁹¹ See ICRC CUSTOMARY LAW STUDY, *supra* note 47, Vol. II, Part 2, 2972-73.

¹⁹² Disaster Relief Act of 1947 (Law No. 108; October 18, 1947), as amended on December 25, 1984, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

necessary to provide assistance beyond these criteria and practice, an approval should be sought from the Ministry of Finance.”¹⁹³

The right to humanitarian assistance should also be understood to encompass the right to request assistance from humanitarian organizations or other parties without fear of reprisal. In occupied territory, this must include the right to directly solicit assistance from international humanitarian organizations. It should also extend to the right to seek assistance from the opposing party in any type of conflict, when that party exercises de facto control over the territory where the person in need is located (and is therefore duty-bound to provide assistance under international humanitarian law, as described above). Similarly, regulations should provide that international humanitarian assistance will not be blocked from entering “enemy territory.” A number of states have directly integrated language from the Geneva Conventions and their additional protocols into domestic military manuals concerning these types of obligation.¹⁹⁴

Moreover, the right to humanitarian assistance includes not only materials such as food and clothing, but also primary health services. These should be taken to include mental health and reproductive health services, often neglected in disaster and conflict situations.¹⁹⁵ Another area of concern in humanitarian medical services is the tendency among some governments to seek “cost recovery” (i.e., user fees) from service users.¹⁹⁶ These fee systems usually provide for exemptions for those without any resources, and it is argued that such systems can help to rebuild shattered health infrastructure. However, studies have shown that the income from such systems is negligible

¹⁹³ Criteria and Practice of Providing Assistance for Disaster Victims in Case of Emergency, B.E. 2546 (2003), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

¹⁹⁴ ICRC CUSTOMARY LAW STUDY, *supra* note 46, Vol. II, Part 1, at 1179-82.

¹⁹⁵ Jan Egeland, United Nations Emergency Relief Coordinator, Keynote Address to the NGOs for the Committee on Mental Health (Nov. 18, 2004), available at http://www.who.int/mental_health/resources/en/Egeland_address.pdf.

¹⁹⁶ *Id.* at 12.

whereas they cause a dramatic decline in usage of health services among the poor, even where exemptions exist.¹⁹⁷ Given this imbalance of risks to benefits, it would not be difficult to recommend that the right to urgent medical care in conflict and disaster situations should be without charge.

Eligibility and IDP status

Both international human rights and humanitarian law call for the allocation of humanitarian assistance on the basis of need. However, this can be easier said than done at the domestic level, as it is not always immediately obvious who does and does not need to be provided assistance and a thorough investigation of every individual's circumstances is usually impractical.

IDP status is a criterion that some states have used for providing assistance and this can frequently be appropriate given the specific vulnerabilities that so often accompany the loss of one's home. Moreover, some limiting mechanism for state assistance is plainly necessary and appropriate, in light of the potential for fraud and the value of equitable and prudent use of state resources. However, in creating such a status, it is important to guard against discrimination, including against those who have not been displaced but who nevertheless also have humanitarian need, and between different groups of IDPs. Thus, if an IDP status is created in national law with eligibility for a broad range of assistance in mind, other routes for eligibility for life-sustaining assistance should also be available for non-IDPs. Moreover, the definition of "IDP" should be sufficiently broad to encompass those placed in similarly difficult circumstances by different causes outside their control (e.g., conflict, disaster, and development). Good examples of this are Angola's Standard Operational Procedures for the Enforcement of the Norms on the Resettlement of Displaced Populations of 2002,¹⁹⁸ Uganda's National Policy for Internally

¹⁹⁷ *Id.*

¹⁹⁸ Angolan Council of Ministers Decree No. 79/02, annex, art. 1 (Dec. 6, 2002), available at <http://www.internal-displacement.org>.

Displaced Persons of 2004,¹⁹⁹ and Azerbaijan's Law on the Status of Refugees and Forcibly Displaced Persons,²⁰⁰ all of which adopt a broad definition of IDP consistent with the *Guiding Principles*.

In other states that have adopted laws or policies on IDPs, the focus has been limited to only some causes of displacement. For example, the IDP laws of Peru,²⁰¹ Croatia,²⁰² Colombia,²⁰³ Georgia,²⁰⁴ and Russia²⁰⁵ only apply to persons fleeing individualized persecution, massive violations of human rights, or armed conflict. This constrained approach makes for poor preparedness for future displacement situations and increases the potential that persons displaced by one cause will receive better care than those displaced by another. At the very least, states should adopt laws that have prospective effect

¹⁹⁹ Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons*, at x (Aug. 2004), available at http://www.brook.edu/fp/projects/idp/idp_policies_index.htm.

²⁰⁰ Law of the Republic of Azerbaijan on the Status of Refugees and Forcibly Displaced Persons, art. 1 (1999), available at http://www.brook.edu/fp/projects/idp/idp_policies_index.htm.

²⁰¹ Republic of Peru, Law No. 28223 Concerning Internal Displacements, art. 2 (May 19, 2004), available at http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

²⁰² Law on the Status of Displaced Persons and Refugees of 1993, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b4de30>.

²⁰³ República de Colombia, Ley 387 de 1987, Diario Oficial No. 43.091, art. 1 (July 24, 1997), available at http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

²⁰⁴ Law of Georgia on Internally Displacement Persons, art. 1 (as amended on June 9, 2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?Docid=44ab85324>.

²⁰⁵ Amended Law of the Russian Federation on Forced Migrants, art. 1 (Dec. 28, 1995), available at http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

—dealing with possible future displacement crises and not only the IDP caseload from a single event (e.g., a recent civil war).²⁰⁶

Even if discrimination concerns are met, it is also important to ensure that the process of determining IDP status does not itself create a bureaucratic barrier or other problems. The absence of corroborating documents, for example, should not be allowed to block applications, in light of the frequency with which displaced persons lose such documents as a result of their displacement. Moreover, although not the topic of this chapter, creating an IDP status tied primarily to humanitarian need can sometimes complicate IDPs' ability to obtain assistance with return or resettlement and/or remedies for human rights violations associated with their displacement after their immediate humanitarian needs have been met. Finally, application processes should ensure a right to appeal initial refusals in light of the potential for error. In this respect, Colombian²⁰⁷ and Russian²⁰⁸ laws provide good examples.

Legislation on Disaster Management

Regardless of any IDP-specific legislation or policy, states should develop comprehensive national laws and/or policies on disaster management, dealing holistically with disaster risk reduction, relief, and recovery. Botswana, for example, adopted a National Policy on Disaster Management in 1996, setting out a framework for the development and updating of contingency plans, setting out some institutional responsibilities, and emphasizing the

²⁰⁶ See, e.g., Law of Georgia on Internally Displaced Persons, *supra* note 204, art. 1 (applying both to past and future displacement due to conflict or massive human rights violations).

²⁰⁷ Decreto No. 2569, de 12 de diciembre de 2000, art. 11 (Colombia).

²⁰⁸ Federal Law No. 202-FY of Dec. 20, 1995, on Introducing the Amendments and Addenda to the Law of the Russian Federation on the Forced Migrants, art. 3(5) (2003), available at http://www.brook.edu/fp/projects/idp/idp_policies_index.htm.

connections between risk reduction, relief, recovery, and development.²⁰⁹ Either together with the foregoing or separately,²¹⁰ states should also have laws dealing with civil protection and rehabilitation in the event of armed conflict. These laws should plainly lay out their responsibilities to provide humanitarian assistance on the basis of need and without discrimination.

*Legislation on Development-Induced Displacement*²¹¹

States should likewise develop laws regulating the process of displacement by publicly-funded development projects. Such laws should ensure that any persons affected are given entitlement to subsistence aid as well as resettlement, rehabilitation assistance, and compensation.

Attention to Vulnerable Groups

National law or policy on humanitarian assistance to IDPs (and other groups) should specifically provide for attention in humanitarian assistance programs to ensure that the special needs of vulnerable groups such as women, children, the elderly, and disabled are met. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War offers a good example by making specific reference to "special attention" for such groups.²¹² Many

²⁰⁹ National Policy on Disaster Management, Presidential Directive No. CAB 27/96 (Jan. 9, 1996) (Republic of Botswana), *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

²¹⁰ Emergency Preparedness Act, RT1 2000, 95, 613 (Nov. 22, 2000) (Republic of Estonia), *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp> (covering civil protection and contingency planning for both disasters and conflict situations); *see also* Law Concerning Disaster Management (Indonesia), *supra* note 190.

²¹¹ See Chapter 15 of this volume on development-induced displacement.

²¹² THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT AND THE LAW OF THE SOUTH CAUCASUS: GEORGIA, ARMENIA & AZERBAIJAN 280 (Roberta Cohen, et al. eds., 2003) [hereinafter THE LAW OF THE SOUTH CAUCASUS].

other states have included similar provisions in military manuals.²¹³ Such provisions are currently rare in disaster laws, which tend to be strongly focused on institutional arrangements.

Minimum Standards

National law or policy should also set out and enforce minimum quality standards for the materials and conduct of humanitarian assistance, both in the aid it provides and, in non-conflict disasters, with respect to aid provided by humanitarian organizations. This is an element of states' underlying responsibility to provide or ensure adequate assistance to persons in humanitarian need. However, these standards should be flexible enough to ensure that humanitarian organizations retain sufficient independence to abide by humanitarian principles.

Many existing laws articulate specific amounts of assistance to be provided. However, the quality of such assistance should also be regulated consonant with international standards. The Sri Lankan and Indonesian governments took steps along these lines in response to the 2004 tsunami, when the former required that all transitional housing structures must comply with the Sphere Handbook's minimum standards²¹⁴ and the latter decreed that international recovery assistance providers must submit plans indicating how they plan to involve local communities, rehabilitation actors in their projects, and abide by a code of ethics.²¹⁵

²¹³ See ICRC CUSTOMARY LAW STUDY, *supra* note 46, Vol. II, Part 2, at 3060-63, 3101-04.

²¹⁴ See The Office of the UN High Commissioner for Refugees [UNHCR], Press Release, *Transitional Shelter—Summary of Government Policy and Present Discussion on Utilities (Water & Electricity) (Draft)*, July 7, 2005, available at [http://www.humanitarianinfo.org/srilanka/catalogue/Files/Reference/Guidelines/United%20Nations/gl_Transitional%20Shelter%20Summary%20Of%20Government%20Policy%20And%20Present%20Discussion%20On%20Utilities%20\(Water%20&%20Electricity\).pdf](http://www.humanitarianinfo.org/srilanka/catalogue/Files/Reference/Guidelines/United%20Nations/gl_Transitional%20Shelter%20Summary%20Of%20Government%20Policy%20And%20Present%20Discussion%20On%20Utilities%20(Water%20&%20Electricity).pdf).

²¹⁵ See Decree of President of the Republic of Indonesia Number 69 of 2005 Concerning Participation of Foreign Organizations/Individuals in Providing Grants for

Criminalizing the Obstruction and Diversion of Aid

States should ensure that measures to obstruct and divert humanitarian aid are subject to criminal sanction. A number of states have long provided for specific crimes for grave breaches of the Geneva Conventions (as required by those instruments),²¹⁶ and many more have recently codified war crimes, crimes against humanity, and genocide into the national law as a result of their adherence to the Rome Statute of the International Criminal Court.²¹⁷ States should also ensure that corruption in humanitarian assistance, whether by government or non-state actors, is proscribed and suitably punished, in both war and peacetime settings.

Information and Consultation of IDPs

National law and policy should provide for the involvement of beneficiaries in the planning and execution of government assistance programs to the extent possible. They should also set out obligations concerning informing IDPs about potential benefits and how to access them. For example, Nepal's 2007 policy provides for "massive dissemination" of information on IDP relief programs and calls for IDP organizations to be "involved in the process of delivery of services."²¹⁸

the Rehabilitation and Reconstruction of the Region and Life in Nanggaroe Aceh Darussalam Province and Nias Islands in North Sumatra Province (Nov. 14, 2005).

²¹⁶ See, e.g., Geneva Conventions Act (R.S., 1985, c. G-3) (Canada), available at <http://lois.justice.gc.ca/en/G-3/index.html>.

²¹⁷ See ICRC CUSTOMARY LAW STUDY, *supra* note 46, Vol. II, Part 1, at 1184-86; Amnesty Int'l, *International Criminal Court: Implementation*, IOR 40/009/2007, May 30, 2007, available at <http://web.amnesty.org/pages/icc-implementation-eng>.

²¹⁸ National Policies on Internally Displaced Persons, 2063 (Nepal), secs. 8.2.10 & 8.2.13 (2007), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/634C98DB1EB6BD2DC12572D70029553B/\\$file/IDP+Policy.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/634C98DB1EB6BD2DC12572D70029553B/$file/IDP+Policy.pdf).

Protection of Recipients

States should make clear in their military manuals and any specific laws on armed conflict, humanitarian assistance, and/or IDPs that they will be responsible for the safety of IDPs and other civilians in conflict situations.

Facilitation and Coordination of Humanitarian Assistance

Initiation and Invitation

National disaster laws should clearly set out procedures for undertaking needs assessments and determining when international assistance is required. They should also set out the steps and responsible organs for requesting such assistance. Fiji's National Disaster Management Plan of 1995 provides a good model in this regard.²¹⁹ It provides that an initial appeal, either general or to specific countries, is made by the Prime Minister on the advice of the national Disaster Controller, a high-level official. Once this overarching appeal has been made, specific requests for particular elements of operational support and relief assistance are made by the National Disaster Controller through the Ministry of Foreign Affairs, after consultation with the Emergency Committee (comprised of a number of ministries and the Fiji Red Cross). Even before the government has made an official appeal, recognized NGOs may seek support from their respective international organizations, provided the National Disaster Controller is notified.

In disaster settings, in particular, governments have wide authority under international law to choose from whom they will seek assistance (so long as those in need receive assistance from someone). In light of experiences with recent highly-televised disasters, they should take steps to ensure that they have the legal and institutional capacity to exercise this power of choice so that they are not overrun by inappropriate or unneeded aid and/or incompetent providers from abroad. At the same time, the need for speed in sudden-onset

²¹⁹ International Federation of Red Cross and Red Crescent Societies [IFRC], *Fiji: Laws, Policies, Planning and Practices on International Disaster Response*, at 14-15 (July 2005), available at <http://www.ifrc.org/idrl>.

disasters requires that this selection process be accomplished as quickly as possible so as not to constitute a bureaucratic delay to the “right” aid.

In the context of conflict, international humanitarian law imposes a stronger obligation on states to accept specific offers of aid from international humanitarian organizations. This obligation should be clearly reflected in national law, as it is for example, in Peru’s Law Concerning Internal Displacements, which specifically provides that “[w]hen the magnitude of the problem demands it, the State must call upon the participation of International Organizations, including Agencies of the United Nations System, in order to participate in terms of protection and assistance or to collaborate in an advisory capacity.”²²⁰ In a somewhat similar vein, Article 2 of Colombia’s Law 387 provides that “[t]he forcibly displaced have the right to request and receive international assistance and that engenders the international community’s corresponding right to provide humanitarian assistance.”²²¹ National law should also recognize the special status of the ICRC under the Geneva Conventions and accord its request for access particular consideration.

Entry of International Assistance

Once international assistance has been accepted, national law should facilitate its smooth entry. This includes provisions for waiving or expediting the granting of visas and work permits for relief personnel. To date, few states have instituted particular provisions on the entry of humanitarian personnel in crisis situations in their immigration laws, relying instead on ad hoc or catch-all exceptions.

National law should also reduce restrictions and procedures for customs clearance of relief goods and equipment, and waiving customs duties and tariffs on relief consignments. A number of states have instituted legal rules in this area, although problems still persist. Such exceptional rules should also be in place for the originating and transit countries and provide for appropriate exceptions for any trade or security-related restrictions or sanctions.

²²⁰ Law Concerning Internal Displacements, art. 4, sec. 4.2 (2005).

²²¹ República de Colombia, Ley 387 de 1987 (July 24, 1997), *supra* note 203.

In addition to providing for permissive rules, states are well advised to set up dedicated institutional means to implement them. For example, in Guatemala, national law provides for the deployment of Centers for the Coordination of Humanitarian Assistance consisting of mobile teams of representatives from the various ministries and governmental departments with authority over the entry of persons, goods and equipment into the country at air, sea and land ports, in order to provide speedy processing for international relief. This system was tested for the first time during the response to Tropical Storm Stan in 2005 to great success.²²²

Operations and Coordination

Domestic law should allow for expedited procedures for the registration of foreign humanitarian organizations and for them to benefit quickly from the legal personality necessary to open bank accounts, enter into contracts, hire staff, etc. To the extent possible, they should also be exempted from taxation.²²³ In disaster settings, these registration procedures should be connected to state coordination structures for international aid efforts. Like quality control, domestic coordination of international aid is an element of a state's duty to ensure that aid reaches those in need and it can also substantially improve the impact of international aid. Particularly in conflict situations, however, such coordination must allow humanitarian organizations a substantial degree of independence to fulfill their mandates and not be perceived to be under the control of a party to the conflict.

Domestic law should also allow for and promote the effective operation of domestic relief societies in order to ensure that they are able to provide

²²² International Federation of Red Cross and Red Crescent Societies [IFRC], *Legal Issues in the International Response to Tropical Storm Stan in Guatemala*, at 20 (2007).

²²³ For international organizations such as the United Nations, such exemptions are required by the doctrine of privileges and immunities. Similar rights have been extended to the international components of the Red Cross/Red Crescent Movement. See International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: Privileges and Immunities and Disaster Relief* (Apr. 26, 2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

assistance to IDPs. In addition to the facilities mentioned above, this includes a balance between adequate coordination and sufficient independence from governmental control to allow them to work according to humanitarian principles as well as permission to receive foreign funding and donations. Other facilities will depend upon the national context, but the Venezuelan law on civil protection provides an interesting example in mandating that qualified personnel of “voluntary organizations” providing disaster relief in conjunction with the civil defense authorities be provided logistical assistance, as well as life and accident insurance, during their activities.²²⁴

Monitoring of Aid and Other Remedies

Traditional, and particularly judicial, mechanisms are generally insufficient to ensure the enforcement of the right to humanitarian assistance. Such remedies are simply too slow and inaccessible for persons in crisis. For this reason, contemporaneous monitoring of the aid process for adequacy, integrity, quality, and coordination should be made a specific priority in domestic law or policy, including through designation of institutional means to accept and address complaints (preferably including the involvement of a national human rights institution, if available, as discussed below).

Nevertheless, judicial remedies also have a role to play. Some courts, such as the Constitutional Court of Colombia as discussed above, have effectively intervened to ensure governments abide by their commitments. Moreover, effective enforcement of laws criminalizing diversion and obstruction of aid are necessary to ensure their deterrent value.

Budgeting Appropriately for Humanitarian Assistance Needs

It is not enough to create clear entitlements to government-sponsored humanitarian relief—the means to fulfill them must also be provided for in the budgeting process. To accomplish this, some states have created dedicated relief funds, like the National Disaster Prevention and Preparedness Fund

²²⁴ Ley de la Organización Nacional de Protección Civil y Administración de Desastres, art. 21, Official Gazette of the Bolivarian Republic of Venezuela, No. 5.557 (Nov. 13, 2001).

established by the Ethiopian National Policy on Disaster Prevention and Management²²⁵ and the National Emergency Fund in the Costa Rican National Emergency Law.²²⁶ It is particularly important to guard against the creation of entitlements by national legislation that must be fulfilled by provincial and/or local levels of government without making corresponding allocations from the national budget or at least providing these entities with the authority to obtain necessary funds themselves.

While there is quite a lot of bad news when it comes to funding for domestic humanitarian assistance, there are also examples of best practice. For instance, the Government of Azerbaijan has drawn praise for assigning increasing portions of its state oil funds for the assistance and resettlement of IDPs (although these funds still remain largely inadequate to meet the enormous needs).²²⁷ Likewise, Sri Lanka was applauded in 1994 for providing the bulk of the expenditure on food aid to persons displaced by the conflict in the north of the country—including to Tamils.²²⁸

In the Context of Durable Solutions

An important question in the context of durable solutions is when is it reasonable to cease providing humanitarian assistance. By its nature, humanitarian assistance is meant to be a temporary solution for a crisis

²²⁵ Transitional Government of Ethiopia, *National Policy on Disaster Management and Prevention*, art. 11.1 (Oct. 1993), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

²²⁶ República de Costa Rica, *Ley Nacional de Emergencias*, No. 7914, arts. 35-37 (Feb. 3, 2002), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

²²⁷ Internal Displacement Monitoring Centre, *Azerbaijan: New Government Programme Improves IDP Conditions, but Still no Return in Sight*, at 3 (Feb. 22, 2005), available at <http://www.internal-displacement.org>.

²²⁸ Representative of the Secretary General, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, submitted pursuant to Commission on Human Rights resolution 1993/95—Profiles of Internal Displacement: Sri Lanka, ¶ 55, U.N. Doc. No. E/CN.4/1994/44 (1994).

situation. However, IDPs often find themselves in an ongoing state of crisis, particularly in chronic conflict situations where continuing fighting blocks the ability to resume normal employment. Moreover, it is clear that return and resettlement can often be practically impossible without some transitional assistance, such as food to tide the IDP over while crops are replanted and tended. On the other hand, overextended periods of humanitarian assistance can lead to dependency and undermine the resilience of recipients.

Most existing IDP laws provide strict limits on the amount of humanitarian aid to be provided. For example, Russia's Law on Forced Migrants provides for a "one-off cash allowance per each member of the family to the amount and in keeping with the procedure established by the government of the Russian Federation, but not less than a minimum salary established by the federal law." Additionally, the Russian law provides for one-time assistance with transportation to a place of temporary accommodation, longer term temporary accommodation, and ongoing free medical assistance and medication (up to the limit of the forced migrant status, which is set at a maximum of five years).

While rigid limits may be undesirable, laws and policies that do not provide details about how much aid will be provided can lead to uncertainty and a lack of specific commitment. On balance, reasonable limits on the amount and timing of assistance are appropriate so long as (1) they are closely tied with rehabilitation and resettlement assistance initiatives—in particular help with establishing a livelihood—such that IDPs can reasonably be expected to provide for themselves and (2) they retain enough flexibility to account for situations where an ongoing crisis make rehabilitation impossible for a specific period of time.

Like the ending point for recipient eligibility, the question of whether and when to terminate special legal facilities (particularly with regard to customs and taxation) for humanitarian actors has often proven problematic. National law tends to be silent or vague as to when such facilities will change and decisions are thus made on an ad hoc basis. For example, four months after the tsunami struck Sri Lanka, the government decided to discontinue exempting humanitarian organizations from a 300 percent duty on imported vehicles, resulting in a \$1 million customs duty imposed on Oxfam for the vehicles it

brought in for its recovery work.²²⁹ As noted above, international standards call for the exemption of relief consignments from customs duties, and national law should provide that this rule remain in effect so long as such relief is needed. Similarly, other facilities offered to humanitarian organizations ought to continue—at least until all humanitarian needs have been fulfilled and most reasonably through the recovery phase as well.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

During Displacement

Role of National, Provincial and Local Governments

National disaster and emergency laws and policies should clearly specify roles and responsibilities of different ministries at the national level, but also of provincial and local governments. If there is a stand-alone IDP law or policy, it should provide a similar type of mapping of responsibilities.

At the national level, both a central executive office and a committee or commission (frequently including at least one high level policy-making body and one or more technical committees) are usually necessary to coordinate the contributions that inevitably must be made by a number of different ministries. It has been recommended that the former executive office be located directly within the prime minister's office, as is the case for the disaster management offices in Tanzania and Colombia, to ensure the requisite authority and to avoid jealousies between line ministries.²³⁰ The central executive offices should also serve as a focal point for international humanitarian actors and ensure that their assistance is facilitated, coordinated, and monitored for quality.

²²⁹ BBC NEWS, *supra* note 173.

²³⁰ InterWorks, *Model for a National Disaster Management Structure, Preparedness Plan, and Supporting Legislation*, at 5 (July 1998), available at <http://www.undmtp.org>.

In many countries, significant authority for relief activities remains at the provincial and local levels. This can lead to problems of coordination—particularly with international humanitarian actors—if the national structures mentioned above are weak.²³¹ On the other hand, lower levels of government have greater understanding of local circumstances and communities. One model for handling this dilemma is Nicaragua’s National System for the Prevention, Mitigation and Response to Disasters (SINAPRED). SINAPRED provides for parallel committees and executive disaster offices at the national, regional, and municipal levels, with clear lines of communication between them and incorporating civil society at each level.²³² A similar approach is taken by Uganda and Angola in their respective IDP policies.²³³

Role of Police and Military Forces

In many cases of ongoing or chronic conflict, the role of the police can become subsumed to that of the armed forces. However, the latter frequently lack an express mandate in national law to affirmatively protect civilians, including IDPs, or humanitarian aid providers. These issues should be addressed as a matter of law or policy. It is particularly important that responsibilities for security in camp situations are made clear, given the heightened dangers of lawlessness and militarization of these settlements, which are frequently outside of normal commercial and social networks. A good model is Uganda’s national IDP policy, which sets out that the national police are responsible for security among the residents of IDP camps and communities, and the army is responsible for guarding their perimeters and protecting humanitarian assistance.

In some states, national militaries themselves play an important role in relief activities, both in disaster and conflict settings. Where this is the case, governing regulations should guard against the potential for blurring the

²³¹ *Id.*

²³² Decreto No. 53-2000, Reglamento de la Ley Número 337, Ley Creadora del Sistema Nacional para la Prevención, Mitigación, y Atención de Desastres (Nicaragua), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

²³³ See *supra* notes 198-199.

perceived distinction between military and civilian actors and undermining the appearance of neutrality of humanitarian actors. Ideally, military actors should be assigned by law to a supporting role to civilian humanitarian actors (e.g., providing transport, repairing infrastructure, and facilitating logistics rather than directly distributing assistance). In any event, they should be required to comply with, and receive training about, the relevant provisions of human rights, humanitarian law, and humanitarian quality standards mentioned above. In particular, governing regulations should prohibit the violation of principles of humanity and impartiality, for instance, by conditioning humanitarian assistance on the provision of information or other collaboration by affected persons.

Role of National Red Cross and Red Crescent Societies and Other Domestic Relief Actors

In many countries, the most important relief actor apart from the government is the national Red Cross or Red Crescent Society. According to the statutes of the International Red Cross and Red Crescent Movement, in order to be recognized by the Movement, a national society must, among other things, be recognized by national law as “auxiliary to the public authorities in the humanitarian field” while at the same time retaining “an autonomous status which allows it to operate in conformity with the Fundamental Principles of the Movement.”²³⁴ Moreover, as noted above, national societies are attributed a specific role in humanitarian assistance by the Geneva Conventions.

In most, but not yet all, countries, national societies have a formal role in the governmental national disaster plan. This defined role is crucial to identifying responsibilities and tasks and to ensure proper coordination with governmental authorities as well as other actors. It is also a necessary means to fulfill the required “auxiliary status.” Accordingly, where national disaster plans are being formulated or updated, the role of the national society should be expressly included. Consideration should also be given to bringing in other

²³⁴ Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference of the Red Cross at Geneva in Oct. 1986 and amended by the 26th International Conference of the Red Cross at Geneva in Dec. 1995, art. 4, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

relevant civil society actors into planning frameworks and bodies for relief activities.

Role of National Human Rights Institutions

National human rights institutions (NHRIs) have an important potential to undertake the “real-time” monitoring of humanitarian assistance recommended above, in light of their autonomous yet semi-public status, their commitment to human rights, and their established practices for addressing individual complaints. In 2005, NHRIs in the Asia-Pacific region adopted a set of guidelines affirming such a role,²³⁵ and a number of institutions both in the region and elsewhere have already been active in this regard.

For example, the Uganda Human Rights Commission has established itinerant tribunals in northern Uganda to hear complaints of human rights violations; reported extensively on these issues to the parliament and other parts of government; and is integrated into national institutional structures for dealing with IDPs, including the Inter-Agency Task Force and the Human Rights Promotion and Protection Subcommittee.²³⁶ Likewise, NHRIs in India, Indonesia, Nepal, the Philippines, and Thailand have all taken active roles in addressing IDP rights issues.²³⁷

Important precedents in this area have been set by the Sri Lanka Human Rights Commission (SLHRC). In 2002, the SLHRC created a very successful

²³⁵ Guidelines on Internally Displaced Persons in the Context of Natural Disasters: A Common Methodology for National Human Rights Institutions (2005), available at http://www.asiapacificforum.net/training/idp/brookings-bern/natural_disasters.htm.

²³⁶ Uganda Human Rights Commission, Sixth Annual Report, chap. 7 (Sept. 2004), available at <http://www.uhrc.org/reports.php?y=2003&subCatId=1>; Brookings Institution-University of Bern, *Background Paper for the Workshop on the Implementation of Uganda's National Policy for Internally Displaced Persons*, Kampala, Uganda, July 3-4, 2006, at 5, available at http://www.brookings.edu/~media/Files/events/2006/0704_uganda/20060704_Uganda_bgpaper.pdf.

²³⁷ See the reports on the IDP activities of each of these institutions, available at <http://www.asiapacificforum.net/training/idp/brookings-bern/national.htm>.

IDP project supported by UNHCR, including the creation of seven regional offices for addressing IDP complaints and issues.²³⁸ In the wake of the 2004 tsunami, the SLHRC also created a Disaster Relief Monitoring Unit, with the responsibility of monitoring both government and non-government sector aid, consulting with beneficiaries, and advising operational departments of the government.²³⁹ It received and acted on a large number of complaints (up to two hundred per day in the initial phases), organized consultative meetings of aid beneficiaries, and also developed a Code of Conduct for Civil Servants to address issues of allocation of resources, community empowerment, information sharing, and corruption, among other topics.²⁴⁰

In the Context of Durable Solutions

There is sometimes a shift of responsibility among ministries or levels of government when relief gives way to rehabilitation programming. When this occurs, it is important to ensure, as mentioned above, that help with subsistence needs is not terminated before it is really possible for IDPs to meet their own needs through employment, cultivation, or otherwise. Similarly, any change in institutional focal points for international relief and recovery actors should ensure that necessary facilities, coordination, and monitoring remain available through the rehabilitation phase.

REGULATORY FRAMEWORK

While much will obviously depend on local traditions, legal systems, and circumstances, it can generally be recommended that the legal issues of

238 Asia Pacific Forum of National Human Rights Institutions/Brookings Institution—SAIS Project on Internal Displacement, *National Human Rights Institutions and Internally Displaced Persons—Visit to the Sri Lanka Human Rights Commission: 30th November-3rd December 2004*, available at <http://www.asiapacificforum.net/training/idp/brookings-bern/srilanka.doc>.

²³⁹ International Federation of Red Cross and Red Crescent Societies [IFRC], *Legal Issues in the International Response to the Tsunami in Sri Lanka*, July 2006, at 33, available at <http://www.ifrc.org/Docs/pubs/idrl/report-srilanka.pdf>.

²⁴⁰ *Id.*

humanitarian assistance examined in this chapter can best be addressed through a combination of enacted laws and policies. The institutional organizations discussed here should be set forth in a single national document which clearly sets out tasks and authorities. In many countries this has been accomplished by a policy rather than a law when existing ministries and structures were deemed sufficient and the main task was to organize their cooperation with each other. However, when a new agency, committee or commission that goes beyond simply serving as a forum for existing ministries is needed, legislation will likely be required to provide it a firm position in the state hierarchy and access to budgetary allocation.

A number of the requirements of military actors can be articulated in policies and, particularly, military manuals. But issues such as the criminal prosecution of war crimes, crimes against humanity, and corruption obviously must be in the form of law. Likewise, “hard law” of some form is required to clearly set out the right to humanitarian assistance discussed above and to assign adequate funding to humanitarian activities. Moreover, the legal facilities for humanitarian organizations must be expressed in “hard law” in order to adequately circumvent everyday rules of customs, visas, organizational registration, etc.

In some states, much reliance is placed on bilateral agreements with international humanitarian actors, including UN agencies, the ICRC and IFRC, and, increasingly, large NGOs, to address some of the facilitation issues discussed in this chapter. While this can work well with regard to the individual organization, in situations of massive disaster it is common that a number of new organizations offer their assistance and the process of negotiating bilateral agreements with each of them is simply too great. For this reason, it is advisable that the authority to quickly grant the necessary legal facilities in these circumstances be already provided to a specific institution by national law.

INTERNATIONAL ROLE

At the international level, there are several organizations with the mandate and capacity to assist states in the development of national laws, policies, and institutions on humanitarian assistance for IDPs.

United Nations

OCHA

While primarily focused on coordination and policy at the international level, OCHA has provided assistance to a number of states in developing laws and policies with regard to humanitarian assistance. For example, its IDP Division has worked with governments in Uganda and Sudan, among others, to develop IDP-specific policies. In recent years, the United Nations Disaster Assessment and Coordination (UNDAC) teams organized by OCHA have begun undertaking “preparedness” missions at the request of states to provide advice to them on improving their disaster management systems, including legal and institutional issues.

UNHCR

The United Nations High Commissioner for Refugees has traditionally worked closely with governments to develop legislation for the protection and assistance of refugees and asylum seekers, as well as to address statelessness. In light of UNHCR’s increasing international role with regard to the protection of IDPs, it is possible that it will begin to apply its expertise to laws for assistance to this population as well, particularly if it is requested to do so by interested governments.

Red Cross/Red Crescent Movement

ICRC

The International Committee of the Red Cross is mandated by the Geneva Conventions and by the statutes of the Red Cross and Red Crescent Movement to disseminate international humanitarian law and assist governments and

other relevant actors to implement it. In addition to the publication and dissemination of model laws, manuals, and scholarly information on international humanitarian law, the ICRC maintains a dedicated Advisory Service to assist states to incorporate international humanitarian law into domestic law as well as an online database of enacted laws from around the world. The Advisory Service also encourages and assists states to set up national committees on international humanitarian law.

IFRC

The International Federation of Red Cross and Red Crescent Societies is an international membership organization formed by the national Red Cross and Red Crescent Societies around the world. The Federation's International Disaster Response Laws, Rules and Principles (IDRL) Programme gathers and disseminates information on national and international law on international disaster relief and recovery, as well as outstanding legal issues in this area. In addition to its legal database, publications and trainings, it has provided support to national societies for their advocacy with governments for the development of appropriate law and policy in these areas.

Private Actors

Brookings Institution-University of Bern Project on Internal Displacement

The Brookings Institution-University of Bern Project on Internal Displacement is associated with the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons. In addition to supporting the activities of the Representative's mandate, the Project organizes international, regional, and national seminars and publishes books, studies, and papers on IDP policy related issues. It has been called upon by a number of governments to provide support for the development of IDP-related policies and laws.

Norwegian Refugee Council, Internal Displacement Monitoring Centre

The Norwegian Refugee Council's Internal Displacement Monitoring Centre²⁴¹ has been mandated by the United Nations' Inter-Agency Standing Committee to maintain a database of conflict-related IDP situations around the globe. Its web-based database is probably the world's largest and most accessible repository of such information. It also provides trainings and workshops to governments, humanitarian organizations, and other actors on IDP issues.

SUMMARY OF RECOMMENDATIONS

Guaranteeing the Right to Humanitarian Assistance for IDPs

1. Governments should ensure that national law explicitly guarantees IDPs and others the right to request and receive humanitarian assistance without discrimination, including adequate food, water, medical supplies, clothing, and similar necessities as well as essential services, such as emergency medical care and sanitation measures.
2. Laws and policies on humanitarian assistance should be concrete, but not overly rigid, as to the types and amounts of assistance to be provided by government, including through the establishment of an adequate budget.
3. Procedures for establishing eligibility for assistance should be accessible, expeditious, and well disseminated to IDP populations.
4. If an "IDP status" is created, it should encompass all causes of displacement and have prospective effect. Eligibility should not be blocked by the lack of documentation. Avenues of appeal should be available for adverse decisions on eligibility. IDP status should not be the sole avenue for receiving humanitarian assistance.

²⁴¹ For more information, see the website of the Internal Displacement Monitoring Center: <http://www.internal-displacement.org>.

5. National law should set out minimum quality standards for humanitarian assistance provided by the government consistent with internationally-accepted standards.
6. Humanitarian assistance should only be terminated with the end of humanitarian need, and in a manner linked with measures to assist with rehabilitation, including livelihood development.
7. IDPs' right to medical care in conflict and disaster settings should include psychological, reproductive, and preventive care and should be made available without charge in the period of emergency.
8. National law or policy should specifically address gender barriers, discrimination, and the humanitarian assistance needs of vulnerable groups, including children, the disabled, and the elderly.
9. National law should require that IDPs, particularly women, be appropriately consulted and informed about assistance programs.
10. Diversion and obstruction of humanitarian aid should be criminalized, monitored, and prosecuted.
11. Policies and laws concerning development-induced displacement should provide for a duty to provide subsistence as well as compensation, resettlement, and rehabilitation assistance to IDPs.

Ensuring Institutional Coherence

12. National law or policy, coordinated by an executive office and a high-level inter-ministerial committee, should establish the roles and responsibilities of different ministries and levels of government with regard to humanitarian assistance for persons in need, including IDPs.
13. Provincial and local governments, in coordination with national authorities, should retain sufficient authority to contribute to assistance activities.

14. A national focal point with sufficient authority should be assigned by law to assist with the facilitation, regulation, and coordination of international humanitarian assistance.

15. National Red Cross and Red Crescent Societies and other relevant domestic actors should be fully integrated into national assistance plans and policies.

16. With regard to humanitarian relief, national law or policy should clearly define roles of the police and military forces in protecting the security of IDPs and aid providers, including specifying that the military act only in a supporting role to civilian efforts.

17. National human rights institutions or other institutional means should be supported to receive and act upon IDP complaints and to monitor assistance activities by all actors.

Facilitation and Regulation of Humanitarian Assistance

18. National law should allow for and promote the operation of domestic relief societies.

19. National law should provide for waiver or expedited issuance of visas and work permits, lower customs barriers, no duties and charges, and expedited export and transit of such items as vehicles, telecommunications and information technology, and appropriate medicines for assistance to other countries.

20. National law should provide for expedited registration of foreign humanitarian organizations providing them with full domestic legal personality, including expeditious temporary recognition of foreign qualifications of professionals (e.g. doctors).

21. National law should exempt relief goods and bona fide humanitarian organizations from taxation, duties, and similar charges, with the exception of reasonable user fees.

22. National law or policy should include the obligation to ensure the security of relief personnel, goods, vehicles, and equipment.

23. National law should also provide for appropriate facilities to speed the transit of international humanitarian assistance through national territory on its way to an affected population in another state.

24. Where national law provides for sanctions or restrictions against another state, exceptions should be available for the shipment of humanitarian assistance, when required.

Facilitation and Regulation of Humanitarian Assistance in Armed Conflict Situation

25. In conflict settings, national law should ensure that government controls over humanitarian relief are kept to a minimum, related solely to the means of ensuring against improper diversion of assistance and time and route restrictions imposed by military necessity.

26. National law and/or military regulation should provide that domestic and international relief societies be permitted to operate on behalf of civilians in need, both on territory controlled by the government and on “enemy” territory.

27. Military regulations should provide that, in occupied territories, IDPs and other civilians have the right to directly solicit assistance from international as well as domestic relief providers without fear of reprisal.

Facilitation and Regulation of Humanitarian Assistance in Disaster Situations

28. Governments should make use of the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (the IDRL Guidelines) to prepare their laws to facilitate and regulate disaster relief.

29. Where domestic means are insufficient to provide needed humanitarian assistance to IDPs in disaster settings, national law and/or policy should provide that international assistance be requested.

30. National law and regulation should clearly set out procedures for assessing needs and domestic capacities in order to rapidly decide upon the need for international assistance in disaster settings. Joint needs assessments with international relief providers should be encouraged.

31. National law should clearly set out rules for the facilitation, regulation, and coordination of international humanitarian assistance, including how it is initiated and terminated.

32. National law on disaster response should provide governments with the means to choose which type of assistance they require and from which actor. In conflict settings, international offers of humanitarian assistance should not be arbitrarily denied.

33. Government coordination of international assistance should guarantee sufficient independence to humanitarian actors to abide by fundamental principles and in particular guarantee them freedom of movement and access to IDPs.

34. National law should provide for a means to monitor the adequacy and quality of humanitarian assistance provided by international relief providers.

Chapter 4

The Rights to Food and Water

Ambra Gobena*

INTRODUCTION

Conflict, both internal and inter-state, has been identified as the foremost cause of acute hunger in recent years, often because it results in displacement.¹ Displacement can be precipitated by factors other than conflict, but whatever the cause, the widespread result is that displaced persons are deprived of their main sources of food, safe drinking water, livelihoods, and income. Where displaced communities do have access to food, it is not always adequate, sufficient, or nutritionally balanced, and in many areas that have large displaced populations, agricultural practices or employment to enable access to food and water is fraught with challenges. Food insecurity often results in malnutrition; statistics indicate that malnutrition among internally displaced persons (IDPs) is very high, in some cases exceeding the World Health Organization's (WHO) 15 percent threshold.² Displaced children, the elderly, and pregnant or lactating women, are particularly vulnerable.

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¹ Food and Agriculture Organization of the United Nations [FAO], *The Right to Food: Theory and Practice* (1998), available at <http://www.fao.org/Legal/rtf/booklet.pdf>; Food and Agriculture Organization of the United Nations [FAO], *State of Food Insecurity in the World Report* (2006).

² *Global Overview 2005—Nutrition and Health*, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/34842E0B6DF3CD3AC12571F600466460/\\$file/Gobal%20Overview%202005%20-%20Nutrition%20&%20Health.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/34842E0B6DF3CD3AC12571F600466460/$file/Gobal%20Overview%202005%20-%20Nutrition%20&%20Health.pdf).

LEGAL FRAMEWORK

Relevant Guiding Principles

Principle 18 of the *Guiding Principles* on Internal Displacement provides for the right to an adequate standard of living, including the rights to food and water. This chapter aims to provide guidance on the rights of IDPs to food and water under international law as well as in national regulatory frameworks. The right to food is a self-standing right, while the right to an adequate standard of living incorporates the right to food as one component towards its achievement.

Principle 18 recognizes the rights to “essential food” (implying nutritional adequacy) and potable water; highlights that this should be achieved without discrimination; and accounts for the particular role of women in the distribution of these essentials. Competent authorities must provide these basic supplies and must ensure safe access to them. The third paragraph of Principle 18 highlights the need for “special efforts” “to ensure the full participation of women in the planning and distribution of these basic supplies.” This provision recognizes the socio-cultural role played predominantly by women towards the achievement of food security and adequate nutrition at the family level, but also explicitly protects a particular group, which as a result of political, socio-economic or cultural factors, may elude protection by the law. Principle 4(2) provides that “certain displaced persons such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.”

In situations where a decision by the state requires population displacement, Principle 7(2) provides that “the authorities undertaking such displacement shall ensure, to the greatest practicable extent, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene.” While the rights to food and water are human rights of universal application and apply at all times, certain causes for displacement such as conflict may also trigger the application of the relevant provisions of humanitarian law.

Principle 10(2b) recaps the humanitarian law obligation that prohibits starvation as a method of combat.

Legal Basis

Under international law, the right to an adequate standard of living is associated with the right to food. Article 25(1) of the Universal Declaration of Human Rights (UDHR) lays down the right of everyone “to a standard of living adequate for the health and well-being of himself and of his family, including food.” Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right....
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed...

With regard to the right to water, Article 14(h) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides for the right “to enjoy adequate living conditions, particularly in relation to...water supply”; and Article 24(2)(c) of the Convention on the Rights of the Child (CRC) sets forth the child’s right to “...adequate nutritious foods and clean drinking-water.”³ The Special Rapporteur on the Right to Food asserts that the right to food comprises liquid and semi-liquid

³ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

nourishment as well as drinking water⁴ and refers to food and water as being “inextricably linked.”⁵

A number of instruments provide the legal basis for special attention on the right of women to food and water. Article 15 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides that the States Parties agree to “provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food [and] establish adequate systems of supply and storage to ensure food security.” Article 12(2) of CEDAW directs Member States to “ensure to women...adequate nutrition during pregnancy and lactation.” Vulnerable sub-groups of the displaced population often suffer from decreased nutritional levels—these generally include children, pregnant women, the elderly and those with HIV/AIDS. Articles 23(1) and 50 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereinafter, the Fourth Geneva Convention) require states to allow “...the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.”

The Fourth Geneva Convention and its Additional Protocols provide the framework for international humanitarian law. Article 54 of Protocol I⁶ of the Fourth Geneva Convention governing international conflicts and Article 14 of Protocol II⁷ on non-international conflicts protect objects indispensable to the survival of the civilian population. These provisions prohibit targeting “objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking

⁴ The Special Rapporteur, *Report by the Special Rapporteur on the Right to Food*, ¶ 32, submitted in accordance with Commission on Human Rights resolution, U.N. Doc. 2000/10, E/CN.4/2001/53 (Feb. 7, 2001).

⁵ *Id.* at ¶¶ 44-51.

⁶ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), 1997.

⁷ *Id.*

water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population”.⁸

Article 55 of the Fourth Geneva Convention provides that where land is occupied, the occupying power is responsible for “ensuring the food and medical supplies of the population” especially if the resources of the occupied territory are inadequate. As regards humanitarian aid, the obligation not to interfere with access to food is also included in Articles 50 and 59 of the Fourth Geneva Convention which makes provisions for relief schemes undertaken by states or impartial humanitarian organizations supplying, *inter alia*, consignments of foodstuffs.

The Committee on Economic Social and Cultural Rights (hereinafter, the Committee) has been responsible for delineating the scope and application of the rights in the ICESCR through the issuance of General Comments which, while not legally binding, are widely considered authoritative interpretations. General Comment No. 12 on the Right to Adequate Food (1999) and General Comment No. 15 on the Right to Water (2002) provide important elaborations on these rights.

The obligation to respect the rights to food and water prohibits direct or indirect interference by the state in the enjoyment of those rights; that is, it must respect existing access.⁹ Respecting the right to food may include implementing a legal framework that facilitates the ability of an individual to claim this right in a court of law, or the formal repeal or suspension of laws and policy that prevent access to food or its procurement.¹⁰ National strategies should include “measures to respect and protect self-employment and work which provide a remuneration ensuring a decent living for wage earners and

⁸ *Id.* at art. 54(2).

⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, *The Right to Water*, ¶ 21 (2002) [hereinafter General Comment No. 15 (2002)]; U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12, *The Right to Adequate Food*, ¶ 15 (1999) [hereinafter General Comment No. 12 (1999)].

¹⁰ General Comment No. 12 (1999), *supra* note 9, at ¶ 19.

their families (as stipulated in Article 7(a)(ii) of the Covenant).”¹¹ The state’s obligation to protect compels it to prevent interference by a third party in the access to food¹² or water of an individual through measures such as adopting “necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water.”¹³

Where an individual cannot attain their rights to food and water through their own efforts, the state must fulfill this right; this obligation includes the duty to facilitate, promote, and provide enjoyment of these rights.¹⁴ With regard to the duty to facilitate, the government must create an enabling environment for people to feed themselves, with particular attention given to vulnerable groups such as IDPs.¹⁵ With regard to promoting the rights to food and water, the state would proactively strengthen access to and utilization of resources, including through land reform, as well as livelihood means. Fulfillment of the right to food also includes setting up social safety nets in situations where IDPs would be unable, for reasons beyond their control, to feed themselves. The duty to fulfill these rights requires that where a state is unable to directly assume this obligation, it must request international assistance and bear the burden of proof of showing that it has tried to do so.¹⁶ The obligation to fulfill this right also includes the duty to take positive actions to identify vulnerable

¹¹ *Id.* at ¶ 26.

¹² *Id.* at ¶ 15.

¹³ General Comment No. 15 (2002), *supra* note 9, at ¶ 23.

¹⁴ *Id.* at ¶ 25.

¹⁵ The Special Rapporteur, *Report by the Special Rapporteur on the Right to Food*, ¶ 5, submitted to the General Assembly in accordance with U.N.G.A. resolution 58/186, U.N. Doc. A/59/385 (Sept. 27, 2004).

¹⁶ General Comment No. 12 (1999), *supra* note 9, at ¶ 17.

groups, their location and needs, and formulate emergency and contingency arrangements.¹⁷

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

Humanitarian assistance during emergencies often prioritizes the provision of food and potable water, although logistical challenges exist. Sometimes people are forced to flee to remote areas that are difficult to access, or where the general security climate makes it difficult for humanitarian personnel to deliver supplies. This can be especially problematic where IDPs are settled in areas of the country outside the direct control of the state.

A related but separate point regarding access to food and water that often arises in the context of conflict is a lack of physical safety and security of the displaced person, which restricts mobility.¹⁸ Fear of leaving settlements is a frequently-cited obstacle to accessing food, water, and other essential supplies. As women often have a particular role in delivering food and water for their families, such constraints can affect them disproportionately and place them at risk of physical and sexual violence.¹⁹ Restricted mobility also limits the possibility of working outside camps and settlements or accessing local markets.

A lack of income or employment is a significant obstacle to accessing food and water because “the right to food is not primarily about food aid, but about the right to be able to feed oneself through an adequate livelihood.”²⁰ A survey of IDPs in Nepal revealed that over 70 percent were unable to support their

¹⁷ Margret Vidar & Frederica Donati, *International Legal Dimensions of the Right to Food*, in *GLOBAL OBLIGATIONS ON THE RIGHT TO FOOD* (George Kent ed., 2007).

¹⁸ See chapter two in this volume on movement-related rights.

¹⁹ Burmese Border Consortium, *Reclaiming the Right to Rice: Food Security and Internal Displacement in Eastern Burma* (Oct. 2003), available at <http://www.burmaissues.org/En/ReclaimingtheRighttoRice.pdf>.

²⁰ *Id.*

families.²¹ In some cases, IDPs have difficulty gaining proper residence status in their new locations and can face administrative difficulties such as in replacing identification documents that are needed to receive unemployment benefits, welfare supplements for food and supplies, and eligibility status to work.²² For example, in Montenegro, employers that hire persons without a permanent resident permit are penalized.²³

The destruction of productive land is common during times of conflict, either as a by-product of hostilities or as a result of direct targeting. Besides removing direct access to food products, this also results in reduced access to a potential source of livelihood.²⁴ Land mines can be a particular obstacle to revitalizing the livelihoods of returning IDPs. Furthermore, IDPs often leave behind seeds, livestock, and tools when they flee, which inhibits their chance to farm in new settlement areas.

Infrastructural damage to the water supply system (collection, purification, and distribution) affects the entire civilian population, but the particular vulnerability of displaced groups to such changes often entails worse conditions of sanitation, health, hygiene, and drinking water in their temporary settlements when they return or relocate. This problem is compounded because IDPs often settle in areas where available resources are already under strain.²⁵

²¹ Prabhu Raj Poudyal, *Situation of Internally Displaced Persons in Nepal and Recommended Responses*, Rural Urban Partnership Programme/UNDP 2005.

²² Concluding Observations of the Committee on Economic, Social and Cultural Rights, Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant—Serbia and Montenegro, ¶ 14, E/C.12/1/Add.108 (June 23, 2005).

²³ Decree on the Employment of Non-resident Physical Persons, Official Gazette of the Republic of Montenegro 28/03.

²⁴ The Special Rapporteur, Human Rights in Lebanon, *Report of the Special Rapporteur on the Right to Food on his Mission to Lebanon*, ¶ 20, A/HRC/2/8 (Sept. 29, 2006).

²⁵ Poudyal, *supra* note 21.

Governments do not always sufficiently address the food and water needs of IDPs beyond emergency situations, thereby failing adequately to address the crucial issue of sustainability and durable solutions. Even where they do exist, medium and long term policies for IDPs often ignore gender or cultural dimensions, which can reduce their effectiveness. For example, in many regions of the world, women are traditionally responsible for both the gathering and preparation of food and the maintenance of home gardens and subsistence crops.²⁶ Policies that fail to take into account the role of women in the provision of food for their families, for example, are less likely to be successful. Related to this is the fact that the formulation of laws and policies often fails to consult affected groups.

The strongest gauge of legal commitment to the standards contained in international instruments is a legal framework at the national level that recognizes, protects, and enforces the rights to food and water. Although some states, notably Brazil, Ecuador, and Guatemala, have recently promulgated food security laws and policies, many countries do not yet have such a framework in place. However, even where an enforceable right has been laid down by statute, laws and policies are not always consistent with one another. For example, benefits conferred to IDPs through specifically targeted legislation should not be negated by conflicting legislation applicable to the whole population. This inconsistency is reflected, for example, in laws that provide tax relief for IDPs but require certain criteria to be fulfilled that, as a result of their status, are not practical or possible. Also, food-related provisions in legislation for the protection of IDPs generally direct assistance in the form of food supplies without delineating the substantive scope of such food and water rights and the considerations they entail.

A significant challenge for returning IDPs is proving property ownership.²⁷ This can be problematic in countries with low levels of title registration, particularly for women who often do not have formal recognition of their land titles either as a result of the operation of statutory or customary rules. In

²⁶ Burmese Border Consortium, *supra* note 19.

²⁷ See Chapter 10 of this volume on property rights.

many countries, land rights are connected to land use which may cause difficulties for persons who have been displaced and wish to return. Also, in Georgia for example, displaced persons cannot own land without losing the legal status of IDP and the benefits that the status confers as they have to register as a permanent resident to own land.²⁸

REGULATORY FRAMEWORK

Legislative recognition can vary from inclusion in the national Constitution or Bill of Rights to laws, decrees, or even administrative regulation. Different legal instruments have varying authority, and the less authoritative the instrument used to protect the right, the greater the implication of inferiority of that right in terms of policy priorities. Inclusion in national constitutions not only signals a clear message of the importance of these rights but also protects them from the legislative amendments of governments of the day. A survey of 203 written constitutions reveals a variation in the way the rights to food and water are protected.²⁹ A comprehensive formulation explicitly guaranteeing the right to food applicable to the whole population can be found in twenty-two countries. The best example is the South African Constitution which echoes the wording of the ICESCR in its Section 27. Other formulations protect the right to food only with reference to a specific part of the population (usually children), or protect a broader right, such as an adequate standard of living, dignified life, or the right to health (which implies the right to food).

The most appropriate way to provide a comprehensive food security regulatory structure is to include right to food and water provisions in the constitution, and enact a law that specifies the contents of such rights. Comprehensive laws can ensure that all elements are covered in multi-sectoral rights such as to food and water, and ensure that this cross-cutting nature is highlighted and accommodated in the legal framework. Ecuador's Law on

²⁸ Ludwig Boltzmann, *Implementing The Guiding Principles On Internal Displacement On The Domestic Level: An Analysis Of Domestic Legislation And Policies And Recommendations On Areas For Further Research* (2005).

²⁹ Margret Vidar, *State Recognition of the Right to Food at the National Level*, Research Paper No. 2006/61 (2006).

Food Security and Nutrition (2006) prioritizes vulnerable groups (Article 2)³⁰ and highlights certain principles such as the guarantee of physical and economic access for all; and culturally acceptable, nutritious food that meets caloric requirements. The Brazilian Law No. 11.346 establishes the National System for Food and Nutrition Security (SISAN) with a view to implementing the right to food, providing general objectives and the substantive elements of such a right.³¹ Guatemala's Law on the National System for Food Security and Nutrition contains useful definitions of concepts and specifies the institutional arrangements to implement its policy.³²

Several laws on food security also mention the right of access to water. The adoption of a framework law has been noted as being “instrumental” to achieve the right to food, and:

should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures.³³

³⁰ Ley de Seguridad Alimentaria y Nutricional, Registro Oficial N° 259, 27 de abril de 2006 (Ecuador).

³¹ Lei N° 11.346, de 15 de Setembro de 2006, Cria o Sistema Nacional de Segurança Alimentar e Nutricional—SISAN com vistas em assegurar o direito humano à alimentação adequada e dá outras providências, art. 1 (Brazil).

³² Decreto N° 32/05—Ley del Sistema Nacional de Seguridad Alimentaria y Nutricional (Guatemala).

³³ General Comment No. 12 (1999), *supra* note 9, at ¶ 29.

The framework governing supply distribution systems for domestic and imported items as well as price-setting, marketing and agricultural boards and related management systems is also relevant to the individual's actual ability to access food.³⁴

National water sector legislation often contains substantive norms on water rights, including access and supply. However, many water laws could be improved by the inclusion of indicators that highlight disparities between vulnerable groups in terms of water access.³⁵ The South African Water Services Act explicitly establishes a right to water and basic sanitation, allowing for differentiation between “different geographic areas, taking into account, among other factors, the socioeconomic and physical attributes of each area.”

A range of other laws in a number of fields will also impact on the right to adequate food and water. Those laws include consumer protection, health, water, minimum wage and social welfare, agricultural, natural resources, including land and water use and management, and environmental laws.³⁶

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Prior to Displacement

Early Warning Systems

Through the use of early warning systems that are based on international cooperation, and disaggregated data derived from consistent and accurate monitoring, natural or conflict-related displacement disasters can be mitigated

³⁴ Kendra Reddekopp, *An Analysis of The Effects of Legislation on Food Security in Canada* (1999).

³⁵ Centre on Housing and Evictions [COHRE], *Legal Resources for the Right to Water: International and National Standards*, Source No. 8 (2004).

³⁶ Reddekopp, *supra* note 34.

or even avoided altogether.³⁷ It is important to include in such early warning systems conflict-related management and surveillance of areas that are drought or flood-prone. The success of early warning systems, specifically monitoring food security levels, depends on timely and decisive responses both at national and international levels that are based on periodic review. Guatemala's Food and Nutrition Law establishes a Secretariat whose role includes designing and implementing an early warning system that identifies situations of food insecurity in the country.³⁸

Emergency Preparations

Relevant emergency preparations in the form of food stocks and grain reserves, together with planning functioning distribution mechanisms, are good examples of how the state can prepare ahead of time. The Uganda National Policy on Internal Displacement—Policy and Institutional Framework (NPID) makes provision for setting up adequate grain stores for IDPs during displacement, and for the initial period of resettlement. The development of seed-saving strategies and seed-banks in anticipation of disasters allows those who have lost seeds to access these facilities; this also reduces the period between seed harvest and marketing.³⁹ Contingency arrangements and technical cooperation should ensure that supplies are capable of meeting anticipated needs.⁴⁰ The Ukrainian Ministerial Decree No. 1029 validating the Regulation on the Modalities of the Formation of the

³⁷ Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security 2005, adopted by the 127th Session of the FAO Council Nov. 2004, guideline 16.7 [hereinafter Voluntary Guidelines].

³⁸ Decreto No. 32/05, *supra* note 32, art. 22(d).

³⁹ Ruth Haug & Estrellita Rauan, *Operationalising the Right to Food in Africa*, Noragric Report No. 2 (Sept. 2001) [hereinafter Noragric Report].

⁴⁰ Protection of Internally Displaced Persons' Inter-Agency Standing Committee Policy Paper (Dec. 1999).

State Food Reserves 2005⁴¹ is one example of a law setting out the responsibilities to establish food reserves.

Relocation Sites

Planning should also include the formulation of strategies for the positioning of potential settlement areas throughout the country, with detailed logistical planning including outlining transport routes for food and supplies. A settlement that has been pre-planned should have functional supply routes, as well as locations for cooking and waste disposal. It should be located far way from fighting or safe from natural dangers such as flooding. Contingency plans for camps that need to be constructed *impromptu* should also follow a general design that facilitates these aspects.

Environmental impact assessments can be conducted to choose locations for temporary sites which would have the least detrimental effects to the surrounding environment. Camps and settlements often impact the surrounding environment negatively, degrading soil quality, forests, and water bodies. This damages the quality of resources available for food production in the area and, in turn, impacts living conditions of the settlements as well as the resident population.⁴²

Important Sources for an Adequate Policy and Legal Framework

General Comments on the Rights to Adequate Food and to Water—Nos. 12 and 15 respectively—provide guidance on the standards and levels of protection which should be included in statutes addressing IDP rights. The *Voluntary Guidelines on the Progressive Realization of the Right to Food in the Context of National Food Security* is instrumental in providing “practical guidance to States in their implementation of ... the right to adequate food in

⁴¹ An Implementing Statute of Law No. 1877-IV on State Support of Agriculture (2004).

⁴² Lorenzo Cotula & Margret Vidar, *The Right to Adequate Food in Emergencies*, 77 FAO LEGISLATIVE STUDY 68 (2002).

the context of national food security.”⁴³ *Centre on Housing Rights and Evictions (COHRE) Source No 8: Legal Resources for the Right to Water: International and National Standards*⁴⁴ is a useful source document highlighting the international instruments containing explicit or implicit mention of the right to water and sample provisions of right to water legislations around the world. The *Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response* (hereinafter the Sphere Handbook) identifies the minimum standards to be attained and the key indicators which demonstrate that they have been achieved, particularly its sections on nutrition, food aid, and water supply. The 1999 Food Aid Convention principles for international food aid such as the “appropriateness” and “adequacy” of the food aid, protection of local production and markets, and the principles for delivery, make provisions for both food aid and food-related aid.⁴⁵

During Displacement

Humanitarian Assistance

In some countries, a majority of the food requirements of the IDP population is met through food aid.⁴⁶ The Committee on Economic, Social and Cultural Rights notes that the right to adequate food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free

⁴³ Voluntary Guidelines, *supra* note 37, at Preface, ¶ 6.

⁴⁴ Centre on Housing Rights and Evictions [COHRE], Right to Water Programme, Jan. 2004.

⁴⁵ Cotula & Vidar, *supra* note 42.

⁴⁶ *Right to Food Case Study: Uganda*, InterGovernmental Working Group on the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, Study conducted for FAO in support of the Intergovernmental Working Group, FAO 2004, [hereinafter Uganda IGWG].

from adverse substances, and acceptable within a given culture.⁴⁷ This is particularly important, for example, in observing religious practices regarding certain types of meat. The Sphere Handbook identifies ways in which the cultural aspect of the right to adequate food can be gauged. Principal considerations include consultations with beneficiaries regarding the acceptability and appropriateness of the food and ensuring that the distributed items do not conflict with traditional or cultural beliefs, that the staple food is familiar to the population, and that culturally important condiments such as sugar or chilies are provided.⁴⁸

Food aid must be sufficiently diverse as to prevent malnutrition among the recipients. Priority in the distribution of food supplies must target the most vulnerable segments of the population,⁴⁹ and when developing the parameters for the program, policies and legal instruments should also emphasize the importance of the special nutritional needs of children and expectant mothers. Targeted interventions in the form of micronutrients and vitamin supplements can reduce the incidence of malnutrition.⁵⁰ Programs such as those administered by the World Food Programme (WFP) recognize that a majority of IDPs are women and focus their strategies at ensuring the direct access of women to appropriate and sufficient food, their participation in decision-making, and their access to resources, jobs, and markets.⁵¹ On a national level, school feeding programs for IDP children not only improve school attendance, particularly among female children, but also provide them with at least one nutritional meal per day which has an important effect on educational progress.

⁴⁷ General Comment No. 12, *supra* note 9, at ¶ 8.

⁴⁸ Cotula & Vidar, *supra* note 42.

⁴⁹ General Comment No. 12 (1999), *supra* note 9, at ¶ 38.

⁵⁰ Department of Agriculture (Republic of South Africa) (2002), *The Integrated Food Security Strategy for South Africa*, Pretoria.

⁵¹ WFP Commitments for Women, noted in 'Protection of Internally Displaced Persons' Inter-Agency Standing Committee Policy Paper New York, Dec. 1999.

While urgent and sufficient quantities of aid is often necessary following emergency situations, the flow of aid needs to be stemmed following a certain period to avoid negative effects on local harvests, production, and marketing structures.⁵² The Colombian Law 387 of 1997, Article 15, paragraph 1, indicates a time limit of three months for the right to emergency humanitarian assistance, with the possibility of renewal under exceptional circumstances for another three months. In contrast, the Sri Lankan National Framework for Relief, Rehabilitation and Reconciliation 2002 rejects the use of arbitrary time limits as a basis for determining eligibility for food assistance and instead provides that “clear-cut criteria for eligibility should instead be established, taking into account the need to encourage productive activity while protecting vulnerable groups.”

States should also provide the form of aid that best meets the purpose of stimulating “local agricultural development, strengthen[ing] regional and local markets and enhance[ing] the longer-term food security of recipient countries.”⁵³ This can be achieved through “triangular purchases” involving a third developing country, perhaps from the region; or “local purchases” from more productive areas of the country being assisted.⁵⁴ In order to address the problem of interrupted and hijacked food and essential supplies during times of conflict, agreements should be reached between all state and non-state actors to ensure the safe and unimpeded access of displaced persons to assistance.⁵⁵ Institutions responsible for providing this security should be clearly identified. The Peruvian Law Concerning Internal Displacement (Law No. 28223) of May 20, 2004, explicitly recognizes the importance of security and protection of those providing humanitarian aid (including their means of

⁵² Food Aid Convention of 1999, art. XIII(a)(i), *available at* <http://untreaty.un.org/english/notpubl/notpubl.asp>.

⁵³ *Id.* at art. XII(a).

⁵⁴ Cotula & Vidar, *supra* note 42.

⁵⁵ Voluntary Guidelines, *supra* note 37, at 15.3.

transportation and their supplies) in Article 11, although there is no indication of who should be responsible for this protection.

Security

The Uganda National Policy for Internally Displaced Persons (2004)⁵⁶ recognizes the security of person and property and the freedom of movement as fundamental entitlements of IDPs. Ensuring security is delegated to the Uganda People's Defense Forces (UPDF), the Uganda Police Force, and other specialized national security agencies. The Defense and Internal Affairs Ministries through the police are responsible for maintaining law and order among displaced communities. The UPDF protects perimeters and areas surrounding IDP sites and protects relief and assistance agency personnel. The Food and Agricultural Organization approach in augmenting a sense of security is to increase the visibility of aid organizations in problematic areas in order to deter violence and eliminate the sense of physical isolation of IDPs.⁵⁷ A Cooperative Housing Foundation (CHF) International study demonstrated the nexus between organized livelihood programs and activities, particularly for women, and perceived increase in security for both men and women.⁵⁸

⁵⁶ Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons* (Aug. 2004), available at http://www.brook.edu/fp/projects/idp/idp_policies_index.htm [hereinafter Uganda's National Policy for IDPs].

⁵⁷ *Protection of Internally Displaced Persons*, Inter-Agency Standing Committee Policy Paper, Dec. 1999.

⁵⁸ Judith A. Hermanson, *Victim to Survivor: the Case of CHF International in Darfur*, CHF International, Apr. 2006, available at <http://ponpo.som.yale.edu/Darfur%20Case%20Study.doc>.

Physical Accessibility and Availability

Water and food must be within safe physical reach⁵⁹ for IDPs. It is recommended that states give priority consideration to policies and strategies with respect to accessibility (both physical and economic) of food.⁶⁰

The water supply must be sufficient, continuous,⁶¹ and adequately maintained. Food availability denotes the opportunity to feed “oneself directly from productive land or other natural resources, or from well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.”⁶² Water and food must also be safe for human consumption.⁶³ The Angolan Decree No. 79 of 2002 on Standard Operating Procedures for the Enforcement of the Norms on the Resettlement of Displaced Populations elaborates in Article 17 the following on water and sanitation:

1. The Provincial Government shall: a) Ensure that adequate measures are taken for the provision of water and sanitation; b) Collaborate with the community to ensure appropriate management of water and sanitation systems, including aspects related to water quality; c) Carry out other tasks as assigned.

2. To implement paragraph 1, the Provincial Government, through relevant bodies of agriculture and rural

⁵⁹ General Comment No. 15 (2002), *supra* note 9, at ¶ 2(c)(i) and General Comment No. 12 (1999), *supra* note 9, at ¶ 13.

⁶⁰ General Comment No. 12 (1999), *supra* note 9, at ¶ 13.

⁶¹ General Comment No. 15 (2002), *supra* note 9, at ¶¶ 12(a), 16(c), 16(f).

⁶² General Comment No. 12 (1999), *supra* note 9, at ¶ 12.

⁶³ General Comment No. 15 (2002), *supra* note 9, at ¶ 12(b); General Comment No. 12 (1999), *supra* note 9, at ¶ 10.

development, fishing and the environment, social assistance and social reintegration, and former soldiers and war veterans, shall adopt the following procedures: a) Enable access to potable water for IDPs; b) Place the public water supply points not further than 500 meters from the houses; c) Guarantee the supply of drinking water; d) Enable the functioning of each water pump to serve 600 persons for 10 hours a day[.]

National strategies for ensuring the right of IDPs to food and water should also incorporate mechanisms for providing information about entitlements. Accessibility of water has been noted to imply the right to seek, impart, and receive information regarding water issues.⁶⁴ An individual has a right to consultations where the right to water has been interfered with, and is entitled to the full timely disclosure of relevant information.⁶⁵ States may consider prioritizing food assistance via women as a means of enhancing their decision-making role and ensuring that the food is used to meet the household requirements.⁶⁶ The use of home and school gardens has been noted as an important way of combating micronutrient deficiencies and promoting healthy eating.⁶⁷

Employment

Within the right to food framework, “economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need

⁶⁴ General Comment No. 15 (2002), *supra* note 9, at ¶ 12(c).

⁶⁵ *Id.* at ¶ 56(a)-(b).

⁶⁶ Voluntary Guidelines, *supra* note 37, at 13.4.

⁶⁷ *Id.* at 10.3.

attention through special programmes.”⁶⁸ Food accessibility must be sustainable,⁶⁹ and a choice should not have to be made between the rights to food and water, and other rights. With regard to water, economic accessibility means that states could adopt mechanisms which may include, *inter alia*, a range of appropriate low-cost technologies, free or low-pricing policies, and income supplements.⁷⁰

Article 11 of the Angolan Decree 1/01 of 5 January, Norms on the Resettlement of Displaced Populations, recognizes the utility of food-for-work programs aimed at preparing land, rehabilitating social infrastructures, and other activities necessary for community stability. The *National Framework for Relief, Rehabilitation and Reconciliation in Sri Lanka* describes these types of projects as multi-purpose—serving simultaneous goals. It explains that:

[a] traditional food-for-work project to reconstruct a damaged school—normally seen as a relief effort—illustrates the case: it provides food to villagers whose harvests may have failed (relief); it provides temporary employment (relief and rehabilitation); it rebuilds a damaged asset (rehabilitation); it enables children to continue their schooling (development); and it strengthens institutional capacity to handle this type of crisis situation (disaster preparedness).⁷¹

⁶⁸ General Comment No. 12 (1999), *supra* note 9, at ¶ 13.

⁶⁹ *Id.* at ¶ 8.

⁷⁰ General Comment No. 15 (2002), *supra* note 9, at ¶ 27.

⁷¹ See *National Framework for Relief, Rehabilitation and Reconciliation in Sri Lanka*, June 2002, at 20, available at http://www.brookings.edu/projects/idp/Laws-and-Policies/sri_lanka.aspx.

In Ethiopia, food-for-work projects and direct food distribution comprise the formal safety nets arrangement in place for the general population.⁷² Approximately 80 percent of food aid has been distributed through food-for-work; and up to 50 percent of surveyed respondents identified these activities as preventing their own starvation and that of their families. One overlooked aspect was the gender dimension which was not sufficiently considered in the design of some of the projects, proving problematic in a country where women are primarily responsible for carrying out domestic roles and have very little time for other forms of work.⁷³ Such programs should also consider alternatives for certain other vulnerable groups within the IDP community, for instance those who as a result of old age or disability cannot participate in the food for work programs.⁷⁴

Other mechanisms exist which, through strategic targeting of IDPs, stimulate local food production and increase food security. In Zambia, for example, safety nets projects also include cash-for-work and inputs-for-work schemes.⁷⁵ Another option is the provision of credit to the most vulnerable groups. It has been found that Grameen Bank structured credit programs, which use a group lending approach, were successful in negating temporary shocks on the rural poor caused by natural disasters.⁷⁶ The Azerbaijan State Program for the Improvement of Living Standards and Generation of Employment for Refugees and IDPs also outlines projects designed to generate livelihood activities for displaced persons.⁷⁷ Under the Serbian National Strategy for Resolving the Problems of Refugees and Internally Displaced Persons (2002), employment schemes involve in-kind grants such as the donation of tools for

⁷² See Haug & Rauan, *supra* note 39.

⁷³ *Id.*

⁷⁴ See Cotula & Vidar M, *supra* note 42.

⁷⁵ See Haug & Rauan, *supra* note 39.

⁷⁶ *Id.*

⁷⁷ Article 16 of the Law on the Status of IDPs and Article 7 of the Law on Social Protection of IDPs.

work. Other employment schemes involve interest-free loans and micro-credits, soft loans granted for the establishment and development of small and medium sized enterprises (SMEs) in industry and services, employment within existing successful companies, and training programs.

Consultation/Participation and Information Exchange

Consulting IDP community representatives is an important factor for the successful implementation of programs. Information exchange should be two-way; while there should be mechanisms for consultation for IDPs to convey their interests, the government can also use this opportunity to ensure that IDPs are aware of general and basic food safety and nutrition issues. Many legal frameworks provide for the right to participation of IDPs in decision-making regarding resettlement and relocation. The Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons, for example, provides in Article 6 Chapter V that its “Member States shall ensure the effective participation [...], particularly women, in the planning and management of their relocation.”

Gender Sensitivity

In their distribution of water and food supplies (and indeed other interventions), aid agencies must ensure their processes and procedures do not directly or indirectly have a discriminatory impact on the displaced beneficiaries. For example, procedures must be gender sensitive, particularly in female-headed households, which is in line with the United Nations Inter-Agency Standing Committee (IASC) Policy Statement for the Integration of a Gender Perspective in Humanitarian Assistance.⁷⁸ To illustrate, procedures with potentially discriminatory effects on women include the requirement to register to receive benefits, which fails to account for the cultural and social

⁷⁸ United Nations Inter-Agency Standing Committee [IASC], *Policy Statement for the Integration of a Gender Perspective in Humanitarian Assistance*, May 31, 1999, available at <http://www.unicef.org/emerg/files/IASConGender.pdf>.

considerations which would make this difficult for women in some countries.⁷⁹ Policies should seek to integrate women in informal social networks and involve them in management decisions regarding the distribution as well as the day-to-day operational aspects of such distribution. Also, greater security measures should be taken for women leaving the camp in search for resources, for example in small convoys accompanied by security personnel. Use of the Participatory Rapid Appraisal (PRA) has been advocated as an awareness raising tool for gender sensitization, increasing the understanding of beneficiaries of the important role played by women in emergencies.⁸⁰

Monitoring

The extent of the realization of the rights to food and water can be monitored through the use of human rights indicators and verifiable benchmarks⁸¹ as provided for in the *Sphere Handbook*. In the context of IDPs, the government should ascertain whether the right to food and water has been denied as a result of their status and identify what measures can be taken to remedy the situation. This involves gathering information on the causes for non-realization of the right to food which must be updated periodically. It would also be useful to classify food security challenges according to their nature and scope, for example if they can be dealt with in the short or long-term, with budgetary allocations made accordingly.⁸²

By monitoring and researching the coping strategies of IDPs, states can tailor response mechanisms to effectively address their needs. Before the distribution of food rations, a nutritional survey of the camp should be

⁷⁹ Regional Disaster Information Center [CRID] Latin America and the Caribbean, *Food Aid and Gender in Emergencies*, available at www.crid.or.cr/digitalizacion/doc/eng/doc13584.doc.

⁸⁰ *Id.*

⁸¹ General Comment No. 12 (1999), *supra* note 9, at ¶ 29.

⁸² Department of Agriculture (Republic of South Africa), *The Integrated Food Security Strategy for South Africa*, Pretoria 2002.

undertaken in order to assess the immediate requirements of the population. A wide compilation of data is necessary, including nutritional surveys and detailed information on malnutrition which can be disaggregated not only in terms of IDPs with respect to the general population but also between sub-groups of IDPs, according to sex, age, disabilities, etc, but also with surveys carried out at the household level. Food security information should be “multi-sourced and, when using existing data collection systems through established agencies, cooperation and coordination is key to establishing efficient and cost-effective systems.”⁸³ Guideline 13.1 of the UN’s Food and Agriculture Organization (FAO) 2004 *Voluntary Guidelines* encourages states to establish Food Insecurity and Vulnerability Information and Mapping Systems (FIVIMS) which identify vulnerable groups and reasons for their food security, followed by specific corrective measures to provide food access.⁸⁴

In the Context of Durable Solutions

Agriculture

It is important to promote agricultural development in IDP settlements and rehabilitation schemes for its role in sustaining livelihoods, providing a source of employment, and enabling displaced communities to become self-sufficient and less dependent on food aid. Return and resettlement on agricultural sites requires good planning, input, and infrastructure provision and can therefore be quite resource intensive and require careful and efficient organization. This can include assisting the establishment of cooperatives; affirmative action schemes that favor IDPs and smallholders with facilitated access to extension services and credit; and investment in rural infrastructure education schemes to promote environmentally sound water use and agricultural practices. The Law of Georgia on Internally Displaced Persons—Persecuted exempts IDPs from paying land tax on agricultural land plots, although this provision is in

⁸³ *Id.*

⁸⁴ See Food and Agriculture Organization of the United Nations, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, available at <http://www.fao.org/docrep/009/y7937e/Y7937E00.HTM>.

the context of temporary use and should be valid for a longer time period until farmers have settled and begun sufficient production.⁸⁵

With a view to promoting self-sufficiency, the Angolan Decree No. 79 of 2002 on Standard Operating Procedures for the Enforcement of the Norms on the Resettlement of Displaced Populations legislates for the provision of Resettlement Kits (Article 15). Productive Packages, provided by Oxfam in Colombia, comprise one-off donations or consecutive contributions over a six or twelve month project duration.⁸⁶ Agricultural emergency and development activities encouraged by FAO are designed to enhance nutritional security by promoting livestock and crop diversification as well as environmentally sound land and water management techniques and soil conservation.⁸⁷ The Ugandan Plan for Modernization of Agriculture (PMA) seeks to create opportunities for poor farmers through the transformation and diversification of agricultural production, processing, and marketing.⁸⁸

It is important not to withdraw food assistance too early. Food aid baskets are sometimes included in Oxfam's Productive Packages to prevent beneficiaries from hastily selling off input items to meet their daily food needs.⁸⁹ The Angolan Decree No. 79 of 2002 on Standard Operating Procedures for the

⁸⁵ Law No. 335-II S on Internally Displaced Persons—Persecuted, *available at* <http://www.legislationline.org/documents/action/popup/id/5531>.

⁸⁶ Antonio Hill, *Protection versus Promotion of IDP Livelihoods in Colombia*, 20 FORCED MIGRATION REV. 21-23 (2004).

⁸⁷ The Brookings-SAIS Project on Internal Displacement, *Basic Course on International Displacement: Background, Program Foundation and Program Approaches for International Agency Staff*, Sept. 2004, *available at* http://hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.brookings.edu%2Ffp%2Fprojects%2Fidp%2Fsyllabi%2F33-IASCmodules-d2-com.pdf&external=N

⁸⁸ See Uganda IGWG, *supra* note 46.

⁸⁹ See Hill, *supra* note 86.

Enforcement of the Norms on the Resettlement of Displaced Populations sets out principles in Article 18 on social assistance that guarantee food assistance to resettled or returned populations; distribute food free of cost until the first agricultural harvest; and ensure the continuation of food assistance depending on the outcome of the agricultural campaign and the nutritional and food security assessments.

*Land*⁹⁰

Property transfer processes that are long or cumbersome should be reformed to accelerate restitution or redistribution policies with safety mechanisms to ensure that IDPs are not granted unsuitable or poor quality land. In the South African context, actions towards removing some of the remaining vestiges of the apartheid era through land reform prompted recommendations which included passing legislation that formalizes and recognizes customary land; establishing a “first right of purchase” of agrarian land for sale; and promoting the use of compulsory appropriation and compensation for underused agricultural land.⁹¹ Land distribution and resettlement policies are crucial to enable equal access to agricultural and natural resources. In this regard, Article 3 of the Angolan Decree No. 1 of 2001, Norms on the Resettlement of Displaced Populations, makes provision for the identification of land for resettlement and return sites. The law also considers the importance of clearing return sites of mines and legislates for the creation of mine awareness brigades as well as carrying out de-mining operations. Appropriate defense and security agencies and humanitarian organizations must certify the security of the resettlement sites.

Access

Transport systems and water utility infrastructure are important to ensure continued access to food and water. Therefore, new constructions, repair, and

⁹⁰ See Chapter 10 of this volume on property rights.

⁹¹ An Overview of Agrarian Reform and Food Security in South Africa is available at <http://www.landcoalition.org>.

maintenance, particularly in rural areas, are crucial to ensure the continued supply of basic provisions and commodities to and from markets.

Resource Sharing Programs

States may opt for the development of resource-sharing and income-sharing programs for longer-term solutions, not only in the context of IDPs but also to ensure a wider sense of food security throughout the country which would also be of benefit to IDPs. In the area of resource-sharing, programs with a positive impact on food security would include natural resource initiatives such as land reform or redistributive agrarian reform; capital resource initiatives; employment guarantee schemes; and education and training campaigns.⁹² Income-sharing programs work as safety nets and include minimum income stipulations, social security, food subsidies, cash transfers conditioned to the purchase of food, food stamps, and food aid.⁹³

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Prior to Displacement

Once the legal framework has been set up, institutional regulation as provided therein must function so as to carry out effectively the stated law and policies. The institutional set-up may consist of varying combinations of key entities involved in the provision of food for emergencies, including the agriculture ministry, food quality and safety control agencies, the private sector (for example water companies), human rights commissions, NGOs and IGOs, and security forces and military personnel to provide the government with responsive task forces equipped with the technical know-how to respond to emergency situations.

Accessing justice can be difficult for IDPs who have low-income levels, and therefore makes affordability an important consideration in the provision of

⁹² Rolf Künemann, *Basic Income: A States' Obligation Under the Human Right to Food*, paper presented to IX BIEN International Conference, Geneva, 2002.

⁹³ *Id.*

legal services. Often, NGOs, universities, or human rights institutions can provide legal assistance to assert claims before court and to offer legal counsel as to alternative remedies. Special Funds are often set up for providing humanitarian assistance to IDPs. One such fund can be found in the Colombian framework (Law 387 of 1997) instituting the National Fund for Comprehensive Assistance to Populations Displaced by Violence, which finances programs for displacement prevention, emergency, return, socioeconomic consolidation, and stabilization. Relevant institutions should have decentralized services to counter the problem of physical accessibility to legal institutions which are often located in major urban centers.

During Displacement

As a result of the multi-sectoral character of the right to food, coordination is a crucial aspect for successful and sound implementation. Inter-sectoral mechanisms will make the most efficient use of limited resources.⁹⁴ States are encouraged to institute anti-corruption and transparency mechanisms in the food management sector and particularly in the management and distribution of food aid.⁹⁵ Food security coordination mechanisms may provide valuable insight in the identification of legislative gaps.⁹⁶ The Brazilian National Council on Food and Nutrition Security (CONSEA), which is comprised of one-third government officials and the remainder of civil society representatives, has an inter-sectoral reach spanning different ministries involved in aspects of food security and nutrition. It oversees compliance with agreements relating to the Food and Nutrition Security Policy. The Council uses the budget allocated to Brazil's Fome Zero (or Zero Hunger) food security policy, to design and implement food access measures, such as cash transfers, food and nutrition interventions, strengthen family farm agriculture production as well as provide access to information and education.⁹⁷

⁹⁴ Voluntary Guidelines, *supra* note 37, at 5.2.

⁹⁵ *Id.* at 5.5.

⁹⁶ *See Vidar, supra* note 29.

⁹⁷ Patrus Ananias de Sousa, *Fome Zero: Building a Policy for Food and Nutrition Security in Brazil*, Statement at the United Nations System Standing Committee on

As a primary obstacle for IDPs in accessing food is lack of security, appropriate institutional responses would include, where possible, the protection of camps, settlements, and surrounding areas as a priority for government security personnel. Angolan Decree No. 79 of 2002 on Standard Operating Procedures for the Enforcement of the Norms on the Resettlement of Displaced Populations provides an example of how the law can set out the tasks and responsibilities of various responsible authorities, as well as elucidating how co-ordination and collaboration of entities functions to carry out a specific activity.

The government should ensure the efficient functioning of redress institutions which are accessible to victims of violations of the rights to food and water; these can be commissions, ombudspersons, or courts.⁹⁸ Ombudspersons working alongside local NGOs can carry out investigations and assessments to ensure greater conditions of safety for IDPs. Robust and independent human rights commissions or ombudspersons are instrumental in providing remedies for violations of the rights to food and water. States that do not have such structures are encouraged to establish them, with their autonomy and independence in accordance with the Paris Principles.⁹⁹ Brazil has in place a Special Rapporteur on the Right to Food responsible for collecting data on the right to food, highlighting problematic areas, identifying violations, and addressing emerging issues. Human rights entities should also be involved in information campaigns which inform the public of the rights they hold and the remedies to which they are entitled.¹⁰⁰

In the Context of Durable Solutions

Well-functioning and coordinated mechanisms are particularly important at the return and resettlement phase. Government agencies with mandates which

Nutrition [SCN] Information Meeting on the Critical Role of Nutrition for Reaching the Millennium Development Goals, New York, June 2005.

⁹⁸ See Cotula & Vidar, *supra* note 42.

⁹⁹ Voluntary Guidelines, *supra* note 37, at 18.1.

¹⁰⁰ *Id.* at 7.3.

specifically include providing assistance to IDPs must liaise with numerous other government entities, including the army, to provide assistance with clearing mines in agricultural resettlement or return sites. Liaisons with local municipalities are also critical in the construction of wells for potable water and to ensure the maintenance of water facilities, for example.

With respect to the restitution of property—as regards the rights to food and water, this would mean the identification of appropriate productive agricultural land for resettlement and ensuring formerly owned agricultural plots are still viable for production. Institutions should ensure that the complex and drawn-out processes of land transactions are streamlined and made cost-effective to cater to the situation of IDPs. Institutions are particularly important in filling in the gaps between formal statutory and customary systems, particularly in African, South Asian, and Latin American countries, where it can be hard for displaced persons to prove their ownership rights. Roles for institutions include awareness campaigns to explain resettlement policies, informing communities of their rights, and assisting with the completion of registration forms.

Mechanisms should be in place for redress of grievances, varying from administrative hearings for complaints to access to courts for breach of rights. Angolan Decree No. 1 of 2001, Norms on the Resettlement of Displaced Populations, is a useful reference law in this regard, setting out the organs responsible for the resettlement and return of displaced populations and the composition of such organs. It goes on to list the competences of the various responsible agencies, state administration, and institutions responsible for social assistance.

INTERNATIONAL ROLE

Article 11 of the ICESCR, delineating the right to an adequate standard of living and the right to food, is the only provision for which the requirement of state cooperation is specifically reiterated.¹⁰¹ Agreements between

¹⁰¹ Marc Cohen et al., *Recommendations, in* GLOBAL OBLIGATIONS FOR THE RIGHT TO FOOD (George Kent ed., 2007).

governments and humanitarian organizations can also establish the parameters for collaboration. The Protocol for the Creation of a Permanent Framework for Consultation on the Protection of Displaced Persons between the Government of Burundi and humanitarian organizations of the United Nations System (2001) created the Permanent Framework for Consultation on the Protection of Displaced Persons (CPF/PDP). Its mandate includes ensuring consultation and information-sharing, designing initiatives to promote the effectiveness of existing structures, and implementing intervention mechanisms, including joint field missions. The Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons provides an example of inter-state cooperation providing a regional framework for the monitoring and follow-up of the standards contained in the *Guiding Principles*.

Recommendations have been made that international fora should be convened along the theme of the implementation of the right to food in order to discuss extra-territorial responsibilities and international state obligations within the context of the ICESCR framework.¹⁰² Advocates of IDP rights might use these fora to ensure that obligations specifically refer to IDPs. Through joint strategies and partnerships with relevant international organizations, local NGOs can complement the resources and assistance brought in by international actors by providing context and cultural-specific information. It is also important to distinguish between the different types of obligations on the various actors at the international level. The obligation of states to protect the rights to food and water apply equally to agents of the state and non-state actors. The significant role of transnational corporations in privatized water services as well as food production, trade, processing, and marketing means they should be regulated to observe human rights principles not only by the state in which they act but through international cooperation as well.¹⁰³ Any state parties that can influence, either politically or by legal means, other third parties to respect the right to food, should do so in accordance with the United Nations Charter and relevant international law.¹⁰⁴

¹⁰² *Id.*

¹⁰³ See Vidar & Donati, *supra* note 18.

¹⁰⁴ General Comment No. 15 (2002), *supra* note 9, at ¶ 38.

SUMMARY OF RECOMMENDATIONS

Humanitarian assistance

1. Mechanisms should be developed in line with the main tenets of the Food Aid Convention.
2. Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response guidelines should be followed.
3. Nutritional considerations should also be taken into account, such as the provision of sufficiently varied food items, and targeted interventions in the form of micronutrients and vitamin supplements for vulnerable subgroups such as children or expectant mothers.

Physical Access to Food and Water

4. Government security forces, intervening states, or emergency assistance agencies should prioritize the creation of a secure environment for IDPs through the clearing of sites and agricultural land of mines and unexploded ordnance (UXOs) or munitions and explosives of concern (MEC), providing protection for those needing to leave camps and other verifications of security.
5. Targeted assistance should be provided to IDP groups in the form of extension services, marketing, credit, tools, and technology provision.
6. Strategies which enhance nutritional security by promoting livestock and crop diversification, soil conservation, and environmentally sound land and water management techniques should be encouraged.
7. Technical assistance should be provided in coordination with other government bodies to locate appropriate land, provide assistance with moving, and provide the necessary input assistance for resettled communities to begin production.

8. Adequate grain stores, seed saving strategies, and seed banks should be set up as contingency plans to be used during displacement and for the initial period of resettlement.
9. Rainwater harvesting and similar technology should be constructed to make use of available water resources. The law should mandate water supply points within a safe distance from the camp or settlement, and determine the minimum quantity to be supplied.
10. Settlements should be located near transport routes in areas away from conflict zones, with a sufficient supply of natural resources so as not to strain or damage the surrounding environment.

Economic Access to Food and Water

11. Limited use of short-term solutions such as resource-sharing schemes and welfare benefits should be encouraged where necessary and greater emphasis is placed on specifically targeted affirmative action programs to increase employment prospects for IDPs.
12. Job creation should be diversified to include the support of small and medium scale enterprises, and labor-intensive public works.

General Law and Policy Considerations

13. A framework law on the right to food should be developed to provide a legal basis for the normative content of the right to food at the national level. This will assist implementation of food related provisions in IDP-specific protection laws.
14. The consistency of IDP-related legislation with the panoply of other laws impacting the right to food and right to water should be ensured.
15. The role of women in distribution and management of food and water should be strengthened.

16. IDP-related legislation should include clauses prohibiting discrimination against IDPs as a group, and also between various subgroups. Schemes designed to integrate or assist vulnerable sub-groups should be incorporated into policy.

17. The participation of IDPs in the projects designed to assist them should be ensured.

18. The government must provide information on policies and rights, creating an awareness of options available for IDPs.

19. Multi-sectoral agencies, local government, and other relevant stakeholders should assist in the design, implementation, management, monitoring, and evaluation of projects.

20. Response mechanisms should be decentralized to municipal and county levels.

21. Court procedures, during emergency situations, should be simplified and the availability of funds for legal aid increased. A network of institutions with right to food and right to water expertise that can provide legal counsel should be established.

Monitoring

22. A human rights based approach should be used in formulating indicators and benchmarks. States should gather information to identify why the right to food has not been realized with respect to a group or individual.

International Cooperation

23. Frameworks for collaboration with international organizations or neighboring states should be adopted.

Chapter 5

Planned Evacuations and the Right to Shelter during Displacement

Roger Zetter and Camillo Boano*

INTRODUCTION

In response to widespread destruction of the built environment and forced displacement caused by conflict or natural disaster, the provision of durable shelter designed to satisfactory physical standards and which is technologically and culturally appropriate, constitutes a basic need and a fundamental right for forced migrants.¹

This chapter examines a number of normative and policy aspects of planned evacuation, shelter, and settlements during displacement for internally displaced persons (IDPs) related to the provisions of the *Guiding Principles on Internal Displacement* (the *Guiding Principles*)² and how they generally are, or should be, addressed in national law and policy interventions. The chapter focuses on conflict-related and disaster-related modes of temporary shelter during displacement and therefore excludes development-induced displacement.

The data are imprecise in detail but consistent in scale and the location of impact in the global south. According to some commentators, from 1980 through the year 2000, 141 million people lost their homes in 3,559 natural

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¹ Roger Zetter & C. Boano, *Gendering Space for Forcibly Displaced Women and Children: Concepts, Policies and Guidelines*, at 4, Inter-University Committee on International Migration for UNFPA Women and Conflict Review, *Working Paper 2007* (forthcoming) (manuscript on file with Authors).

² U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4 /1998/53/Add.2 (Feb. 11, 1998) (prepared by Francis M. Deng).

hazard events, of whom over 97 percent lived in developing countries.³ These data precede the impact of other recent disasters such as Hurricane Mitch, the tsunami in 2004, Hurricane Katrina, and the Pakistan earthquake in 2005. More recent disaster data suggest that between 1974 and 2003, more than two million people were killed in 6,367 natural disasters globally, and over 182 million made homeless.⁴ Current estimates suggest that thirty-three million people are forcibly displaced,⁵ either as IDPs or refugees, because of conflict. Of the approximately twenty-six million IDPs, 75-80 percent are women and children.⁶ A recently published report in the United Kingdom suggests that currently around 163 million people are forcibly displaced worldwide.⁷ Controversially, this same report presents a case for anticipating the rather alarmist figure of one billion people forcibly displaced by 2050, of whom 250 million are predicted to be displaced by climate change.

LEGAL FRAMEWORK

IDPs are often forced to leave their homes and their habitual place of residence, finding themselves in refugee-like situations. However, they remain entitled to the full range of rights enjoyed by other persons in the country and this includes the right to protection and assistance during displacement as well as during return or resettlement and reintegration.

³ Roy Gilbert, *Doing More for Those Made Homeless by Natural Disasters*, Disaster Risk Management Series No. 1, at 1 (2001).

⁴ Centre for Research on Epidemiology of Disasters [CRED], *2005 Disaster in Numbers*, at 13-14 (2005), available at <http://www.em-dat.net/documents/2005-disasters-in-numbers.pdf>.

⁵ World Refugee Survey (2006), available at http://www.refugees.org/data/wrs/06/docs/key_statistics.pdf.

⁶ Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2007*, 2008 INTERNAL DISPLACEMENT MONITORING CTR. 6 [hereinafter IDMC Global Overview].

⁷ Christian Aid, *Human Tide: the Real Migration Crisis* (May 2007), available at http://www.christianaid.org.uk/Images/human_tide3_tcm15-23335.pdf.

Relevant Guiding Principles

The *Guiding Principles*, rooted in well-established standards of international human rights law, provide overarching principles related to planning evacuation, shelter, and settlements. Principle 1(1) provides that internally displaced persons “shall enjoy in full equality, the same rights and freedoms under international and domestic law as do other persons in their country” and “shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”

Different Principles are directly or indirectly related to shelter and settlements in the different phases of displacement. Principle 6(1) expressly affirms the right to be protected if displaced from “home or place of habitual residence” while Principle 6(2)(d) acknowledges the necessity of evacuation in case of disasters. Principle 7(1) provides that authorities shall ensure that alternative solutions to displacement are explored, while 7(2) requires authorities to provide proper accommodation in satisfactory conditions of safety.

Principle 12(1) stresses the right to no arbitrary arrest or detention and conceives confinement in a camp only in exceptional circumstances, while 14(2) affirms the right of freedom of movement in and out of camps or other settlements. Furthermore, Principle 18 affirms a direct right in terms of protection and assistance related to shelter, housing, and living conditions to an adequate standard of living, acknowledging that competent authorities shall provide basic shelter and housing, essential medical services, and sanitation.

Legal Basis

The right of IDPs to planned evacuation, shelter, and settlements during displacement is not directly grounded in international human rights law, humanitarian law, and codes of conduct⁸, but is grounded in a rich body of laws specifically referring to an adequate standard of living and right to housing.

⁸ WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS (2d ed., 2007) [hereinafter ANNOTATIONS].

Article 25, paragraph 1, of the 1948 Universal Declaration of Human Rights (the UDHR)⁹ provides for the right to a standard of living adequate for the health and well-being of a person and housing and the right to security in the event of circumstances beyond his control. Since the adoption of the UDHR, housing rights and provisions have been reaffirmed and reinforced in several international covenants,¹⁰ conventions, world conferences, fora,¹¹ protocols,¹²

⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

¹⁰ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 11.1, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, arts. 27(1), 14.2(h), U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW]; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989); International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, art. 5(e)(iii), U.N. Doc. A/6014 (1966) [hereinafter CERD]; International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 52, at 1, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, Annex, 45 U.N. GOAR Supp. No. 49A, at 262, art. 43.1(d), U.N. Doc. A/45/49 (1990).

¹¹ UN-Habitat, *Habitat Agenda and Istanbul Declaration*, Adopted at the Second United Nations Conference on Human Settlements (Habitat II), Istanbul, Turkey, June 3-14, 1996; see also G.A. Res. 51/177, ¶ 61; chap. 7, ¶ 7.9(a); U.N. Doc. A/CONF.165/14 (Dec. 16, 1996); ¶ 13, G.A. Res. 46/163, U.N. Doc. A/RES/46/163 (Dec. 19, 1991).

¹² Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, *reprinted in* U.N. Doc. A/32/144, 16 I.L.M. 1391 (1977).

and regional documents.¹³ These pay considerable attention to various measures designed to promote and protect these critical and fundamental rights.

In 1991, the UN Economic and Social Council (ECOSOC) adopted General Comment No. 4,¹⁴ which provides the most authoritative legal interpretation of the right to adequate housing. The right to housing is not interpreted in a restrictive sense of merely having a roof over one's head or being a commodity. Rather, it is the right "to live somewhere in security, peace and dignity" stressing different integral components of the right (paragraph 8) such as: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy." Paragraph 8(d) specifies that "adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards...." These principles are consistent with other UN Comments and Recommendations with regard to housing rights and conditions.¹⁵

¹³ European Social Charter, Oct. 18, 1961, arts. 31, XI, 529 U.N.T.S. 89; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221; American Declaration of the Rights and Duties of Man., O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949), art. XI.

¹⁴ U.N. Doc. E/1992/23-E/C.12/1991/4, annex III. Compilation of General Comments and Recommendations, adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1.

¹⁵ The Special Rapporteur, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, E/CN.4/2005/48 (Mar. 3, 2005); U.N. Doc. E/1992/23-E/C.12/1991/4, annex III. Compilation of General Comments and Recommendations, adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1, No. 7(16), 4(4).120.

The principles are further elaborated in relation to equal rights for all social groups based on the right to non-discrimination.¹⁶ Equal rights for women and men are fundamental to this approach. This is reflected in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁷ which specifies the importance of impartiality, proportionality, and a right to life with dignity related to housing and sanitation in Article 14(2)(h), while Article 15(4) recalls the right of individuals to choose their residence and domicile.

The Special Rapporteur on adequate housing refers to the Millennium Development Goals¹⁸ as an important opportunity to ensure that women's rights are fully realized, including their right to adequate housing, land, property, and inheritance. Paragraph 30 recalls the importance of specific situations faced by women, particularly in relation to discrimination and additional obstacles in accessing adequate housing, such as domestic violence, female-headed households, forcible separation from children, forced evictions, disabilities, and conflict/post-conflict situations.

The March 2005 report of the Special Rapporteur refers to the impacts of natural disasters on the adequate provision of housing for women.¹⁹ Temporary settlements are often inadequate and contribute to the ill health of women, resulting in an increased vulnerability to impoverishment and sexual and gender-based violence.

The Special Rapporteur stresses in paragraph 83(c) the need to ensure that gender-sensitive housing policies and legislation are developed to eliminate discrimination in housing experienced by groups of women in vulnerable

¹⁶ The Special Rapporteur, *Report by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination*, ¶ 8, E/CN.4/2006/118 (Feb. 27, 2006).

¹⁷ See CEDAW, *supra* note 10.

¹⁸ The Secretary General, *Report of the Secretary General on the Implementation of the United Nations Millennium Declaration*, U.N. Doc. A/58/323 (Sept. 2, 2003).

¹⁹ The Special Rapporteur (Mar. 3, 2005), *supra* note 15.

situations. Paragraph 83(e) ensures that women can access temporary, appropriate shelters and retain access to adequate housing on a longer term basis. In addition, with a specific reference to post-disaster situations, paragraph 84 stresses the need for the adequacy of durable solutions in order for women to participate and benefit equally from reconstruction efforts.

The UN Inter-Agency Standing Committee Gender Manual on Humanitarian Action (the IASC Gender Manual)²⁰ advocates for the need to integrate gender considerations into shelter planning and programs to ensure people affected by crises benefit equally from safe shelter. The IASC Gender Manual stresses the importance of:

- location of sites which should not expose populations to further inevitable risks;
- site planning which should assure accessibility and protection against sexual assaults;
- individual or communal shelter assignment procedures which should take into consideration proximity to services;
- avoiding overcrowding, especially in the case of spontaneous settlements, in order to reduce the risks of violence against women and the vulnerability of young men to being recruited for gangs or by rebel groups.

In emergency situations, participatory planning must be undertaken to ensure the right to an adequate standard of living for people. Although emergency shelter by definition normally does not meet the criterion of “adequate housing,” a number of minimum human requirements are still applicable in the emergency shelter context. Article 12 of the UDHR²¹ and Article 17 of the

²⁰ Inter-Agency Standing Committee [IASC] *Women, Girls, Boys and Men. Different Needs—Equal Opportunities* (Dec. 2006), available at [http://www.humanitarianinfo.org/iasc/content/documents/subsidi/tf_gender/IASC%20Gender%20Handbook%20\(Feb%202007\).pdf](http://www.humanitarianinfo.org/iasc/content/documents/subsidi/tf_gender/IASC%20Gender%20Handbook%20(Feb%202007).pdf).

²¹ Universal Declaration of Human Rights, *supra* note 9.

International Covenant on Civil and Political Rights (ICCPR)²² ensure the right to privacy and Article 3 of the UDHR²³ and Article 9 (1) of the ICCPR²⁴ provide that everyone has the right to liberty and security of person.

In situations of natural disaster, the UN Inter-Agency Standing Committee (IASC) Guidelines on Human Rights and Natural Disasters (the IASC Guidelines)²⁵ affirm, in A.1.1., that “all appropriate measures necessary to protect those in danger, in particular vulnerable groups, should be taken to the maximum extent possible (e.g., emergency shelter arrangements).”

Section A.1. (paragraphs 1-8) stresses the importance of evacuation in a manner that fully respects the rights to life, dignity, liberty, and security of those affected, safeguarding homes and common assets left behind. A.1.4. provides that evacuations should be conducted without compromising the right to move to other parts of the country and to settle. This right may not be subject to any restrictions except those which are provided by law.

With regard to the post-emergency phase, the IASC Guidelines provide that the displaced should be granted the opportunity to choose freely whether they want to return to their homes and places of origin, remain in the area to which they have been displaced, or resettle in another part of the country. In particular, the return to their homes and places of origin should only be prohibited if these homes or places of origin are in zones where there are real dangers to the life or physical integrity and health of the affected persons.

The IASC Guidelines state, in A.4.1., that camps are a last resort and should only be established where, and until, the possibility of self-sustainability or

²² ICCPR, *supra* note 10.

²³ *Id.*

²⁴ *Id.*

²⁵ United Nations, Inter-Agency Standing Committee [IASC], *Operational Guidelines on Human Rights Protection in Situations of Natural Disasters, with Particular Reference to the Persons who are Internally Displaced*, at 18 (2006).

fast rehabilitation assistance does not exist. If camps are provided, the location and lay-out of camps and settlements should be situated in areas with a low natural hazard risk and designed to maximize the security and protection of displaced persons, including women and others whose physical security is most at risk. Moreover, A.4.4. provides that there should not be any restriction of movement unless it is necessary for the security or health of camp residents and population in the vicinity.

The IASC Guidelines, in B.2.1., reiterate that adequate shelter, as well as other emergency services, should be provided “without any discrimination of any kind.” In B.2.4., the right to shelter is to be understood as the right to live somewhere in security, peace, and dignity and needs to be translated in planning and implementing shelter programs to allow, as stressed in C.3.1., for the speedy transition from temporary or intermediate shelter to temporary or permanent housing, drawing attention to long term planning and participation to the maximum extent possible (C.3.3).

In line with the abovementioned human rights obligations, Section C.3.2. of the IASC Guidelines emphasizes that “adequacy of these goods and services” means that they are (i) available (in sufficient quantity and quality), (ii) accessible, (iii) acceptable (culturally appropriate and sensitive to gender and age), and (iv) adaptable (flexible enough to adapt to the change of needs in the different phases of emergency relief, reconstruction and, in the case of displaced persons, return). It also indicates that respect for safety standards aimed at reducing damage in cases of future disasters is a criterion for adequacy.

Article 1 of the International Federation of the Red Cross (IFRC) Code of Conduct in Disaster Response Programmes²⁶ (the IFRC Code of Conduct) and the *Sphere Project Humanitarian Charter and Minimum Standards in Disaster*

²⁶ International Federation of Red Cross and Red Crescent Societies (IFRC), *Code of Conduct* (1994).

Response (the *Sphere Handbook*),²⁷ while not legally binding, are useful guides. The IFRC Code of Conduct and the *Sphere Handbook* articulate the rights to shelter, settlement, and assistance as a right to life with dignity.²⁸

Finally, Article 49 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention)²⁹ reiterates the duty of the Occupying Power to undertake total or partial evacuation, ensuring to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, in satisfactory conditions of hygiene, health, safety, and nutrition. Additionally, Article 61 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (the First Additional Protocol),³⁰ provides for the management of shelters and the provision of emergency accommodations and supplies, defining these as “civil defense activities.”

Although not directly related to evacuation and shelter provision and, in any case, comprehensively covered in other chapters of this volume, it is worth mentioning the *Pinheiro Principles*³¹ as an important advance in this sector.

²⁷ ISOBEL MCCONNAN, THE SPHERE PROJECT: HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (2000) [hereinafter THE SPHERE PROJECT].

²⁸ Marci Van Dyke & Ronald Waldman, *The Sphere Project. Evaluation Report*, Center for Global Health and Economic Development, Program on Forced Migration and Health, at 7 (2004).

²⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

³⁰ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977.

³¹ Special Rapporteur, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons*, U.N. Doc. E/CN.4/Sub.2/2005/17

Recently translated in a manual,³² the principles address the field of restitution rights, which provide important guidance in addressing the legal and technical issues surrounding housing, land, and property restitution in a continuum from emergency provision to restitution.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

Although the rights of IDPs to shelter and settlements in adequate quantity and quality are clear, in practice they often face obstacles in exercising those rights. These obstacles, in many cases, result in long-term temporary and inadequate solutions, in overcrowded locations which increase vulnerabilities and exacerbate the difficulty of finding durable solutions.

Addressing the procedural, legal, and institutional obstacles to the implementation of the *Guiding Principles* has to be set within the wider context that the vast majority of IDPs are to be found in countries and regions that are affected by a complex mixture of development, governance, human rights, and conflict-related challenges. Such challenges are both a cause and a consequence of internal displacement.³³ Nevertheless, there are three substantive sets of obstacles.

First, there is the absence, or limited capacity, of institutional frameworks such as special national agencies to address issues of emergency management and shelter-related issues for IDPs; the lack of any workable monitoring

(2005), available at <http://domino.un.org/unispal.NSF/0/577d69b243fd3c0485257075006698e6?OpenDocument>.

³² Inter-Agency Standing Committee [IASC], *Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the "Pinheiro Principles"* (2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4693432c2>.

³³ The Office of the UN High Commissioner for Refugees [UNHCR], *UNHCR's Role in Support of an Enhanced Inter-Agency Response to the Protection of Internally Displaced Persons*, Policy Framework and Corporate Strategy, Informal Consultative Meeting (Jan. 30, 2007).

mechanisms to oversee displacement operations and minimize harm; and the failure of states to involve affected communities and consult them in planning and policy-making.³⁴ The competing interests and policies of multilateral development institutions, donor agencies, and national governments further contribute to the weakening of the implementation of adequate shelter and settlement policies for IDPs and in following the standards that they attempt to lay down.

Second, a diverse range of multi-sectoral characteristics of shelter and settlement is unique among the arenas of humanitarian intervention and post-conflict/post-disaster reconstruction. These characteristics serve a rich nexus of needs and interests but are especially problematic in temporary phases of displacement. Shelter is a basic physical resource reflecting the narrowly defined output-driven, “bricks and mortar” model of much current practice.³⁵ Yet, it also serves a complex set of social, cultural, domestic, and personal needs represented by the variety of ways in which space is identified, ordered, and used.³⁶ Social meaning also intersects with shelter as a vital economic multiplier.³⁷ Housing (re-)construction is an on-going process in most

³⁴ C.H. Davidson et al., *Truths and Myths about Community Participation in Post-disaster Housing Projects*, 31:1 HABITAT INTERNATIONAL (2007); Jennifer Hyndman, *The Securitization of Fear in Post-Tsunami Sri Lanka*, 97 ANNALS OF THE ASSOC. OF AM. GEOGRAPHERS 361-372 (2007); John Telford & John Cosgrave, *The International Humanitarian System and the 2004 Indian Ocean Earthquake and Tsunamis*, 31 DISASTERS 1.28 (2007).

³⁵ Jim Kemeny, *Housing and Social Structure: Towards a Sociology of Residence*, (University of Bristol Working paper No. 12, 1992).

³⁶ Kimberly Dovey, *Home and Homelessness in HOME ENVIRONMENTS, HUMAN BEHAVIOUR AND ENVIRONMENT ADVANCES IN THEORY AND RESEARCH* 39 (Irwin Altman & Joachim Werner eds., 1977); Rachel Kallus, *The Political Role of the Everyday*, 8(3) CITY 341 (2004).

³⁷ Stephen Sheppard & Richard Hill, *The Economic Impact of Shelter Assistance in Post- Disaster Settings*, CHF International Report 156 (2005), available at http://www.chfhq.org/files/2136_file_EIES_final.pdf; UNITED NATIONS HUMAN

societies, especially for forcibly displaced populations, not simply an end-state package delivered by humanitarian agencies.³⁸ Shelter interventions intersect different program arenas (for example, community strategies and livelihoods) and different spatial and operational scales (from field level projects to national recovery and development strategies). The need for a holistic approach is a *sine qua non* of policy and practice in this sector.³⁹ These conceptual and operational challenges link to the final set of obstacles.

Third, in terms of implementation, the shelter sector is arguably the least successful despite recent improvements in defining principles and practices. Characteristic in the sector are: uncoordinated agency planning; conflicting mandates; inappropriate design solutions; lack of participation of affected populations; the “lumpy” nature of resources; and inadequate resettlement planning.⁴⁰ The division of responsibilities among various agencies, including IFRC as lead agency for IDPs in natural disasters and the Office of the United Nations High Commissioner for Refugees (UNHCR) as lead agency for IDPs in conflict situations, addresses some of these problems but inhibits generic learning.

In this respect, a barrier to implementation has been the reductionist approach of many actors involved in the sector and the failure to regard housing as a complex commodity with many attributes and levels of meaning. Only recently has this complexity been acknowledged in shelter policies and

SETTLEMENT PROGRAMME, *THE CHALLENGES OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS* (2003).

³⁸ Saunders, G., *Dilemmas and Challenges for Shelter Sector: Lessons Learned from the Sphere Revision Process*, 28(2) *DISASTERS* 164 (2004).

³⁹ Zetter, R.W., *Land, Housing and the Reconstruction of the Built Environment*, in Barakat, S., ed., *AFTER THE CONFLICT: RECONSTRUCTION AND DEVELOPMENT IN THE AFTERMATH OF WAR*, 155-173. See also Zetter & Boano, *supra* note 1.

⁴⁰ ALNAP, *ALNAP Annual Review 2002, Humanitarian Action: Improving Performance through Improved Learning*, at 90, 95 (2002), available at <http://www.alnap.org/AR2002/>.

programs for forced migrants. As Zetter⁴¹ has emphasized, although shelter is one of the basic needs of forced migrants, it must encompass far more than a physical commodity and the product of basic standards codified in operational guides.

REGULATORY FRAMEWORK

While much will obviously depend on local traditions, legal systems, and circumstances, it can generally be recommended that the legal issues of planned evacuation, shelter, and settlements, examined in this chapter, can best be addressed through integrating enacted laws with well-conceived policies for the three stages prior, during, and post displacement. The institutional organization discussed below should be a reference point for an articulated and coherent national framework which incorporates the main actors and defines, in strategic and if possible operational terms, their roles.

If temporary accommodation fills the gap between the immediate relief phase and the later reconstruction phase, this is an important phase in the disaster recovery process that requires strategic collaboration between governments, NGOs, and aid organizations.⁴² Each disaster situation is unique. As such, it will need a unique set of appropriate actions. Finding the “best-fit” solution⁴³ for temporary accommodation means that emergency relief, rehabilitation, and

⁴¹ Zetter, R.W., *supra* note 39.

⁴² Rita Jalali, *Civil Society and State: Turkey after the Earthquake*, 26(2) DISASTERS 122 (2002); Kathleen Tierney & James Goltz, *Emergency Response: Lessons Learned from the Kobe Earthquake* (Univ. of Delaware, Disaster Research Center Prelim. Paper No. 260, 1997); Economic and Political Weekly Research Foundation, *Marathwada Earthquake: Role of Donor Agencies and NGOs in Relief and Rehabilitation Operations*, Maharashtra Earthquake Rehabilitation Documentation Project, Report No. 5 at 1.

⁴³ Cassidy Johnson, *What's the Big Deal about Temporary Housing? Planning Consideration for Temporary Accommodation after Disasters: Example of the 1999 Turkish Earthquakes*, TIEMS Disaster Management Conference, Waterloo, Canada, 2002, available at <http://www.grif.umontreal.ca>.

development response mechanisms need to be integrated and planned for in a holistic and coordinated manner.⁴⁴

To determine the “best-fit” temporary accommodation solution for the particular disaster, both pre-disaster preparedness planning and immediate post-disaster assessment are necessary. Preparedness should aim at ensuring that the necessary institutional structures, resources, and information are in place prior to the disaster, or that they can be obtained promptly when needed. However, “even if preparedness is good, it does not follow that managing a disaster will also be good...good planning does not automatically translate into good managing.”⁴⁵ Since each disaster situation is unique, it follows that the preparedness plan must be adapted and modified after the disaster to ensure the “best-fit” solution for the particular disaster situation.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Prior to Displacement

States affected by internal displacement differ in terms of their historical experience, institutional framework, and management capacity related to emergency evacuation and emergency shelter. Some have established effective emergency management frameworks, while others may have limited or no prior experience and must devise the frameworks from scratch, often in the context of an interim constitution and a transitional institutional framework.

First, recourse should be made to national laws and the policy and institutional frameworks which derive from them. This is because many states have laws that are relevant to this sector and which are applicable without discrimination to national populations as a whole, including IDPs. On the legal front, for example, many national constitutions and *ad hoc* legal instruments assure the

⁴⁴ *Id.*

⁴⁵ Enrico L. Quarantelli, *Converting Disaster Scholarship into Effective Disaster Planning and Managing: Possibilities and Limitations*, 11 INT’L J. OF MASS EMERGENCIES AND DISASTERS 15-39 (1993).

right to adequate housing and adequate temporary accommodation. These set out pre-displacement norms. National law on disaster risk reduction is also the key instrument addressing the procedural issues of enforcement of existing laws, inter-ministerial collaboration, and ensuring community involvement, particularly in early warning and disaster management.

Next, an integrated approach to substantive issues, prior to displacement, is essential. This reinforces the need for a multilayered institutional capacity for disaster management to be established, with formal recognition of the role of various public, private, and nongovernmental stakeholders. Crucial in this period is an effective functioning partnership among the stakeholders and a culture of collective decision-making in planning, resource-sharing, and developing capacity for implementing disaster management policies and programs in an integrated and transparent way. Moreover, an effective institutional framework is needed to implement prevention, preparedness, response, and recovery phases of disaster management through the development of local action plans. In this context, promoting education, public awareness, and training at the community level by local authorities⁴⁶ plays an important role.

The experience in the evacuation of people from villages along the slopes of the Tungurahua volcano in Ecuador in 2000 has shown the problems that can occur where there are deficiencies in pre-displacement planning with uncoordinated mass evacuation implemented with the use of military forces.⁴⁷ Contrarily, evacuation experiences in Cuba⁴⁸ offer a positive experience of evacuation policies through a detailed and localized pre-displacement capacity. In 1998, during Hurricane George, 818,000 persons were evacuated

⁴⁶ Jeroen Warner & Maria Teresa Orè, *El Niño Platforms: Participatory Disaster Response in Peru*, 30(1) DISASTERS 102-117 (2006).

⁴⁷ Graham A. Tobin & Linda M. Whiteford, *Community Resilience and Volcano Hazard: the Eruption of Tungurahua and Evacuation of the Faldas in Ecuador*, 26(1) DISASTERS 36 (2002).

⁴⁸ Holly Sims & Kevin Vogelmann, *Popular Mobilization and Disaster Management in Cuba*, 22(3) PUBLIC ADMIN. & DEV. 389-400 (2002).

in seventy-two hours with no lives lost in the hurricane.⁴⁹ This experience reinforces the need for a register of public building or structures that could serve as emergency accommodation/evacuation centers. Similarly, mapping exercises should allow planners to designate areas for evacuation.⁵⁰

In order to ensure that integrated structures are in place prior to displacement in Central America,⁵¹ some governments have recently initiated the development of national legislation to deal with disaster situations. With the same objectives, Indonesia has recently proposed a new disaster management bill to its parliament, and the governments of Sri Lanka⁵² and India⁵³ recently adopted new disaster bills.

During Displacement

Five procedural elements or requirements form the backbone of state regulation of shelter during displacement.

The first requirement is establishing standards for shelter and settlement practices. These practices are now reasonably well understood and

⁴⁹ A. Snow, *Highly Organized Evacuation Procedures Saved Lives in Cuba*, ASSOCIATED PRESS, Oct. 2, 1998.

⁵⁰ Office of the Coordination of Humanitarian Affairs [OCHA], *Exploring Key Changes and Developments in Postdisaster Settlement, Shelter and Housing*, at 52 (2006).

⁵¹ Ley de la Coordinadora Nacional para la Reducción de Desastres. 109-96 (Guatemala); Ley de Contingencias Nacionales, decreto n. 9-90-E (12/12/1990), GACETA NO.26348 DEL 25/01/1991 (Honduras); Ley 337 in Nicaragua; Ley, n. 7, resolución n. 28 (De 11 de febrero de 2005) (Panama).

⁵² Disaster Management Act No. 13 of 2005, Gazette Extraordinary No 1412/31, Sept. 29, 2005 (Sri Lanka).

⁵³ Disaster Management Bill 2005, Bill No. LV of 2005, Dec. 12, 2005 (India).

elaborated⁵⁴ in many manuals.⁵⁵ In the past decade there has been commendable progress in the degree to which physical protection needs have been incorporated into assistance projects and technical areas such as the physical layout of shelter, settlements, water, and sanitation facilities. The *UNHCR Handbook for Emergencies* stresses the importance of preserving the original family and community structures as key elements of protection. Standards should be introduced to avoid further vulnerability.

In terms of shelter provision and security, and in accordance with the *Sphere Handbook*,⁵⁶ UNHCR endorsed as standard the concept of “adequate dwelling” in camps and settlements. UNHCR advocates that shelters should:

- provide a covered area that affords dignified living space with a degree of privacy;
- have sufficient thermal comfort with ventilation for air circulation;
- provide protection from the elements and natural hazards; and
- ensure that inhabitants, especially women or groups with special needs, are not disadvantaged due to poor accommodation design; physical safety should be a prime concern.⁵⁷

⁵⁴ The Office of the UN High Commissioner for Refugees [UNHCR], *Handbook for Emergencies* (1999), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opedoc.pdf?tbl=PUBL&id=3bb2fa26b> [hereinafter UNHCR Handbook for Emergencies]; see also SPHERE PROJECT, *supra* note 27; Norwegian Refugee Council, *Camp Management Toolkit* (2004), available at <http://103220.c.telecomputing.no/publisher/arch/img/9069531.pdf> [hereinafter Camp Management Toolkit]; see also TOM CORSELLIS & ANTONELLA VITALE, *TRANSITIONAL SETTLEMENT: DISPLACED POPULATIONS* (2005).

⁵⁵ UNHCR Handbook for Emergencies, *supra* note 54, at 144.

⁵⁶ See SPHERE PROJECT, *supra* note 27.

⁵⁷ The Office of the UN High Commissioner for Refugees [UNHCR], *Practical Guide to the Systematic use of Standards and Indicators in UNHCR Operations*, at 53 (2006); see also Zetter & Boano, *supra* note 1.

In this context, a neighborhood planning concept should be adopted in the design and layout of camps and settlements to promote a sense of community and reinforce community-based protection⁵⁸ while also preserving the privacy of the family unit.⁵⁹

The IASC Guidelines⁶⁰ stress the importance of providing adequate material for partitions between family dwelling units, especially in communal accommodation, in order to increase security and privacy. Appropriate lighting and security are also basic requirements. Recent reports on tsunami-affected villages in Aceh document threats to women's security in communal temporary shelters⁶¹ with incidents of sexual assault reported, for example, in poorly lit toilets, because the guidelines had not been followed by local authorities and NGOs.⁶²

The second requirement is co-ordination, which is essential for all shelter interventions. In Indonesia, after the tsunami, the disaster response for the

⁵⁸ Inter-Agency Standing Committee, *Guidelines for Gender-based Violence Interventions in Humanitarian Settings Focusing on Prevention of and Response to Sexual Violence in Emergencies*, at 54 (2005) [hereinafter IASC Guidelines]; Andrew Chalinder, *Temporary Human Settlement Planning for Displaced Populations in Emergencies*, GOOD PRACTICE REVIEW (1998).

⁵⁹ CORSELLIS & VITALE, *supra* note 54, at 390.

⁶⁰ See IASC Guidelines, *supra* note 58.

⁶¹ The report indicates that almost 90 percent of women interviewed were dissatisfied with their accommodation because of inadequate facilities, poor access to public services, insufficient sanitation, and lack of designated washing areas for sanitary cloths used during menstruation. Moreover, each family was provided a single room without internal partitions, decreasing privacy.

⁶² Oxfam, *A Place to Stay, a Place to Live: Challenges in Providing Shelter in India, Indonesia, and Sri Lanka After the Tsunami*, Oxfam Briefing Note (Dec. 14, 2005), available at <http://oxfam.intelli-direct.com/e/d.dll?m=234& url=http://www.oxfam.org.uk/what we do/issues/conflict disasters/downloads/bn tsunami shelter.pdf>.

habitat sector was initially coordinated by the National Development Planning Agency (BAPPENAS), in cooperation with the Ministry of Public Works (MPW). But after the establishment of the Aceh and Nias Rehabilitation and Reconstruction Agency (BRR) in May 2005, strategy formulation was handed over to BRR.⁶³

A third requirement is grafting short-term shelter needs with long-term shelter strategies. In the post-tsunami Indonesian case, the prime issue was whether temporary structures were a necessity in the light of slow progress on reconstruction, or, conversely, a wasteful use of available resources. It has been argued that these resources could have been used for more permanent or incrementally upgradeable solutions. The need to graft short-term temporary needs to longer term strategies is underscored by the fact that disaster-affected populations had to be moved from tents which were rapidly decaying in the scorching tropical sun and rains.⁶⁴

The fourth requirement is deciding on the location of settlements during displacement and understanding the implications for the durable solution phase. General principles have been long established here, but often forgotten. The affected population's priorities and problems, where compulsory evacuation takes place and contingent on feasibility, should be governed by factors such as:

⁶³ BRR was established by Government Regulation No. 2/2005, on April 28, 2005. This Government Regulation, established under a state of emergency, was then made Law No. 10/2005. This law emphasized the agency's responsibility to redevelop Aceh and Nias, with its two principle assignments being to manage projects funded by the Indonesian Government's National Annual Budget (APBN) and to coordinate projects funded by donors and foreign NGOs. Based on Presidential Regulation No. 70/2005, BRR can directly appoint housing contractors to supply shelters and homes for the people of Aceh and Nias. BRR, *Building a Land of Hope: One Year Report Executing Agency of the Rehabilitation and Reconstruction Agency for Aceh and Nias*, at 13 (Apr. 2006).

⁶⁴ Florian Steinberg, *Housing Reconstruction and Rehabilitation in Aceh and Nias, Indonesia—Rebuilding Lives*, 31(1) HABITAT INT'L 155 (2007).

- remaining as close as possible to damaged homes and means of livelihood (as in the case of the Balkans and Sri Lanka);
- staying, where possible, in homes of families or friends;
- improvising temporary shelters close to damaged homes (as in Kosovo, Balkans, Pakistan);
- occupying temporarily requisitioned buildings; and
- permitting emergency shelter, such as tents, next to damaged homes.⁶⁵

Although there is frequently the official desire to clear people away from affected regions, the desire of the displaced is to remain as near as possible to damaged homes or locations from which they have been forcibly displaced. Neglecting the benefits from a more flexible and adaptable procedural response to displacement will often:

- make distribution of supplies and services more difficult;
- reduce possibilities of families salvaging materials;
- create an artificial need for temporary shelter;
- create “refugee-like” situations;
- reduce the capacity of surrounding communities to assist;
- retard reconstruction; and
- retard psychological recovery.⁶⁶

Of course, general principles on location for temporary settlements will be governed by local conditions. Thus, to avoid recreating tsunami vulnerability, exclusion zones for coastal redevelopment⁶⁷ were mandated in Sri Lanka and,

⁶⁵ United Nations Disaster Relief Organization [UNDRO], *Shelter After Disaster: Guidelines for Assistance*, at 6 (1982).

⁶⁶ *Id.* at 22.

⁶⁷ Prior to the tsunami, the area adjacent to the coast was densely populated and was regulated by the Coast Conservation Act No. 57, passed in 1981. Regarding the post-tsunami buffer zone, see *TAFREN: Post-Tsunami Recovery and Reconstruction*

to a lesser extent, in Aceh. These were, however, subject to inconsistent and arbitrary changes, which meant that many new transitional settlements were built after March 2005, but without clear plans for permanent settlement and shelter since the coastal land available for permanent settlement was not clearly designated.⁶⁸

The fifth procedural element or requirement is the active participation of the displaced people in reconstructing their own homes and communities is a *sine qua non* of procedural requirements during displacement. Evidence from Sri Lanka shows that this not only contributes to improved results, but also provides a psychological boost to post-disaster mental health recovery. Providing secure shelters also helped to support livelihoods, for example, by providing a place for storing tools and materials while land security assisted in securing cash grants or bank loans for construction and for restarting livelihoods.⁶⁹

Turning to more substantive elements of state regulation, physical, social, and legal protection⁷⁰ is at the heart of responsibility towards IDPs in this phase⁷¹ and should result in a “comprehensive approach that integrates protection with assistance and includes steps to defend the physical safety and rights of [the] displaced.”⁷² Thus, a national response needs to be inclusive, covering all

Strategy (2005), available at http://www.tafren.gov.lk/portal/resources/pdf/TAFREN_P-TRRS_May05.pdf.

⁶⁸ Jim Kennedy et. al., *Post-tsunami Transitional Settlement and Shelter: Field Experience from Aceh and Sri Lanka*, 37 HUMANITARIAN EX. MAGAZINE 28-31 (Mar. 2007).

⁶⁹ *Id.*

⁷⁰ UNHCR Handbook for Emergencies, *supra* note 55.

⁷¹ Patricia Weiss Fagen, *Protecting Refugee Women and Children*, 41(1) INT'L MIGRATION 77 (2003).

⁷² Roberta Cohen, *Strengthening Protection of IDPs: The UN's Role*, LAWS & ETHICS 108 (Winter/Spring 2006).

situations of internal displacement and groups of IDPs and a range of interpretations of protection, without discrimination.⁷³ Specifically, a non-discriminatory national response should apply to “all persons fitting the definition of IDPs found in the *Guiding Principles*.”⁷⁴

With respect to physical safety, encampment is a widespread temporary expedient, premised on the potential to provide effective protection as well as the efficient delivery of large scale material needs. In Uganda, camps were established for IDPs according to the directives of Uganda’s National Policy for IDPs, adopted in 2004.⁷⁵ This stressed the duty of the government to protect its citizens against arbitrary displacement and, in case of displacement, to provide for the protection and assistance of IDPs by setting guidelines to be observed by government institutions, local and international humanitarian organizations, and NGOs involved in upholding the rights and entitlements of IDPs through all the phases of displacement.

Second, material needs are, of course, a major substantive element or consideration during displacement. Uganda’s National Policy for IDPs states that the government, supported by humanitarian/development agencies, shall provide basic shelter and housing to IDPs.⁷⁶ Section 3.9.1. a. and b. further provide that the government will ensure that the “physical and primary social needs of individuals, families and communities for safety, security and privacy are sufficiently met” and that “shelter and housing facilities are within

⁷³ ICCPR, *supra* note 10, arts. 2, 26; ICESCR, *supra* note 10, art. 2; Universal Declaration, *supra* note 9, art 2.

⁷⁴ The Brookings Institution, *Addressing Internal Displacement: A Framework for National Responsibility*, at 9 (2005).

⁷⁵ Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons* (Aug. 2004), available at http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Uganda/Uganda_IDPpolicy_2004.pdf [hereinafter Uganda’s National Policy for IDPs].

⁷⁶*Id* at § 3.9.1.

proximity to local infrastructure and strategically placed for IDPs for easy access to food, water, firewood, medical facilities and other basic necessities.”⁷⁷

Third, the needs of particular groups within the IDP population must be considered during displacement. A national framework should address the needs of “women, unaccompanied minors, persons with disabilities, and the elderly.”⁷⁸ Regardless of the form of shelter provision, within this specific protection right, shelters should comply with UNHCR’s “adequate dwelling” standard in the Practical Guide to the Systematic Use of Standards and indicators in UNHCR Operations.

The need for privacy in the dwelling (and beyond), for women, is widely stressed. Lack of privacy was noted as the biggest deprivation experienced by encamped Afghan women.⁷⁹

Shelter density is an important consideration both in this context and in relation to proximity to services such as water and food distribution points and latrines. Afghan women refugees from rural areas, who had relative freedom of movement before displacement, found the overcrowded and confined nature of high density camps dramatically and adversely affected their daily lives and social wellbeing.⁸⁰

⁷⁷ Boltzmann Institute, *Implementing the Guiding Principles on Internal Displacement on the Domestic Level* (June 2005), available at <http://www.brookings.edu/idp> (offering an analysis of domestic legislation, policies, and recommendations on areas for further research).

⁷⁸ The Brookings Institution, *supra* note 74, at 9.

⁷⁹ Nancy Hatch Dupree, *The Women of Afghanistan* (Swedish Committee for Afghanistan, with Support from the UN Co-ordinator for Afghanistan) in Sultan Barakat & Garteh Wardell, *Exploited by Whom? An Alternative Perspective on Humanitarian Assistance to Afghan Women*, 23(5) THIRD WORLD QUARTERLY 909-930 (2004).

⁸⁰ Barakat & Wardell, *supra* note 79.

Fourth, temporary housing solutions, and notably collective centers, barracks and, camps are emblematic of the shelter-during-displacement phase. Experience points to many challenges which need to be addressed and confirms that collective centers are especially problematic in transitional situations. In Georgia, almost 44 percent of all registered IDPs are living in one of the more than 1,500 remaining collective accommodation centers. The abject poverty in these centers contrasts with the situation of IDPs living with host families. Around 70 percent of these centers do not meet minimum standards, with inadequate access to clean water, unsafe electric systems, and insufficient insulation.⁸¹ Conditions are not in accordance with the right to an adequate standard of living, and some collective centers are located in relative isolation, forcing children to walk several kilometers to school and complicating access to health care, particularly for the elderly.⁸²

Special attention is also required for urban IDPs, such as in Colombia, where informal settlements on the outskirts of cities now house tens of thousands of IDPs and are growing daily as newly displaced families move in and set up their own makeshift homes. As a rule, housing conditions in these informal communities are grossly inadequate. Overcrowding and a lack of basic services are the day-to-day reality. In many such communities, the problems are compounded by a lack of personal security and privacy and inadequate or even no access to employment, schools, and healthcare facilities.

In the Context of Durable Solutions

By its nature, humanitarian assistance, and specifically emergency shelter and settlements, are meant to be a temporary solution for a crisis situation. However, IDPs often find themselves in an ongoing humanitarian crisis,

⁸¹ Internal Displacement Monitoring Centre/Norwegian Refugee Council, *Profile of Internal Displacement: Georgia* (2005).

⁸² Representative of the Secretary-General, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (Addendum, Mission to Georgia)*, submitted pursuant to Commission on Human Rights resolution, at 12-13, ¶ 14(c), E/CN.4/2006/71/Add.7. 24 (Mar. 24, 2006).

particularly in chronic conflict situations where continued fighting blocks the ability to resume normal paths of development. Moreover, it is plain that return and resettlement can often be impossible in practice without some transitional assistance. On the other hand, overextended periods of humanitarian assistance can lead to dependency and undermine the resilience of recipients.⁸³

As expressed in the Brookings Institution's publication, *Addressing Internal Displacement: A Framework for National Responsibility* (the Framework for National Responsibility),⁸⁴ such responsibility "extends across all phases of displacement. It includes preventing arbitrary displacement, ensuring the security and well being of persons once they are displaced, and creating the conditions for durable solutions to their plight, namely through voluntary and safe return or resettlement and reintegration." The links between emergency relief and the longer term development needs of forcibly displaced populations poses complex operational challenges for agencies working in the shelter sector, and contradictory technical, and political demands.⁸⁵ This is because shelter provision in humanitarian situations does not just serve temporary needs. Structures and communities often remain in place far longer than anticipated and represent durable physical assets which serve longer term recovery and development objectives, especially for returnee populations.⁸⁶

In the shelter policy that UNHCR established in Sri Lanka, it was clear that the agency would not be engaged in permanent shelter. However, it took active steps to liaise with agencies working in this area. Its focus on standards

⁸³ International Federation of Red Cross and Red Crescent Societies [IFRC], *World Disaster Report 2004: Focus on Community Resilience*, at 28-29 (2004).

⁸⁴ The Brookings Institution, *supra* note 74, at 9.

⁸⁵ Margie Buchanan-Smith & Paola Fabbri, *Links between Relief, Rehabilitation and Development in the Tsunami Response: A Review of the Debate* (2005), available at http://www.tsunami-evaluation.org/NR/rdonlyres/F3802701-9EF5-4D4C-AF32-D6B12B254313/0/lrrd_review_debate.pdf.

⁸⁶ See Zetter, *supra* note 39.

and quality and the success with the transitional shelter program, meant that agencies involved in permanent shelter were given adequate time to prepare and implement a well designed program. The success of the transitional shelter program allowed those agencies involved in permanent shelter the time to develop community-based approaches.⁸⁷ This experience appears to underscore the vital need for agencies involved in the different phases to be fully coordinated. Even so, there were some major gaps, notably in information-sharing with affected communities. The experience of Somalia's IDP settlements in Bosasso might be considered a good example of both field shelter coordination and upgrading and regularization of uncontrolled sprawl of numerous densely populated informal and formal (re-)settlement areas.⁸⁸

The scope of shelter assistance, in addition to physical provision, must also be addressed in the context of durable solutions. Existing IDP laws in many countries provide strict limits on the amount of finance provided. For example, Russia's Law on Forced Migrants provides for a "one-off cash allowance per...member of the family...in keeping with the procedure established by the government of the Russian Federation, but not less than a minimum salary established by the federal law," one-time assistance with transportation to a place of temporary accommodation, longer-term temporary accommodation, and ongoing free medical assistance and medication (up to the limit of the forced migrant status, which is set at a maximum of five years).⁸⁹

While very specific limits such as these may not always be appropriate, laws and policies that do not provide details about how much aid will be provided can lead to uncertainty and a lack of specific commitment. On balance,

⁸⁷ *Id* at 16.

⁸⁸ UN Habitat, *The Story of the Tawakal IDP Settlement and the Lady who Planned It*, 5 SUDP NEWSLETTER 4 (May 2007).

⁸⁹ See Law of the Russian Federation on Forced Migrants, available at [http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Russia/Russia_Law%20Forced%20Migrants.pdf](http://www.brookings.edu/projects/idp/Laws-and-Policies/~/media/Files/Projects/IDP/Laws%20and%20Policies/Russia/Russia_Law%20Forced%20Migrants.pdf) and http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Russia/Russia_AmendedLawNo202%20FZ.pdf.

reasonable limits on the amount and timing of assistance are appropriate so long as (1) they are closely tied with rehabilitation and resettlement assistance initiatives—in particular help with establishing a livelihood—such that IDPs can reasonably be expected to provide for themselves and (2) they retain enough flexibility to account for situations where ongoing crisis make rehabilitation impossible for a specific period of time.⁹⁰

Another dimension is the use of social housing schemes which, although not a common current practice, may offer some potential for IDP housing in the context of durable solutions. Recent experience comes from Azerbaijan⁹¹ and Serbia.⁹² In 2002, the Government of Serbia adopted the National Strategy for Resolving the Problems of Refugees and Internally Displaced People.⁹³ It focused on ensuring the conditions for repatriation of refugees and IDPs and activities for providing conditions for local integration, recommending the development of both social housing and affordable housing.

Procedurally, a gender sensitive approach is fundamental for durable solutions in the shelter sector. Clearly, the role of shelter and settlement as a developmental resource, and its scope in embracing multiple issues and options, offers substantial potential to empower displaced women. Indeed, this is a consistent theme running through this chapter. As we have seen, women prioritize different needs for shelter, settlement, and infrastructure due to different gender roles in the division of labor and perceptions of well being. However, empowerment depends on effective participation and the

⁹⁰ See chapter 3, *supra*.

⁹¹ Azer T. Khanlarov, *Social Housing in Azerbaijan*, paper presented at UNICE Social Housing Conference in Vienna, Austria, Nov. 28-30, 2004.

⁹² Vladimir Macura & Zlata Vuksanovic, *New Approach to Social and Functional Mix in Housing of Belgrade After 2000*, paper presented at UNICE Social Housing Conference, Vienna, Austria, Nov. 28-30, 2004.

⁹³ For more information, see the Government of Serbia's Poverty Reduction Strategy, available at <http://www.prsp.sr.gov.yu/dokumenta.jsp>.

representation of gendered needs. The positive rhetoric is poorly borne out in practice which, most usually, offers consultation rather than participation.⁹⁴

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Responsibility for assisting IDPs lies first with national authorities. Institutional elements of state regulation that are in place with regard to planned evacuation, shelter, and settlements are generally addressed by recalling the concept of “adequate housing” in different state constitutions. Directly regarding planned evacuation, institutional elements should be provided under specific laws or policies. Fewer countries have specific regulations focused on the situation of IDPs. Institutionally, despite the fact that there is no “best fit” solution, it is advantageous to have a centralized coordination policy and strategic agency as in the examples of the Philippines, Peru, Jamaica, and Cuba.⁹⁵

Prior to Displacement

The first priority for action of the Hyogo Framework⁹⁶ not only commits states to make disaster risk reduction a priority, but also to give it “a strong institutional basis for implementation.” To do this, it recommends the creation of “multi-sector national platforms,” meaning “national mechanisms for coordination and policy guidance on disaster risk reduction that need to be multi-sectoral and inter-disciplinary in nature, with public, private and civil society participation involving all concerned entities within a country [including UN agencies present at the national level, as appropriate].”⁹⁷ To

⁹⁴ Zetter & Boano, *supra* note 1, at 16.

⁹⁵ Sims & Vogelmann, *supra* note 48, at 390; Osei, P.D. (2007); Warner & Orè, *supra* note 46, at 104.

⁹⁶ International Strategy for Disaster Reduction [ISDR], Hyogo Framework for Action 2005-2015: ISDR International Strategy for Disaster Reduction, Extract from the final report of the World Conference on Disaster Reduction, A/CONF.206/6, Kobe, Japan, 18-22 Jan. 2005 [hereinafter ISDR].

⁹⁷ *Id.* at 9-11.

date, thirty-five countries have developed such national platforms.⁹⁸ In addition, it has been recommended that governments incorporate responsibilities for disaster management into institutional arrangements for disaster relief and recovery to ensure an “holistic response.” A number of states such as India,⁹⁹ Nicaragua,¹⁰⁰ and Nigeria¹⁰¹ have proceeded along these lines in recent years. A number of governments have included mechanisms to foster risk reduction strategies and activity in an overall disaster response policy and legislation.¹⁰² In Asia, the Philippines is considering new legislation to widen the scope of its Office of Civil Defense and National Disaster Coordination Council, whereas Vietnam is currently expanding the Disaster Management Unit.¹⁰³ All of these legislative frameworks provide for planned evacuation.

⁹⁸ Sálvano Briceño, *Progress on the Implementation of the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters* (Powerpoint Presentation to the ISDR ECOSOC Side Event, July 19, 2006), available at <http://www.unisdr.org/eng/isdr-system/docs/1>.

⁹⁹ Disaster Management Act of 2005, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

¹⁰⁰ Ley Número 337, Ley Creadora del Sistema Nacional para la Prevención, Mitigación, y Atención de Desastres, art. 15 (Nicaragua), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

¹⁰¹ National Emergency Management Agency (NEMA), *Nigeria: Promoting Disaster Risk Reduction in Post Disaster Recovery and Reconstruction Efforts*, (Powerpoint Presentation to the ISDR ECOSOC Side Event, July 19, 2006), available at <http://www.unisdr.org/eng/isdr-system/docs/1>.

¹⁰² Hyogo Framework for Action 2005-2015, Building the Resilience of Nations and Communities to Disasters, available at <http://www.unisdr.org/eng/hfa/hf-implem-states.htm>.

¹⁰³ International Strategy for Disaster Reduction [ISDR], *Living with Risk: A Global Review of Disaster Reduction Initiatives* (2004).

During Displacement

Evidence similarly reinforces the need for multi-level co-ordination of government institutional capacity during displacement. National disaster and emergency laws and policies should clearly specify roles and responsibilities of different ministries at the national level, as well as provincial and local administrative structures.

At the national level, both a central executive office and a committee or commission, frequently including one high level policy-making body and one or more technical committees, are usually necessary to coordinate the contributions that inevitably must be made by a number of different ministries.¹⁰⁴ The case of Nicaragua with the National System for the Prevention, Mitigation and Response to Disasters (SINAPRED) might be a relevant example of an institutional framework with parallel committees and executive disaster offices at the national, regional, and municipal levels.¹⁰⁵ With specific reference to the situation of IDPs, Law 387 of 1997 in Colombia established the National Council for Comprehensive Assistance to Populations Displaced by Violence which is an inter-ministerial body responsible for the functioning of the National System for Comprehensive Assistance to Populations Displaced by Violence.¹⁰⁶

Second, the role of the police and armed forces can become crucial institutional components not only in responding to the social and material

¹⁰⁴ Disaster Management Training Programme, *The Role and Responsibilities of the United Nations Disaster Management Team*, Aug. 20, 2002, available at <http://www.undmtp.org/english/roles/role.pdf>.

¹⁰⁵ Decreto No. 53-2000, Reglamento de la Ley Número 337, Ley Creadora del Sistema Nacional para la Prevención, Mitigación, y Atención de Desastres (Nicaragua), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

¹⁰⁶ Law 387 of 1997, Diario Oficial [Official Gazette] No. 43,091 of July 24, 1997, art. 6, available at [http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Colombia/Colombia_Law387_1997_En_g.pdf](http://www.brookings.edu/projects/idp/Laws-and-Policies/~/media/Files/Projects/IDP/Laws%20and%20Policies/Colombia/Colombia_Law387_1997_En_g.pdf).

needs of temporarily displaced populations (a role which is well developed in recent decades), but also in cases of ongoing or chronic conflict. The issues here are the needs for protection and the logistical support that the police and military can provide. These issues should be addressed as a matter of national law or policy and co-ordination should take place through multilateral and bilateral agreements between the agencies.¹⁰⁷ The IASC's Reference Paper, *Civil-Military Relationship in Complex Emergencies*,¹⁰⁸ is one of the most comprehensive tools on the subject and spells out a common understanding on when and how, as well as how not, to coordinate with the military in fulfilling humanitarian objectives.¹⁰⁹

The tsunami disaster response raised the profile and importance of military logistical assistance as part of the overall architecture of response.¹¹⁰ This experience brought urgency to the need to promote mutual understanding of respective mandates, capabilities, and limitations through joint training and exercises, and developing further joint field-level procedures. The operational complexity of responding to a disaster of such magnitude, and its geographic spread, compelled the use of foreign military resources as well for those countries requesting assistance. Their support was considered vital.¹¹¹ Despite the contributions of national and international military forces in disaster

¹⁰⁷ The Use of Military and Civil Defense Assets in Disaster Relief—"Oslo Guidelines" (Nov. 2006), *available at* <http://www.reliefweb.int/rw/lib.nsf/db900SID/AMMF-6VXJVG?OpenDocument>.

¹⁰⁸ The paper was endorsed by the IASC in June 2004 and is available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7CTJ8U/\\$file/iasc_jun2004.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7CTJ8U/$file/iasc_jun2004.pdf?openelement).

¹⁰⁹ Manuel Bessler & Kaoruko Seki, *Civil-Military Relations in Armed Conflicts: A Humanitarian Perspective*, 3(3) LIAISON 4-10 (2006).

¹¹⁰ Tsunami Evaluation Coalition, *Coordination of International Humanitarian Assistance in Tsunami-affected Countries*, at 46 (July 2006), *available at* <http://www.ifrc.org/docs/pubs/updates/tec-coordination-summary.pdf>.

¹¹¹ UN Agency and NGO presentations, Cobra Gold 2005 Disaster Relief Workshop.

situations, where there is also ongoing conflict such as in Sri Lanka and Indonesia, the military support to humanitarian organizations and interventions in these countries inevitably remains problematic.¹¹²

In the Context of Durable Solutions

There is sometimes a shift of responsibility among ministries or levels of government when the relief phase is declared over and the shift to a more mid-to-long term recovery program takes place. Any change in institutional focal points and responsibility for relief and recovery should ensure that necessary facilities, coordination, and monitoring remain available through the rehabilitation and recovery phase for all the actors, whether these are domestic or international.

INTERNATIONAL ROLE

Crucial in understanding the international role in planned evacuation, shelter and settlements is the new cluster approach adopted in the UN in the Humanitarian Reform Review. The Inter-Agency Standing Committee (IASC) has welcomed the cluster approach and in December 2005 adopted IASC Principles which designated global cluster leads in nine areas of humanitarian activity where there was considered to be a need to reinforce response capacities. In December 2006, the IASC Principles endorsed the IASC Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response.¹¹³ Within this framework, the Emergency Shelter Permanent Cluster Working Group (the Emergency Shelter Cluster) was created. The purpose of the Emergency Shelter Cluster¹¹⁴ is to assist national governments,

¹¹² Philippe LeBillon & Arno Waizenegger, *Peace in the Wake of Disaster? Secessionist Conflicts and the 2004 Indian Ocean Tsunami*, 32(3) TRANS. OF THE INST. OF BRITISH GEOGRAPHERS 411-427 (2004).

¹¹³ Inter-Agency Standing Committee [IASC], *Guidance Note on Using Cluster Approach to Strengthen Humanitarian Response* (2006), available at <http://ocha.unog.ch/humanitarianreform>.

¹¹⁴ Current members: UNHCR (chair for displacements due to conflict), IOM, UNICEF, WFP, UNDP, OCHA, OHCHR, IDD, UN-HABITAT, IFRC is convener of

through the country teams, to improve humanitarian action vis-à-vis emergency shelter provision in emergency settings.

The cluster system has great potential, but there remains the risk that issues that involve multiple players will still constitute a significant gap. Examples are protection of the vulnerable and the particular needs of IDPs when major problems still exist in the shelter sector,¹¹⁵ such as in the aftermath of the Pakistan earthquake¹¹⁶ and the tsunami.¹¹⁷ Also, sharing of knowledge and experience between the clusters may be inhibited unless clear structures for collaboration exist. A number of major international organizations and agencies share responsibility and involvement in various dimensions of shelter and settlement for forcibly displaced populations, including IDPs.

UNHCR

The Office of the United Nations High Commissioner for Refugees (UNHCR) protects and assists refugees, asylum seekers, and stateless persons.¹¹⁸ Recently, UNHCR's mandate has been expanded to include the protection of

the Emergency Shelter Cluster in disaster situations, and CRS representing ICVA/SCR/InterAction.

¹¹⁵ United Nations, Secretary-General's High-level Panel on UN System-wide Coherence in the Areas of Development, Humanitarian Assistance, and the Environment, *Transition from Relief to Development: Key Issues Related to Humanitarian and Recovery/Transition Programmes*, at 3 (May 8, 2006).

¹¹⁶ Action Aid, *The Evolving UN Cluster Approach in the Aftermath of the Pakistan Earthquake: an NGO Perspective* (2006), available at http://www.actionaid.org/docs/un_cluster_approach.pdf.

¹¹⁷ See Tsunami Evaluation Coalition Home Page, <http://www.tsunami-evaluation.org>.

¹¹⁸ See Statute of the Office of the United Nations High Commissioner for Refugees, available at <http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=3ae69ee64>.

IDPs.¹¹⁹ Moreover, UNHCR's leading role, and its long standing experience in the shelter sector, is fundamentally important for its leadership.

UNDP

The United Nations Development Programme's (UNDP) Bureau of Crisis Prevention and Recovery (BCPR)¹²⁰ has initiatives focused on the prevention of conflict, disaster risk reduction, and recovery and reintegration. It has an extensive advisory service in the area of disaster risk reduction, disaster prevention, and recovery. The work of BCPR bridges the humanitarian phase of a post-crisis response and the long-term development phase following recovery. BCPR is also an advocate for crisis sensitivity, working to ensure that all UNDP's long-term development policies and programs address the risks and opportunities related to disaster reduction and conflict prevention. UNDP recently has been involved in the Early Recovery Cluster, which includes some traditional relief and assistance sectors (water and sanitation, nutrition, health, emergency shelter); service provision (emergency telecommunications, logistics); and cross-cutting issues (camp coordination, early recovery and protection).¹²¹

¹¹⁹ The Office of the UN High Commissioner for Refugees [UNHCR], *UNHCR's Expanded Role in Support of the Inter-agency Response to Situations of Internal Displacement: Report of Lessons Learned and Effective Practice Workshop*, PDES/2006/06 (Nov. 2006); The Office of the UN High Commissioner for Refugees [UNHCR], *Policy Framework and Corporate Strategy: UNHCR's Role in Support and Enhanced Inter-agency Response to the Protection of Internally Displaced Persons*, Informal Consultative Meeting, at 30 (Jan. 2007).

¹²⁰ See International Strategy for Disaster Reduction Home Page, <http://www.unisdr.org>.

¹²¹ See Early Recovery Home Page, <http://ocha.unog.ch/humanitarianreform/Default.aspx?tabid=80>.

IOM

The International Organization for Migration (IOM) has developed significant expertise in shelter interventions. IOM provides transportation and emergency humanitarian assistance to persons requiring evacuation from emergency situations as well as post-emergency movement assistance, including to internally displaced persons, demobilized soldiers, and persons affected by natural disasters.

UN Habitat

The United Nations Human Settlements Programme (UN-HABITAT) is the UN agency for human settlements. It is mandated by the UN General Assembly to promote socially and environmentally sustainable towns and cities with the goal of providing adequate shelter for all. UN-HABITAT also has some 154 technical programs and projects in sixty-one countries around the world, most of them in the least developed countries. These include major projects in post-war societies such as Afghanistan, Kosovo, Somalia, Iraq, Rwanda, and the Democratic Republic of Congo, and recently in post-tsunami Indonesia.¹²² The agency's operational activities help governments create policies and strategies aimed at strengthening a self-reliant management capacity at both national and local levels. The focus on promoting shelter for all, improving urban governance, reducing urban poverty, improving the living environment, and managing disaster mitigation and post-conflict rehabilitation, provides significant knowledge and technical resources which could be better incorporated into the work of the main agencies responsible for shelter and settlement interventions in disaster or conflict situations.

IFRC

The International Federation of Red Cross and Red Crescent Societies (IFRC) is an international membership organization formed by the national Red Cross and Red Crescent Societies around the world. The Federation's International

¹²² See UN-Habitat Indonesia Home Page, <http://www.unhabitat-indonesia.org>.

Disaster Response Laws, Rules and Principles (IDRL) Programme¹²³ gathers and disseminates information on national and international law on international disaster relief and recovery, as well as outstanding legal issues in this area. In addition to its legal database, publications, and trainings, it has provided support to national societies for their advocacy with governments for the development of appropriate law and policy in these areas. Moreover, the IFRC is convener of the Emergency Shelter Cluster in disaster situations.

Norwegian Refugee Council

The Norwegian Refugee Council (NRC) is a humanitarian NGO that began providing legal advice and representation to beneficiaries in the context of its work supporting repatriation and return in the Balkans during the mid-1990s. NRC's legal counseling programs have expanded considerably with programs set up to assist displaced persons in locations ranging from Afghanistan and Uganda to Georgia and Colombia. Extensive experience in shelter and settlements has given the NRC considerable insights into how to improve qualitatively the shelter sector. Recently NRC has been actively engaged in the coordination of the Camp Management Project which led to a Camp Management Toolkit.¹²⁴

IDMC

The Internal Displacement Monitoring Centre (IDMC) is a body monitoring conflict-induced internal displacement worldwide. IDMC runs an online database¹²⁵ providing comprehensive information and analysis on internal

¹²³ See International Federation of Red Cross and Red Crescent [IFRC], International Disaster Response Laws, Rules and Principles Programme, *available at* <http://www.oas.org/dsd/Nat-Dis-Proj/Documents/Enews6Final.pdf>.

¹²⁴ Camp Management Project, *Camp Management Toolkit*, Norwegian Refugee Council (2004), *available at* http://103220.c.telecomputing.no/publisher/arch/_img/9069531.pdf.

¹²⁵ See Internal Displacement Monitoring Centre Home Page, <http://www.internal-displacement.org>.

displacement in some fifty countries. Based on its monitoring and data collection activities, the IDMC runs advocacy and training activities. The database contains a significant number of documents on background, causes of displacement, humanitarian and human rights concerns, and national and international responses.

Shelter Centre

Shelter Centre is an NGO, based in Geneva, which supports humanitarian operations that respond to the transitional settlement and reconstruction needs of populations affected by conflicts and natural disasters, from the emergency phase until durable solutions are reached.¹²⁶ Shelter Centre is mainly focused on research, development, dissemination, and operational implementation of humanitarian settlement and shelter policy, best practice, equipment, training, and field programs. Shelter Centre has been actively engaged in the revision of *Shelter After Disaster: Guidelines for Assistance*, prepared by the Office of the United Nations Disaster Relief Co-ordinator (UNDRO, now OCHA) and published in 1982.

ADPC

The Asian Disaster Preparedness Center (ADPC)¹²⁷ is a non-profit organization supporting the advancement of safer communities and sustainable development through implementing programs and projects that reduce the impact of disasters upon countries and communities in Asia and the Pacific. ADPC develops and enhances sustainable institutional disaster risk management capacities, frameworks, and mechanisms; supports the development and implementation of government policies; facilitates the dissemination and exchange of disaster risk management expertise, experience, and information; and enhances disaster risk management knowledge and skills.

¹²⁶ See Shelter Centre—Supporting the Humanitarian Shelter Community Home Page, <http://www.sheltercentre.org>.

¹²⁷ See Asian Disaster Preparedness Center Home Page, <http://www.adpc.net>.

LA RED

In recent years, the Latin American Network of Social Studies on Disaster Prevention (LA RED)¹²⁸ has become an important point of reference in the field of risk management and the prevention of disasters.

ProVention Consortium

The overall goal of ProVention¹²⁹ is to reduce the risk and social, economic, and environmental impacts of natural hazards on vulnerable populations in developing countries in order to alleviate poverty and contribute to sustainable development.

Refugee Studies Centre, University of Oxford

The Refugee Studies Centre (RSC) combines world-class academic research and teaching with a commitment to recognizing the human rights, and improving the lives, of refugees and other forced migrants who are among some of the world's most disadvantaged people. Research and dissemination of information on shelter and settlement issues for the forcibly displaced form part of its extensive portfolio. The RSC has a global outreach through international collaboration programs with academics and practitioners and through its dissemination program which includes *Forced Migration Review* and *Forced Migration Online*.

SUMMARY OF RECOMMENDATIONS

1. Review the scope and impact of national legislation and procedures on the right to adequate housing for IDPs, including women and children, and introduce legislative and procedural reform to ensure IDPs' ability to exercise their rights to being protected during evacuation and displacement.

¹²⁸ See La Red, Red de estudios sociales en Prevención de desastres en América Latina Home Page, <http://www.desenredando.org>.

¹²⁹ See ProVention Home Page, <http://www.proventionconsortium.org>.

2. Ensure that the right to adequate shelter is recognized as the right to live somewhere in peace and dignity and where physical, legal, and social security are protected.
3. Ensure that the protection of displaced people is at the center of frameworks for intervention, according to binding and non-binding international and national instruments.
4. Prepare for the possibility of displacement, ensuring shelter and settlements plans and contingency evacuation plans are in place in order to assure the application of international rights of protection and adequate housing in a coordinated and comprehensive manner.
5. Establish in countries affected by, or susceptible to, internal displacement, a special office or focal point for evacuation and shelter and settlement assistance with responsibility to co-ordinate and monitor the provision of different shelter and settlement options during displacement.
6. Ensure that strong institutional frameworks are in place at national and local levels to coordinate and implement planned evacuations, the temporary provision of the shelter and settlement needs for displaced populations, and the transition to recovery.
7. Give special attention to enhancing the capacity of the special office/focal point as well as other institutional stakeholders to plan and deliver shelter and settlement options during displacement.
8. Ensure that national governments prepare appropriate standards and guidelines for temporary shelter and settlement provision during evacuation and displacement in order to address habitability, safety, cultural adequacy, tolerable densities, access to adequate infrastructure and services (such as health and education), secure tenure and suitable locations with regard to income and livelihood opportunities in accordance with appropriate economic, cultural, and social conditions.
9. Establish coordination mechanisms prior to, during, and after displacement, involving all competent authorities who commit themselves to providing

adequate housing rights and to upholding all such rights recognized not only under domestic law, but also in accordance with international human rights law, without adverse distinction.

10. Establish coordination mechanisms for evacuation plans and temporary shelter plans which integrate different stakeholders in programming and project implementation, and assign clear mandates and roles, especially in the case of military involvement.

11. Consult with, and enable the participation of, IDPs, including women and affected minority groups, in the formulation, monitoring, review, and appraisal of national, regional, and local shelter and settlements options and evacuation procedures so as to address the obstacles IDPs may face to their participation.

12. Ensure that national governments develop policies for the rapid transfer of displaced populations from transitional and temporary accommodation to temporary or permanent housing.

13. Recognize the long-term impacts of shelter and settlement provision under conditions of temporary evacuation and adopt strategies and policies which address that link and recognize the need for durable solutions.

Chapter 6

The Right to Health and Basic Services

W. Courtland Robinson*

INTRODUCTION

Health as a human right does not mean the right to be healthy nor does it assert an unlimited right to be treated for every medical condition.¹ Rather, the right to health may be seen as having two components: a right to health care and a right to healthy conditions.² The rights-based approach to health incorporates both a clinical, curative perspective focusing on health care and health services, and a public health, preventive perspective focusing on the social determinants of health—including water, sanitation, nutrition, and health education.

Internally displaced persons (IDPs) have the right to health and other basic services, including the right to a standard of living adequate to maintain health and well-being. This chapter focuses on how these rights are, or should be, implemented in domestic law and policy for the provision of essential health and other basic services to IDPs in various contexts. For the purposes of this chapter, the definition of health is that contained in the Preamble to the Constitution of the World Health Organization (WHO). “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³ The chapter’s definition of “basic services” draws from the *Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response* (hereinafter the *Sphere Handbook*), which seeks to ensure that

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¹ Special Rapporteur, *Report of the Special Rapporteur on the Right to Health*, E/CN.4/2006/48/Add. 1 (Dec. 22, 2005).

² Judith Asher, *The Right to Health: A Resource Manual for NGOs*, 2004 INT’L HEALTH & HUMAN RTS. ORG. 17, available at http://shr.aaas.org/pubs/rt_health/rt_health_manual.pdf.

³ Constitution of the World Health Organization (July 22, 1946).

people affected by disasters “have access to at least the minimum requirements (water, sanitation, food, nutrition, shelter and health care) to satisfy their basic right to life with dignity.”⁴

LEGAL FRAMEWORK

The right of IDPs to health and other basic services, including the right to a standard of living adequate to maintain health and well-being, is affirmed in the *Guiding Principles on Internal Displacement* (the *Guiding Principles*) and is established in various instruments of international human rights and humanitarian law.⁵ Emerging standards in humanitarian action and practice seek to establish a regulatory framework for ensuring that the basic health and survival needs of displaced populations are met.⁶ The *Guiding Principles* reflect the convergence of clinical, curative perspectives and public health, preventive perspectives by affirming both the right to health and the right to an adequate standard of living.

Relevant Guiding Principles

The Principles that affirm the right to health and basic services before, during, and after displacement are Principle 4, which provides for protection and assistance to especially vulnerable populations;⁷ Principle 7, which relates to

⁴ ISOBEL MCCONNAN, *THE SPHERE PROJECT: HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE* 19 (2000) [hereinafter the SPHERE PROJECT].

⁵ United Nations, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2.

⁶ See SPHERE PROJECT, *supra* note 4, at 6.

⁷ Principle 4 states that “Certain internally displaced persons ... shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.”

conditions necessary to undertake displacement in safety and dignity,⁸ Principles 18 and 19 which relate to protection during displacement;⁹ and Principle 29 which relates to access to public services after displacement.¹⁰ The right to health is continuous through all phases of internal displacement, although providing access to basic humanitarian aid during displacement preoccupies the attention and resources of most organizations and institutions assisting IDPs.

⁸ Principle 7(2) states that “The authorities undertaking...displacement shall ensure, to the greatest practicable extent ... that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene.”

⁹ Principle 18 states that all IDPs have the right to an adequate standard of living and that “At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to (a) essential food and potable water; (b) basic shelter and housing; (c) Appropriate clothing; and (d) Essential medical services and sanitation.” Principle 19 reads as follows:

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual or other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

¹⁰ Principle 29 does not make explicit reference to health and basic services but it does assert the right of IDPs to “have equal access to public services,” which could be assumed to include any health care that would be available through public services and facilities.

Relevant International Law

International Human Rights Law

The Universal Declaration of Human Rights (UDHR) Article 25(1) states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”¹¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) affirms the right to an adequate standard of living in similar terms to the UDHR in Article 11. Article 12.1 of the ICESCR recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹² Numerous provisions of regional human rights treaties also set out the right to health and an adequate standard of living.¹³

In 2000, General Comment 14 of the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) noted that “the right to health is closely related to and dependent on the realization of other human rights” and that reference to the “highest attainable standard of physical and mental health” extends “not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, and adequate supply of safe food, nutrition and

¹¹ Universal Declaration of Human Rights, A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., ¶ 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

¹² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) 1966, Jan. 3 1976 [hereinafter ICESCR].

¹³ See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), art. 10, O.A.S. Treaty Series No. 69 (1988), 29 I.L.M. 156 (1989); African Charter on Human and Peoples’ Rights, June 26, 1981, art. 16, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter]; European Social Charter, Oct. 18, 1961, arts. 11, 30, 529 U.N.T.S. 89.

housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”¹⁴ The Committee also noted the evolution of “a wider definition of health [that] also takes account such socially-related concerns as violence and armed conflict.”

In delineating actions to be taken by states, General Comment 14 noted that the right to prevention, treatment, and control of epidemic, endemic, occupational, and other diseases “includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.” General Comment 14 also set out a number of “core obligations” under the ICESCR that require immediate rather than progressive implementation. In its prior General Comment 3, the Committee affirmed that “a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary care, of basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations.”¹⁵

Discrimination in enjoyment of the right to health is specifically banned by both the Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁶ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁷ CEDAW Article 6 calls on states parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” Though

¹⁴ UNCESCR, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4 (Nov. 2000) [hereinafter CESCR, General Comment No. 14].

¹⁵ General Comment 3 of the Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1990/12, n. 24, ¶ 10.

¹⁶ ICERD, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, Jan. 4, 1969.

¹⁷ CEDAW, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

not all aspects of trafficking and sexual exploitation of women are health-related, the fundamental health risks are well documented, including the risk of sexually transmitted infections, rape, and other forms of gender-based violence, unwanted pregnancy, and physical and psychological trauma. The Committee on the Elimination of All Forms of Discrimination against Women's General Recommendation No. 24¹⁸ expands upon the right to health in a variety of respects, including by saying that "special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women, and women with physical or mental disabilities."

The Convention on the Rights of the Child (CRC) obligates states to "ensure to the maximum extent possible the survival and development of the child."¹⁹ Article 24(1) calls upon states parties to recognize "the right of the child to the enjoyment of the highest attainable standard of health, and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." CRC, Article 19(1) requires states parties to "take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse...." While the full scope of this chapter extends beyond curative or preventive health, virtually all forms of child abuse, exploitation, or neglect have a distinct health component, especially in the context of humanitarian emergencies. Article 39 requires that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts."

¹⁸ CEDAW, General Recommendation No. 24 (20th sess., 1999), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>.

¹⁹ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, art. 6, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

The Committee on the Rights of the Child General Comment No.4 elaborates on adolescent health and development in the context of the CRC, noting, *inter alia*, that:

[s]ystematic data collection is necessary for States parties to be able to monitor the health and development of adolescents. States parties should adopt data-collection mechanisms that allow disaggregation by sex, age, origin, and socio-economic status so that the situation of different groups can be followed. Data should also be collected to study the situation of specific groups such as ethnic and/or indigenous minorities, migrant or refugee adolescents, adolescents with disabilities, working adolescents, etc.²⁰

International Humanitarian Law

International humanitarian law also incorporates the right to health for victims of international and civil conflict. Protocols I and II of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) state that “all the wounded, sick and shipwrecked...shall be respected and protected. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.”²¹ Article 16 of the Fourth Geneva Convention states that “the wounded and sick as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.” The *Annotations to the Guiding Principles*

²⁰ United Nations Convention on the Rights of the Child, Comm. on the Rights of the Child, General Comment No. 4 (2003), *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4.

²¹ Protocol I, art. 10; Protocol II, art. 7

notes that:

[U]nlike human rights law, humanitarian law does not explicitly set forth a right to an adequate standard of living. The basic supplies for survival such as food, water and shelter, however, are expressly protected by several rather specific provisions of the Geneva Conventions and Protocols....Thus humanitarian law does implicitly guarantee a right to an adequate standard of living.²²

Other Relevant Principles and Guidelines

The Millennium Development Goals (MDGs) adopted by the UN General Assembly in September 2000 include undertakings to reduce poverty, malnutrition, and lack of access to water, as well as to reduce maternal and child mortality and halt the spread of major diseases such as HIV/AIDS and malaria.²³ The MDGs also resolve to “ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.”

The *Sphere Handbook* reflects a commitment by humanitarian agencies “to ensure that people affected by disasters have access to at least the minimum requirements (water, sanitation, food, nutrition, shelter and health care) to satisfy their basic right to life with dignity.”²⁴ Minimum standards related to health include the following:

²² WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS (2d ed., 2007), at 45.

²³ United Nations Millennium Declaration: Resolution adopted by the General Assembly, A/Res/55/2.

²⁴ See SPHERE PROJECT, *supra* note 4, at 17-19.

- Establishing health systems and infrastructure: prioritizing health services; supporting national and local health systems; coordination; primary health care; clinical services; and health information systems.
- Controlling infectious diseases through prevention; measles prevention; diagnosis and case management; outbreak preparedness; outbreak detection, investigation, and response; and HIV/AIDS.
- Controlling non-communicable diseases through addressing injury; reproductive health; mental and social aspects of health; and chronic diseases.

The 58th World Health Assembly passed a May 2005 resolution on health action in relation to crises and disasters, which urged member states to:

ensure that—in times of crisis—all affected populations, including displaced persons, have equitable access to essential health care, focusing on saving those whose lives are endangered and sustaining the lives of those who have survived, and paying attention to the specific needs of women and children, older people, and persons with acute physical and psychological trauma, communicable diseases, chronic illnesses, or disability.²⁵

The Madrid International Plan of Action on Ageing (2002) calls for “[e]qual access by older persons to food, shelter and medical care and other services during and after natural disasters and other humanitarian emergencies.”²⁶

²⁵ World Health Organization, Fifty-eighth World Health Assembly Resolutions and Decisions, *Health Action in Relation to Crises and Disasters, with Particular Emphasis on the Earthquakes and Tsunamis of 26 December 2004*, WHA58/2005/REC/1.

²⁶ Report of the Second World Assembly on Ageing, Madrid, Spain, Apr. 8-12, 2002, A/CONF/197/9, Priority Direction I, Issue 8, Objective 1.

In cases of displacement caused by development projects, the World Bank's Operational Directive 4.30 on Involuntary Resettlement states that "[t]o ensure the economic and social viability of the relocated communities, adequate resources should be allocated to provide shelter, infrastructure (e.g. water supply, feeder roads), and social services (e.g. schools, health care centers)." A footnote comments further that "health care services, particularly for pregnant women, infants, and the elderly, may be important during and after relocation to prevent increases in morbidity and mortality due to malnutrition, the stress of being uprooted, and the usually increased risk of water-borne diseases."²⁷

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

Availability

According to the CESCR, "[f]unctioning public health and health-care facilities, goods and services, as well as programs, have to be available in sufficient quantity within the State party."²⁸ The great majority of the world's IDPs are in developing countries where health facilities, goods, and services are inadequate or essentially unavailable. Conflict can lead to the destruction of health facilities and supplies, flight of health workers, and a breakdown in services for displaced and non-displaced populations alike. Internal displacement can carry an additional burden as, within an already resource-poor environment, it can push populations into even more deprived circumstances where health services are lacking or where they must compete with local residents for limited supplies and assistance.²⁹

²⁷ World Bank Operational Manual, OD4.30—Involuntary Resettlement (June 1990), at 6.

²⁸ CESCR, General Comment No. 14, *supra* note 14, at 3.

²⁹ IDMC, Health and IDPs, *available at* [http://www.internal-displacement.org/8025708F004D404D/\(httpPages\)/27E7C556E3549FC8802570A100471F33?OpenDocument](http://www.internal-displacement.org/8025708F004D404D/(httpPages)/27E7C556E3549FC8802570A100471F33?OpenDocument).

For instance, in Iraq, a January 2007 study noted that “[a]lready poorly equipped and inadequately staffed, health centers located in areas of high IDP concentration are unable to cope with the increased caseloads. There is a chronic shortage of medication, lab materials and X-ray films in the country, which renders many health facilities useless.”³⁰ A 2006 assessment in Iraq found that 10 percent of IDPs reported that there were no health care services in their area of displacement, 70 percent said they had not been visited by a health care worker within the past 45 days, and 55 percent had not been involved in any vaccination campaigns.³¹

In northern Uganda, despite the existence of a national policy on IDPs as well as large-scale international assistance, a 2005 study found mortality rates in the camps well above emergency thresholds (with malaria/fever, AIDS, and violence the top three reported causes of death), leading the sponsoring organizations to state that “a very serious humanitarian emergency” was occurring in the IDP camps and “extremely urgent action was needed to reduce mortality to non-crisis levels.”³² The limited availability of functioning public health and health-care facilities, goods and services was by no means the only problem identified in the northern Uganda IDP camps, but it contributed significantly to the serious humanitarian emergency in the camps, despite the long-running and large-scale presence of the relief community.

Accessibility

According to the CESC, health facilities, goods and services must be accessible to everyone, taking into account four overlapping dimensions. Those dimensions are (1) non-discrimination,³³ (2) the provision of health

³⁰ International Medical Corps [IMC], *Iraqis on the Move: Sectarian Displacement in Baghdad*, at 4 (Jan. 2007).

³¹ International Organization for Migration [IOM], *Iraqi Displacement: 2006 Year in Review*, at 16 (Feb. 2007).

³² WHO, *Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda* (July 2005), iv, 33-34.

³³ CESC, General Comment No. 14, *supra* note 14, at 3.

facilities “within safe physical reach for all sections of the population, especially vulnerable or marginalized groups...including in rural areas”,³⁴ (3) economic accessibility or affordability, meaning that costs for health care services “whether privately or publicly provided, are affordable to all, including socially disadvantaged groups”,³⁵ and (4) “the right to seek, receive and impart information and ideas concerning health issues.”³⁶

Examples abound of IDPs facing accessibility barriers to health care and an adequate standard of living. In Colombia, for instance, an IDP Law (387/97, passed in 1997) established that IDPs should have access to health services to the maximum of the funds available and a 2000 regulation guaranteed that registered IDPs would have free and unlimited access to health care and medicines. However, a 2003 government decree limited the range of medical services available to IDPs, restricted access to health care to those IDPs who had health insurance but were unable to make payments, and decentralized responsibility for IDP health care to local municipalities without allocating adequate resources.³⁷ Moreover, the precondition of registration as an IDP was complicated by a lack of coherent guidelines and resources.³⁸ It is estimated that less than 22 percent of IDPs are registered and receive some form of government assistance. As a 2005 report noted, “[o]ne of the reasons for low levels of assistance, apart from issues relating to registration, is that IDPs are not always aware of their rights, entitlements and obligations.”³⁹

³⁴ *Id.* at 3-4.

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ IDMC, Colombia, *Government “Peace Process” Cements Injustice for IDPs*, at 160, 288 (June 30, 2006).

³⁸ Support Group for Displaced People Organizations [GAD], *Report on Forced Displacement in Colombia*, at 16, 52 (1999).

³⁹ ICRC, *IDPs in Colombia: A Joint Needs Assessment by the ICRC and the World Food Programme*, at 4 (Apr. 22, 2005).

A multi-country study of displacement in the Balkans found that the proportion of displaced households with inadequate water and sanitation was far higher than that in non-displaced households and far below MDG targets for countries in the region. Displaced populations also reported greater distances to health facilities as compared to majority households.⁴⁰ Displaced Roma have faced particular vulnerability. As a 2005 report noted, “[l]iving conditions of Roma IDPs are appalling; many live in illegal settlements or unofficial collective centers without electricity, water and sewage systems. In the absence of legal status, Roma cannot register their place of residence and are at risk of eviction at any time. The absence of a registered address is an additional element preventing them from accessing their rights,” including the right to health care.⁴¹

Acceptability

According to the CESCR, “all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.”⁴² IDPs have a right to health care and a standard of living that are not only available and accessible but acceptable as well. The extent to which health services respect culture, ethnicity, gender, age, and individual preferences can have significant impacts not only on health care utilization and health-seeking behavior but on health outcomes as well. Services that are not acceptable—whether because they ignore issues of gender-based violence or dietary preferences—are

⁴⁰ UNDP Regional Bureau for Europe, *At Risk: Roma and the Displaced in Southeast Europe*, at 92-92 (2006).

⁴¹ IDMC, *Roma Lead Poisoning in North Mitrovica Illustrates Roma’s Disastrous Health and Shelter Conditions* (2005), available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/3B1B9AB0D4A9C586802570B8005AAA8A?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/3B1B9AB0D4A9C586802570B8005AAA8A?OpenDocument).

⁴² CESCR, General Comment No. 14, *supra* note 14, at 4.

commonplace in IDP settings and present another obstacle to the fulfillment of the right to health.

In 2004, the Inter-Agency Working Group on Reproductive Health in Refugee Situations evaluated coverage, quality, accessibility, and utilization of reproductive health services for refugees and IDPs.⁴³ While the working group had a “generally favorable impression” of reproductive health services for refugees, those for IDPs “appeared, in general, to be severely lacking, requiring much more attention if the [reproductive health] needs of these persons are to be met.” Among the factors found to influence the health-seeking behaviors of displaced persons were “cultural and religious barriers to family planning, preference for using TBAs (Traditional Birth Attendants), lack of time (e.g., busy at home or at work) to attend health facilities for antenatal care, and dislike of the lithotomy position and fear of having an episiotomy during childbirth.”⁴⁴

A study conducted after the December 2004 tsunami found that older displaced people were rarely consulted on their needs or views and often were seen as helpless, passive victims rather than as resources for counseling, support to family members, and community rebuilding. This resulted not only in the neglect of an important source of counsel and support to the community but also a heightened sense of isolation.⁴⁵ Likewise, in Serbia, a 2001 assessment of elderly IDPs found that, in collective centers, older people felt isolated and invisible. “In one centre, older people were concerned that the

⁴³ The Office of the UN High Commissioner for Refugees [UNHCR], *Inter-Agency Global Evaluation of Reproductive Health Services for Refugees and Internally Displaced Persons* (Sept. 2004), available at <http://www.rhrc.org/resources/iawg/documents/Summary-Nov04.pdf>.

⁴⁴ *Id.* at 4.

⁴⁵ HelpAge International, *The Impact of the Indian Ocean Tsunami on Older People: Issues and Recommendations* (2005).

sort of food they were given—for example, fatty foods, with few fresh fruits and vegetables—would increase their rates of heart disease.⁴⁶

In Liberia, food rations to IDPs included bulgur wheat, an unfamiliar food to a population for which rice is the staple food. A 2002 study found that bulgur wheat was not only deemed inappropriate but had two specific impacts on health. First, it was identified as a cause of diarrhea. Second: “To adjust their diets, bulgur wheat is exchanged for meat and rice. However, the frequency of food sales has lowered the market value of bulgur apparently contributing to a reduction of the food ration.”⁴⁷

Quality

According to the CESCR, “as well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.”⁴⁸ Properly understood, quality health care in developing countries—and this applies as much or more so to vulnerable, displaced populations—is not a luxury but a necessity.

Good quality means that providers are able to manage an individual’s or a population’s health care by timely, skillful application of medical technology in a culturally sensitive manner within the available resource constraints...A sadly unique feature of quality is that poor quality can obviate all the implied benefits of good access and effective treatment. At its best, poor quality is wasteful—a tragedy in severely

⁴⁶ HelpAge International, *Building a Better Future: Older People in Serbia*, at 14 (2001).

⁴⁷ Carlos Valderrama, *International Rescue Committee Health Unit, Health Assessment: Internally Displaced Camps in Liberia*, at 19 (Sept. 2002).

⁴⁸ CESCR, General Comment No. 14, *supra* note 14, at 4.

resource-constrained health systems. At its worst, it causes actual harm.⁴⁹

The IDP Law of Georgia (adopted 1996) provides that vulnerable IDPs are entitled to free medical treatment, with benefits including basic medicines and in-patient services.⁵⁰ Although it appears that a majority of IDPs have publicly provided health care benefits, and enjoy relatively good access to and availability of health services, much evidence suggests that the overall health status of IDPs is worse than that of the general population.⁵¹ This is due to several factors. Many IDPs (and some health providers) are not aware of the policies or have incomplete or inaccurate information.⁵² Since 2005, many non-emergency medical interventions, such as chronic conditions, have not been covered; and many of the clinics serving IDPs, especially in rural areas, “often lack modern and adequate medical equipment and other resources.”⁵³ A 2004 report noted that “quality healthcare services are largely inaccessible to IDPs, mainly because of the high costs involved...The quality of medical treatment for IDPs is negatively influenced by the insufficient material-technical base of healthcare institutions for IDPs and lack of medicines.”⁵⁴

⁴⁹ John W. Peabody et al., *Improving the Quality of Care in Developing Countries*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 1304 (Dean T. Jamison et al. eds., 2006), available at <http://files.dcp2.org/pdf/DCP/DCP70.pdf>.

⁵⁰ J. Kharashvili et al., *Study on IDP Rights*, 22 and Annex B, 39-40 (2006).

⁵¹ Akaki Zoidze & Mamuka Djibuti, *IDP Health Profile Review in Georgia*, at 19 (2004).

⁵² Kharashvili et al., *supra* note 50, at 22.

⁵³ United Nations Country Team in Georgia, *Georgia: Humanitarian Situation and Transition to Development 2006—Consolidated Policy Recommendations* (Nov. 2005).

⁵⁴ UN Office for the Coordination of Humanitarian Affairs, *Georgia Humanitarian Situation and Strategy 2005*, at 19 (Nov. 2004).

Among the proximate causes identified by the 2005 WHO study on IDP camps in northern Uganda for excess mortality were insufficient quality and quantity of health care.⁵⁵ The study noted that one-fifth of all sick children were taken to private providers despite the presence of free health services in the camps. In Kitgum district, more than half of the people interviewed said they were dissatisfied with health services, citing an absence of qualified staff and essential drugs. Timely referral to hospitals was also noted as a challenge.

The issue of quality of services—whether it be health care, water, or sanitation—can also be an obstacle to return. As the Minister for Disaster Preparedness in Uganda noted, in the context of the signing of a ceasefire in late August 2006 that raised the prospect of large-scale return, “while people were suffering in the camps, the humanitarian groups and the government were able to give them at least safe water. Going home should not be like punishment; pushing them to drink from unprotected wells, swamp water and valley water is not the intention of government.”⁵⁶

In some cases, faulty coordination alone can reduce the quantity and quality of available medical care. For instance, in the wake of Hurricane Katrina in the United States in 2005, substantial difficulties arose as thousands of volunteer health personnel (VHPs) in Louisiana, Mississippi, and Texas were confronted with red tape and institutional inertia at federal, state, and local levels.

REGULATORY FRAMEWORK

The rights of IDPs to health and an adequate standard of living should be safeguarded by existing national public health systems and regulatory frameworks. Public health systems are meant to fulfill a number of key functions, including reducing the impact of emergencies and disasters on

⁵⁵ WHO, *supra* note 32, at iv, 33-34.

⁵⁶ UN Office for the Coordination of Humanitarian Affairs, *Uganda: Daunting Post-conflict Challenges in the North*, IRINNEWS.ORG, Sept. 1, 2006.

health.⁵⁷ This function, which has particular relevance to displaced persons, refers to public health activities in risk assessment, prevention, mitigation, preparedness, and response. The state regulatory system, including the national health authority (typically the Ministry of Health, although other ministries and departments may be involved as well) should, in other words, incorporate into its essential functions a capacity to prevent, prepare for, and respond to emergencies. Likewise, the state's response to emergencies and disasters, including those that involve internal displacement, should incorporate the broadest possible participation of the health system and other sectors to reduce the impacts on the population's health.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Prior to Displacement

The right to health and an adequate standard of living should be incorporated into national law for the entire population so that these basic rights can be more clearly articulated in the context of emergencies and disasters and other events involving internal displacement. As of 2005, at least thirteen states had codified the right to health into their national constitutions.⁵⁸ The Ugandan Constitution, for example, commits the State to "endeavour to fulfill" key developmental and health-related rights.⁵⁹ Uganda's National Policy for Internally Displaced Persons (hereinafter Uganda's IDP Policy), moreover,

⁵⁷ See Pan American Health Organization [PAHO], National Level Instrument for Measuring Essential Public Health Functions, *Public Health in the Americas* (May 2000).

⁵⁸ Iain Byrne, *Making the Right to Health a Reality: Legal Strategies for Effective Implementation*, Paper presented at the Commonwealth Law Conference, Sept. 2005, available at <http://www.interights.org/doc/health%20paper.doc>.

⁵⁹ *Id.*

reflects these commitments through direct reference to the rights to adequate food, water and sanitation, basic shelter, appropriate clothing, and health.⁶⁰

The establishment of an integrated health support system should extend to the areas of mental health and reproductive health. The Inter-Agency Standing Committee (IASC) *Guidelines on Mental Health and Psychosocial Support in Emergency Settings* (the *IASC Mental Health Guidelines*) notes that “activities that are integrated into wider systems (e.g. existing community support mechanisms, formal/non-formal school systems, general health services, general mental health services, social services, etc) tend to reach more people, often are sustainable, and tend to carry less stigma.”⁶¹ Similarly, the WHO recommends during all phases of conflict and displacement that:

reproductive health is treated as an integral component of primary health care, and the solutions to reproductive health needs are sought both in the health sector and elsewhere...Among refugees and displaced persons, an integrated approach means including the interactions between host and displaced communities in program planning. It also means that wherever possible, vertical programs, such as maternal and child health, family planning, and STI/HIV control and prevention should be linked or integrated to ensure that reproductive health care needs are met by the provision of a holistic service.⁶²

⁶⁰ Uganda National Policy for Internally Displaced Persons, Office of the Prime Minister, Department of Disaster Preparedness and Refugees, Aug. 2004, at 29-30.

⁶¹ Inter-Agency Standing Committee, *Guidelines on Mental Health and Psycho-Social Support in Emergency Settings*, at 8, IASC-WG Approved, Feb. 25, 2007.

⁶² World Health Organization [WHO], *Reproductive Health in Conflict: Guidelines for Programme Managers*, at 21 (2003).

The *Hyogo Framework for Action 2005-2015* (the *Hyogo Framework*) spells out priorities for risk reduction in both natural and human-made disasters.⁶³ As part of reducing underlying risk factors, the *Hyogo Framework* identifies a range of key activities including, within the context of social and economic development practices, integrating disaster risk reduction planning into the health sector. This includes mitigation measures to reinforce existing health facilities, particularly those providing primary health care; protecting and strengthening critical public facilities, including clinics and hospitals; and strengthening “the implementation of social safety-net mechanisms to assist the poor, the elderly and disabled, and other populations affected by disasters,” including psycho-social training programs to mitigate the psychological impact on vulnerable populations.

Disaster preparedness and risk reduction efforts in the health sector should apply equally to mitigating the effects of both natural and human-made calamities, though state self-interest might interpret the contexts differently. In Nepal, for example, a three-year program to reduce hospital vulnerability following earthquakes has provided for structural and non-structural assessments of selected hospitals for seismic vulnerability.⁶⁴ UN inter-agency assessments of hospital and clinic-based care for IDPs displaced by civil conflict, however, suggest that access to health care has been hampered by restrictive eligibility criteria and that there has been little to no special care for IDPs traumatized by violence.⁶⁵

⁶³ United Nations International Strategy for Disaster Reduction [UNISDR], *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, Extract from the final report of the World Conference on Disaster Reduction, A/CONF.206.6, available at http://www.icsu-asiapacific.org/resource_centre/ISDR_Hyogo-framework-for-action_HFA.pdf.

⁶⁴ See *Risk Reduction in the Health Sector and Status of Progress*, available at http://www.preventionweb.net/globalplatform/firstsession/docs/Workshops/4_2_1_Reducing_risk_health/Background_Paper.pdf.

⁶⁵ UNHCR, UNICEF, OHCHR, WHO, UNDP, OCHA, SNV, INSEC, Inter-Agency Mission Report, Eastern Region, May 18-29, 2006, available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/355A3F3D4756FA52802570B8005AAAE1?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/355A3F3D4756FA52802570B8005AAAE1?OpenDocument).

One important means of preparing for displacement-related health emergencies is the active collection of health-related data and development of criteria and techniques for assessing the health needs of populations affected by emergencies. WHO's Department for Health Action in Crises (WHO/HAC) has recommended that all countries in which the health sector has been disrupted by a natural or human-made disaster should, prior to or at the beginning of a crisis, develop a Health Sector Profile (HSP) which should include the health needs of the population and the status of health facilities, goods, and services.⁶⁶ The Special Rapporteur on the Right to Health has noted that "...with a view to monitoring its progress [towards the progressive realization of the right to the highest attainable standard of health], a State needs a device to measure this variable dimension of the right to health," and recommended "the combined application of indicators and benchmarks." In the context of the right to health, indicators can help national health officials, legislative bodies as they monitor the performance of the executive, courts, human right institutions and other national adjudicating bodies, specialized agencies and other UN bodies working in partnership with states, UN human rights treaty bodies and non-governmental organizations.

In order to monitor the progressive realization of the right to health, the Special Rapporteur recommended that indicators should correspond to a right to health norm. They should be disaggregated at least by sex, race, ethnicity, rural/urban, and socio-economic status. Examples of indicators to measure the right to health included child mortality rates, maternal mortality ratios, and the proportion of births attended by skilled health personnel. For each health indicator identified, the state should set appropriate national targets or benchmarks.⁶⁷ Such targets and benchmarks should be established not only for "normal" times, but calibrated for times of emergency and disaster.

⁶⁶ See Enrico Pavignani, Module 13: Producing a Health Sector Profile, *available at* http://www.who.int/hac/techguidance/tools/disrupted_sectors/module_13/en/print.htm

⁶⁷ The Special Rapporteur, *Report of the Special Rapporteur on the Right to Health*, E/CN.4/2006/48/Add.1 (Dec. 22, 2005).

States should articulate priority health services in disasters and complex emergencies and establish minimum standards of health care as well as indicators for measuring whether these standards have been attained. The *Sphere Handbook* includes minimum standards related to the prioritization and support of health services and control of both infectious and non-communicable disease.⁶⁸ The *Sphere Handbook's* minimum standard for health systems and infrastructure is that “[a]ll people have access to health services that are prioritized to address the main causes of excess mortality and morbidity.” Indicators that show whether this standard has been met include that the major causes of mortality and morbidity are identified, documented and monitored; that priority health services include the most appropriate and effective interventions to reduce excess morbidity and mortality; and that all members of the community, including vulnerable groups, have access to priority health interventions. The *Sphere Handbook* specifies that priority public health interventions include “adequate supplies of safe water, sanitation, food and shelter, infectious disease control (e.g. measles vaccination), basic clinical care and disease surveillance. Expanded clinical services, including trauma care, are given higher priority following disasters that are associated with large numbers of injuries, e.g. earthquakes.” Vulnerable groups typically include “women, children, older people, disabled people and people living with HIV/AIDS,” but may also include people made vulnerable by reason of “ethnic origin, religious or political affiliation, or displacement.”⁶⁹

The right to health and to an adequate standard of living, once established substantively in national law and policy frameworks, require procedural and administrative safeguards if they are to be effective, especially in the context of displacement, either planned or unplanned. Procedures must establish how public health powers are to be articulated consistent with four standards that Professor Larry Gostin refers to as “public health necessity, reasonable means, proportionality, and harm avoidance.”⁷⁰

⁶⁸ See SPHERE PROJECT, *supra* note 4.

⁶⁹ See *id.* at 256-260.

⁷⁰ LARRY GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 68 (2000).

Procedural due process should be articulated and made available where authorities interfere with freedom of movement, whether in the form of isolation and quarantine or evacuations and other compulsory population movements.⁷¹ Second, it is incumbent on states that displacement is effected in satisfactory conditions of safety, nutrition, health, and hygiene. State procedures should spell out the roles of police and law enforcement authorities, health departments and Red Cross/Red Crescent societies, as well as the media (radio, television and newspapers) and civic organizations to ensure that displacements necessary to maintain public health and safety are carried out with full information, appropriate coordination, and minimal coercion. In Uganda, for example, the Department of Disaster Management and Refugees implemented awareness and sensitization meetings in districts where landslides were prevalent.⁷²

Procedural safeguards of the right to health and an adequate standard of living should also include systems for gathering and maintaining population and health data, both for purposes of vulnerability-mapping and for ensuring that proper monitoring of health status can be maintained. Population and individual-level health information and documentation storage systems should ensure that back-up copies are maintained and that clear procedures are established for provision of replacement documents in the event of disaster and/or displacement.

⁷¹ See chapter two of this volume on movement-related rights.

⁷² The Department of Disaster Management and Refugees, Office of the Prime Minister, *Uganda National Report and Information on Disaster Risk Reduction Efforts for the World Conference on Disaster Reduction*, Kobe, Japan, Jan. 19-22, 2005, ¶ 2.1.1, available at <http://www.unisdr.org/eng/mdgs-drr/national-reports/Uganda-report.pdf>.

During Displacement

Eligibility for Services

In the acute phase of a disaster or complex emergency, IDPs should be considered presumptively eligible for priority public health interventions, including adequate supplies of safe water, sanitation, food and shelter, infectious disease control, basic clinical care, and disease surveillance to the maximum extent necessary through national, international, and non-governmental resources. It may be possible, in the case of some natural disasters or limited conflicts, for IDPs to return reasonably promptly to their places of permanent or habitual residence, where access to basic health services should be restored. In many more cases, however, it is likely that the acute phase of emergency will transition into a chronic phase, marked by longer-term displacement, with uncertain prospects of return or permanent settlement in new locations. In such cases, it may become necessary for national authorities to establish eligibility criteria for on-going access to health services for displaced populations.

While eligibility criteria for IDP access to on-going health services in displacement may be subject to local conditions and circumstances, certain principles should apply, consistent with core obligations of the right to health.⁷³ More specifically, eligibility and service-delivery criteria should ensure the following:

- Basic health services are available in sufficient quantity. In the context of displacement, services should not be subject to arbitrary time limits and should be available such that displaced and resident populations are not placed in competition against one another.
- Health facilities, goods, and services are accessible to IDPs without discrimination.
- Health facilities, goods, and services are within safe physical reach of all sections of the IDP populations, including vulnerable groups and

⁷³ CESCR, General Comment No. 14, *supra* note 14, at 3.

those in temporary shelter settings. Generally, however, establishment of special or parallel services for IDPs should be only a short-term, emergency measure; in the longer term, health services to IDPs and local populations should be integrated in such a way that any preference given is not on the basis of status but health needs.

- Payment for health care services—as well as water, sanitation, food, shelter, and other services relating to the underlying determinants of health—is provided on the basis of the principle of equity. IDPs should not be expected to pay for services in the acute phase of an emergency. Over time, however, as more durable solutions are being developed, it is appropriate to begin to harmonize payment (and ongoing social support) mechanisms with those available for local populations.⁷⁴
- IDPs have the right to seek, receive, and impart information and ideas concerning health issues. Such information accessibility should not impair the right to have personal health data treated with confidentiality. In the context of displacement, accurate and up-to-date information about availability of and access to health services—as well as eligibility criteria for such services—is essential to maintain appropriate use of services by those who need them. In particular, if eligibility criteria are changed over time, this should be done with full participation and involvement of IDP populations.
- Health facilities, goods, and services for IDPs are respectful of medical ethics and culturally appropriate, including being sensitive to gender and life-cycle requirements. Health information, as well as information collected for purposes of assessing eligibility for services, should be collected in a culturally sensitive manner and stored confidentially. This is particularly important in the context of reproductive health services, which may include the gathering and storing of information about such sensitive issues as fertility and contraception, HIV/AIDS and other sexually transmitted infections (STIs), and sexual and gender-based violence.

⁷⁴ See SPHERE PROJECT, *supra* note 4, at 260.

- Health facilities, goods, and services to IDPs are scientifically and medically appropriate and of good quality. This should include attention to the elements of patient safety, effectiveness of care, patient centeredness, timeliness of service delivery, efficiency, and equity.⁷⁵
- Clear, streamlined procedures for IDPs and other affected populations are established to maintain necessary health documentation and eligibility for services. These procedures should be broadly disseminated through all available media with adequate opportunity for community participation and input.

Collection of Information

An effective and integrated health system requires functional health information systems, without which it is nearly impossible to measure over time whether the health system is accessible to all of the population. Emergencies and disasters pose a special challenge to the development or maintenance of health information systems but such systems are even more vital in times of crisis. The *Sphere Handbook's* key indicators for health information systems in humanitarian emergencies include (1) a standardized health information system (HIS) implemented by all health agencies to routinely collect relevant data on demographics, mortality, morbidity, and health services; (2) a designated HIS coordinating agency (or agencies) to organize and supervise the system; (3) regular submission of surveillance data by health facilities and agencies to the designated HIS coordinating agency; (4) production and dissemination of a regular epidemiological report, including analysis and interpretation of the data by the HIS agency; and (5) data protection precautions to guarantee the rights and safety of individuals and/or populations.

Wherever possible, the health information system should build upon pre-existing surveillance systems. In some emergencies, a new or parallel health information system may be necessary, but this should be determined by and/or in consultation with the lead health authority. Data should be disaggregated by

⁷⁵ See Institute of Medicine, Committee on Quality Health Care in America, *Crossing the Quality Chasm* (2001).

age and sex, to be able to capture morbidity and mortality data for children under five from the outset of the emergency. Gradually, more detailed disaggregation can be developed to detect gender-specific differences as well as other possibly vulnerable population sub-groups.⁷⁶

Standards and Indicators

Having identified priority health services in disasters and complex emergencies, established minimum standards for services, and defined indicators for measuring progress and accountability, states should articulate the procedures for collecting, analyzing, and disseminating health indicators for IDP and other affected populations. As noted previously, the *Sphere Handbook* has recommended that, in emergencies, a standardized health information system (HIS) should be implemented under the authority of a designated HIS coordinating agency.⁷⁷

It is recommended that, wherever possible, the HIS should build upon pre-existing public health surveillance and vital registration systems. These can and should be supplemented by national census data, Demographic and Health Surveys, as well as health information gathered by international and non-governmental organizations in the course of their work. In some complex emergencies, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), on behalf of IASC, serves as the steward of Humanitarian Information Centers (HICs), which have been launched in more than twelve countries since 2003. The main aim of the HICs is “to ensure that individuals at [the] field and strategic level[s] have access to the benefits of information management tools to assess, plan, implement and monitor humanitarian assistance.”⁷⁸ While not limited to health information, HICs have been instrumental in coordinating data-tracking of some key health indicators.

⁷⁶ See SPHERE PROJECT, *supra* note 4, at 270-271.

⁷⁷ *Id.*

⁷⁸ United Nations Office for the Coordination of Humanitarian Affairs [UN-OCHA], *Humanitarian Information Centers (HICs)*, available at <http://www.ochaonline.un.org>.

In the Context of Durable Solutions

In the context of return or resettlement after displacement, it might be appropriate to view re-connecting IDPs with health services as a process involving interim and long-term elements. Health services in the context of durable solutions should involve systematic delivery of essential health services, while more comprehensive rehabilitation work on the health system itself is carried out. In Mozambique, priority services following conflict included the Expanded Programme on Immunization (EPI) for children under five, tetanus immunization for pregnant women, vitamin A supplementation for high-risk populations, deworming for children, and initial health education campaigns. In Afghanistan, the Basic Health Services Package (BHSP) includes maternal and newborn health; traditional birth attendants (TBAs); additional emergency obstetric services; child health and immunizations; nutritional supplements including vitamin A, folic acid, and iron; growth monitoring; supplementary feeding programs; communicable disease control (including bednets for malaria prevention); community health workers trained in the diagnosis and treatment of common conditions; mental health treatment; and a defined set of essential drugs.⁷⁹ States should also be sure that the transition from the delivery of health services during displacement to their delivery in the context of durable solutions does not lead to a diminution of availability or quality of health services, nor to circumstances that perpetuate or exacerbate inequities in accessing care.

As IDPs are able to return home or offered permanent resettlement in another location, states should establish procedures to integrate them back into the health systems that are, or at least should be, in place for local residents. Procedures should spell out mechanisms for transitioning from IDP status—and the special services and assistance that may entail—to ordinary citizens, while also recognizing that displacement *per se* can impose additional physical

⁷⁹ See Hugh Waters et al., *Rehabilitating Health Systems in Post-Conflict Situations*, at 7 (Jan. 2007), available at http://www.wider.unu.edu/publications/working-papers/research-papers/2007/en_GB/rp2007-06/files/78091828154141008/default/rp2007-06.pdf; see also Ronald Waldman & Homaira Hanif, *The Public Health System in Afghanistan*, Kabul: Afghanistan Research and Evaluation Unit (2000).

and psychological burdens, which a state should take into account through means tests and/or vulnerability assessments to identify those especially vulnerable households and individuals who may need sustained special assistance in the context of transition.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Prior to Displacement

In the area of disaster preparedness, one of the key points for action in the *Hyogo Framework* was to “ensure that disaster risk reduction is a national and a local priority with a strong institutional basis for implementation.” In this regard, states are recommended to develop national institutional and legislative frameworks, such as “multi-sectoral national platforms,” with designated responsibilities from the national to the local levels to facilitate coordination across sectors. It is also recommended that states integrate risk reduction, as appropriate, into development policies and planning at all levels of government, including in poverty reduction strategies.⁸⁰

The Pan American Health Organization recommends that one of the key public health functions of a national health care system is “reducing the impact of emergencies and disasters on health.”⁸¹ The state regulatory system, including the bodies responsible for health issues, should incorporate into its essential functions a capacity to prevent, prepare for, and respond to emergencies. Before the beginning of a crisis (or during a current one), the national health authority should develop a Health Sector Profile (HSP) which should identify health sector financing; health delivery systems; regulatory and management systems; health networks (including patterns of urban and rural networks, hospitals and primary health care facilities, referral capacity,

⁸⁰ UNISDR, *supra* note 3.

⁸¹ See Pan American Health Organization [PAHO], *National Level Instrument for Measuring Essential Public Health Functions, Public Health in the Americas* (May 2000).

and support infrastructure); human resources; the pharmaceutical area; and priorities for action.⁸²

During Displacement

Role of National, Provincial and Local Government

Whether states implement stand-alone laws and policies for IDPs or incorporate them into existing institutional frameworks, the roles of national, provincial, and local government should be spelled out clearly (with appropriate budgetary authority) so that a chain-of-command can function efficiently up and down the line. Uganda's IDP Policy, for example, spells out government responsibilities at the national, district, and county levels. At the national level, the Office of the Prime Minister, Department of Disaster Preparedness and Refugees, is the lead agency. The national policy also establishes an Inter-Ministerial Policy Committee, an Inter-Agency Technical Committee, and a Human Rights Promotion and Protection Sub-Committee. At the district level, Uganda's IDP Policy calls for the District Disaster Management Committee (DDMC) to be the lead agency and provides that "[t]he DDMC shall be constituted by all relevant heads of Government Departments, humanitarian and development agencies and the private sector resident in a district."⁸³

States will need to decide whether to establish a separate department or ministry for processing assistance to IDPs or to incorporate such functions within existing entities. In general, states should be discouraged from instituting parallel systems and services, although, in the case of long-term displacement, specialized departments and functions may be necessary. The IDP Law of Georgia, for example, established the Ministry of Refugees and Accommodation (MoRA) in 1996, more than four years after displacement took place. MoRA is tasked, along with other relevant bodies, to ensure

⁸² See Pavignani, *supra* note 66.

⁸³ Uganda's National Policy for IDPs, *supra* note 60, at § 2.4.

implementation of IDPs' rights at the place of temporary residence.⁸⁴ More than ten years later, MoRA is still in existence, although, in the context of Georgia's new strategy of integrating IDPs, it is possible that the Ministry's specialized functions will be phased out.

Role of Health and Relief Personnel

It is particularly important during displacement for a state to articulate a plan for deploying health personnel for both shorter-term and longer-term interventions, including how state personnel will interact with other actors such as national Red Cross and Red Crescent Societies and personnel from international and non-governmental organizations. Coordination is key in the health sector, as effective health care delivery in an emergency involves coordinated decision-making and information-sharing about prioritizing public health interventions, harmonizing health education messages, establishing consistent drug treatment protocols, and maintaining patient confidentiality.

In order to coordinate the roles and responsibilities of government agencies working at various levels with that of other actors, states should develop an Emergency Health Action Plan, either incorporated within or coordinated with a national health action plan. The Emergency Health Action Plan should lay out a clear regulatory framework for responding to the health needs of populations affected by disasters and complex emergencies. One model that states should consider is that of the Committee for the Coordination of Services to Displaced Persons in Thailand (CCSDPT), which was first established in 1977 as a coordinating body for NGOs, international organizations, and government agencies and is still in existence. Another useful model is the Consortium of Humanitarian Agencies (CHA) in Sri Lanka, which has a national and international membership and a mandate.⁸⁵

⁸⁴ Kharashvili et al., *supra* note 50, at 40-41.

⁸⁵ Consortium of Humanitarian Agencies in Sri Lanka, <http://www.humanitarian-srilanka.org>.

Role of National Human Rights Institutions

To protect IDPs' right to health and an adequate standard of living, states should establish linkages with national human rights commissions to provide a forum where complaints may be lodged and redress may be sought. In Uganda, for example, the National Policy for IDPs establishes a Human Rights Promotion and Protection Sub Committee (HRPP) which, in collaboration with the Uganda Human Rights Commission, monitors protection of the human rights of IDPs including the right to medical care.⁸⁶

In India, the National Human Rights Commission has recommended that the government adopt a National Action Plan to Operationalize the Right to Health Care that delineates essential health services and supplies, outlines a basic set of health sector reform measures essential for universal and equitable access to quality health care, and would recognize and legally protect the health rights of various sections of the population, including persons facing displacement.⁸⁷

In the Context of Durable Solutions

When IDPs begin to return home or resettle permanently in a new location, institutional frameworks regulating such movements must have in place some means to monitor the conditions under which such movements take place and to be able to maintain health and basic services that meet core human rights obligations. In some cases, return and resettlement do not take place in conditions of full safety or to places that are fully prepared to accommodate arrivals. To clarify the frameworks within which return and resettlement can be supported as durable solutions, states should develop clear guidelines and regulations spelling out what returning and resettling IDPs can expect in terms of access to health services. In Colombia, for example, the Social Solidarity

⁸⁶ Uganda's National Policy for IDPs, *supra* note 60, at 10.

⁸⁷ National Human Rights Commission, *Recommendations of National Action Plan to Operationalize the Right to Health Care*, available at <http://www.nhrc.nic.in/dispArchive.asp?fno=874>.

Network (now Social Action) has prepared a Return Manual which lays out how state institutions can guarantee integrated assistance that includes health.⁸⁸

Institutional frameworks, in the early stages of return and resettlement, may need to incorporate immediate relief interventions into health services planning. If the situation continues to stabilize, the state health authority—supported as needed by international and non-governmental organizations—can shift toward more systematic delivery of essential health services (like the Basic Health Services Package in Afghanistan), and eventually into more comprehensive rehabilitation work on the health system itself.

INTERNATIONAL ROLE

There are a number of roles that the international community could play in supporting IDP rights to health and an adequate standard of living. The international community can help develop national laws and policies, build national and local capacity, and strengthen monitoring of state compliance with international human rights standards.

United Nations

OCHA/IASC

The mandate of the Office for the Coordination of Humanitarian Affairs (OCHA) includes the coordination of humanitarian response, policy development, and humanitarian advocacy. OCHA carries out its coordination function primarily through the Inter-Agency Standing Committee (IASC), which is chaired by the Emergency Relief Coordinator (ERC). Participants include all humanitarian partners, from UN agencies, funds and programs to the Red Cross Movement and NGOs. The IASC ensures inter-agency decision-making in response to complex emergencies. These responses include needs assessments, consolidated appeals, field coordination arrangements, and the development of humanitarian policies. The IASC has

⁸⁸ Report on the Inter-Agency Internal Displacement Division Mission to Colombia (Jan. 17-27, 2005), Summary of Recommendations.

developed a number of resources that provide useful guidelines for governmental and non-governmental organizations working with IDPs.

UNFPA

Within the coordinated, inter-agency response to disasters, the United Nations Population Fund (UNFPA) takes the lead in providing supplies and services to protect reproductive health. Priority areas include safe motherhood; prevention of sexually transmitted infections, including HIV; adolescent health; and gender-based violence. UNFPA also encourages the full participation of women and young people in efforts to rebuild their societies. One of the three major objectives of the UNFPA reproductive health program for 2003-2007 is improved access to sexual and reproductive health services for displaced populations, particularly adolescents. Activities will include training and institutional capacity building of organizations working with IDPs to educate IDPs about their reproductive health rights and to implement integrated sexual and reproductive health services with particular emphasis on adolescents.⁸⁹

UNICEF

Within the United Nations Children's Fund (UNICEF), the Office of Emergency Programmes (EMOPS) is the focal point for emergency assistance, humanitarian policies, staff security, and support to UNICEF offices in the field, as well as strategic coordination with external humanitarian partners both within and outside the UN system. EMOPS coordinates headquarters support to country and regional offices dealing with emergencies in terms of staffing, funding, donor relations, inter-agency issues, or technical guidance. Through the IASC and other coordination entities established among the United Nations family, EMOPS works to ensure that children's interests are at the center of the humanitarian policy debate both within the UN and among NGO forums.

⁸⁹ Executive Board of the United Nations Development Programme and of the United Nations Population Fund, United Nations Population Fund Country Programme for Colombia, Oct. 2002.

UNHCR

The mandate of the UN High Commissioner for Refugees (UNHCR) to provide international protection and seek durable solutions for refugees includes IDPs and, thus, UNHCR has played an active role in many IDP situations. In terms of health services, UNHCR has been particularly active on the issue of HIV/AIDS. In cooperation with its partners, UNHCR has developed the *Framework for Durable Solutions for Refugees and Persons of Concern* (the Framework).⁹⁰ The *Framework* consists of the following three tools: Development Assistance for Refugees (DAR); the 4Rs (Repatriation, Reintegration, Rehabilitation, and Reconstruction); and Development through Local Integration (DLI). The 4Rs initiative—found in countries such as Afghanistan, Eritrea, Sierra Leone, and Sri Lanka—facilitates the return and sustainable reintegration of refugees and internally displaced persons and is intended to ensure “that UNHCR’s relatively short-term reintegration programs are linked to longer-term reconstruction and development efforts.”⁹¹

WHO

WHO plays a number of roles that relate, directly or indirectly, to IDPs. First, WHO serves as the chair of the IASC Global Health Cluster which is designed to provide health leadership in emergency and crisis preparedness, response and recovery; prevent and reduce emergency-related morbidity and mortality; ensure evidence-based actions, gap filling and sound coordination; and enhance accountability, predictability, and effectiveness of humanitarian health actions. Second, WHO has created a Department for Health Action in Crises (HAC) with objectives that include building efficient partnerships for emergency management, developing evidence-based guidance for all phases

⁹⁰ Executive Committee of the High Commissioner’s Programme, Standing Committee, 28th Meeting, EC/53/SC/INF.3, Sept. 16, 2003.

⁹¹ The Office of the UN High Commissioner for Refugees [UNHCR], *Activities of the UNHCR in the Area of International Migration and Development*, Fourth Coordination Meeting on International Migration, UN/POP/MIG-FCM/2005/05 (Oct. 13, 2005).

of emergency work in the health sector, and strengthening capacity and resilience of health systems and countries to mitigate and manage disasters.⁹²

Special Rapporteur on the Right to Health

The Special Rapporteur's office has tried to make the right to health more specific, accessible, practical, and operational. His reports to date have focused on such issues as the right to reproductive health, access to essential medicines, the rights of people with mental disabilities, health-related Millennium Development Goals, and the development of a human rights-based approach to health indicators. Country reports have included Mozambique, Peru, Uganda, Romania, and Sweden.

Red Cross/Red Crescent Movement

International Committee of the Red Cross (ICRC)

The ICRC's position on IDPs, as articulated in May 2006, notes that its main mode of action consists of:

persuading the authorities and armed groups through confidential dialogue, to fulfill their obligation not to displace civilians or commit other violations of the relevant bodies of law that would result in displacement. If displacement occurs, the authorities must ensure that IDPs are protected, their rights respected and their essential needs met. They must also promote voluntary return whenever it is safe and whenever adequate living conditions are in place.⁹³

⁹² World Health Organization [WHO], *Health Action in Crisis*, available at <http://www.who.int/disasters>.

⁹³ ICRC Position on Internally Displaced Persons (IDPs) (May 2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/idp-icrc-position030706/\\$File/2006_IDPs_EN_ICRCExternalPosition.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/idp-icrc-position030706/$File/2006_IDPs_EN_ICRCExternalPosition.pdf).

International Federation of Red Cross and Red Crescent Societies (IFRC)

The IFRC's three key areas of activity—health, disaster management, and promoting humanitarian principles and values—all serve to promote the rights of IDPs to health and to an adequate standard of living. In their commitment to disaster management and humanitarian response, the IFRC, in conjunction with the national Red Cross and Red Crescent Societies, have pledged to:

make certain that physical, mental and social health care are incorporated and are an integral part of all other humanitarian work and programs; ensure that all health care services provided in a disaster context shall take the long-term sustainability of services into consideration, with the assurance that services provided in any prolonged emergencies will develop into sustainable, integrated community-based primary care; [and] recognize the need to prepare and train communities for rapid response to public health emergencies and disease outbreaks and to strengthen the preventive capacity of communities.⁹⁴

Private Organizations

Global Action on Aging

Global Action on Aging's International Human Rights Education Group has prepared a report on international legal standards, principles, and commitments relating to the human rights of older people in armed conflict.⁹⁵

⁹⁴ The IFRC Health Policy was adopted by the 15th session of the General Assembly of the International Federation of the Red Cross and Red Crescent Societies (2005), available at <http://www.ifrc.org/Docs/pubs/who/policies/health-policy-en.pdf>.

⁹⁵ Global Action on Aging, International Legal Standards, Principles and Commitments, available at <http://www.globalaging.org/armedconflict/internationalstandards.htm>.

HelpAge International

HelpAge International has published a handbook, *Older People in Disasters and Humanitarian Crises: Guidelines for Best Practice*, that includes an emphasis on ensuring the human rights of older people in disasters and humanitarian emergencies. HelpAge International has also published *Equal Treatment, Equal Rights: Ten Actions to End Age Discrimination*, which includes the action to “include and consult older people in emergency aid and rehabilitation planning after disasters and humanitarian crises.”⁹⁶

International Council of Nurses

The International Council of Nurses (ICN) has committed to “work in all appropriate ways to promote the development of timely health and social programs for migrants, refugees and displaced persons (MRDPs), for example, emergency treatment, care and maintenance, repatriation/integration/resettlement, bank of nursing experts [*sic*].” The ICN also pledges to work with national nursing associations and encourages them to examine the extent of the problem regarding the development of health and social programs for MRDPs in their countries and to undertake cooperative action to provide adequate services to MRDPs.⁹⁷

Women’s Commission for Refugee Women and Children

The Women’s Commission for Refugee Women and Children has developed a Reproductive Health Program which works to improve services in the following four primary areas of reproductive health care: safe motherhood, including emergency obstetric care; family planning; gender-based violence; and sexually transmitted infections, including HIV/AIDS. Over the past two years, the Women’s Commission has collaborated with the Inter-agency

⁹⁶ HelpAge International, *Equal Treatment, Equal Rights: Ten Actions to End Age Discrimination*, at 3 (Nov. 2001).

⁹⁷ International Council of Nurses, *Position Statement on Health Services for Migrants, Refugees and Displaced Persons*, available at <http://www.icn.ch/psmigrants00.htm>.

Working Group (IAWG) on Reproductive Health in Refugee Situations to produce the report *Global Evaluation of Reproductive Health for Refugees and Internally Displaced Persons*. The Women's Commission continues to coordinate the Reproductive Health Response in Conflict (RHRC) Consortium. The Reproductive Health Program includes a variety of projects geared toward improving the reproductive health care of refugee women, children, and youth. They include ending gender-based violence, preventing sexually transmitted infections and HIV, emergency health for displaced women and girls, safe motherhood, and youth.⁹⁸

SUMMARY OF RECOMMENDATIONS

1. Governments should provide the necessary assistance to guarantee the rights of IDPs to health, an adequate standard of living, and to social security.
2. Governments should remove obstacles that hinder IDPs from accessing essential services, including food and nutrition, water and sanitation, health (including psycho-social and mental health services, and sexual and reproductive health services), shelter, and appropriate clothing.
3. Governments should remove obstacles that hinder IDPs from accessing pension entitlements and other social security benefits, regardless of their place of residence in the country.
4. Governments should adopt a definition of internally displaced person consistent with that of the *Guiding Principles* and incorporate that definition into national laws and into regulatory frameworks governing the delivery of essential humanitarian services, recognizing that it is not appropriate to discriminate between and among displaced populations according to their cause of displacement (natural disaster, conflict, etc.)
5. Governments should ensure that the registration procedures for receipt of essential humanitarian services provide for delivery of all essential aid in a non-discriminatory, transparent, and expeditious manner, with a particular

⁹⁸ Women's Commission on Refugee Women and Children, *Reproductive Health Program*, available at <http://www.womenscommission.org/projects/rh>.

focus on assistance to especially vulnerable groups. Entitlement to government benefits should be based on humanitarian need, not on eligibility status or other criteria.

6. Governments should commit to the full involvement of affected populations in consultation and planning after disasters and humanitarian crises. This should especially involve marginalized and vulnerable populations, and minority and indigenous peoples.

7. Governments should establish minimum humanitarian standards for essential services based on the standards in the *Sphere Handbook*. These standards should be translated and disseminated to all appropriate national and international stakeholders.

8. Governments should incorporate validated indicators and vulnerability assessment tools to measure population needs and programmatic impact in the delivery of essential services, including food and nutrition, water and sanitation, health, shelter, and clothing. Data on internally displaced populations should be collected in such a way that it can be disaggregated by age and sex, at minimum, and by other characteristics deemed necessary for an understanding of vulnerability.

9. Governments should establish mechanisms to ensure that the delivery of essential humanitarian services is coordinated and consistent with established minimum humanitarian standards.

10. Governments should ensure that the return of IDPs should take place only under agreed minimum conditions (voluntary, safe, dignified, sustainable) and that shorter-term reintegration measures are linked to longer-term reconstruction and development efforts.

11. Governments should coordinate their activities with existing international agencies and private organizations.

Chapter 7

The Right to Education in Situations of Internal Displacement

Erin Mooney and Jessica Wyndham*

INTRODUCTION

Education is the right of everyone, including internally displaced persons (IDPs), and in all circumstances. Ensuring this right is critical for children's development and future opportunities. In situations of displacement, this is no less important. Continued school attendance provides a degree of stability, security, structure, and normalcy in the context of upheaval, uncertainty, and trauma that the experience of displacement entails. It can provide IDP children with an important source of psycho-social support and help to reduce their exposure to threats including sexual exploitation, physical attack, and military recruitment. Moreover, classrooms are effective fora for conveying key survival messages about other risks, such as landmines and HIV/AIDS. When curricula are well-designed, education can also be a vehicle for promoting understanding, tolerance, and peace, thereby contributing to reconciliation and rebuilding of the social fabric in war-torn societies. In addition, equal access to education is an important indicator of IDPs' integration into the local community, whether while they are displaced or when they return to their home areas or settle elsewhere. Indeed, the availability of quality education often is a decisive factor in IDPs' decisions about whether and when to return and resettle elsewhere, and is essential for a durable solution to displacement.

In practice, education too often tends to be regarded more as a need than as a right. Moreover, education historically has been considered as a development issue, to be addressed only once humanitarian emergencies have subsided. Yet, these crises can persist for years or even decades, potentially depriving an entire generation of education. Governments have the responsibility to ensure the right to education for all, including for IDPs. To this end, a number of normative, policy, and practical measures are required. This chapter focuses

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on the measures that can be taken in domestic legislation and policy to support realization of the right to education in situations of internal displacement.

LEGAL FRAMEWORK

The right to education is well established in international human rights law. In addition, international humanitarian law underscores the importance of continued education for children in times of conflict. Drawing upon both of these bodies of law, the *Guiding Principles on Internal Displacement* (hereinafter the *Guiding Principles*)¹ affirm the right to education for IDPs.

Relevant Guiding Principles

Principle 23(1) affirms the right of every human being to education. Principle 23(2) specifies that “[t]o give effect to this right for internally displaced persons, the authorities concerned shall ensure that persons, in particular displaced children, receive education which shall be free and compulsory at the primary level [and] [e]ducation should respect its recipients’ cultural identity, language and religion.” Paragraphs (3) and (4) of Principle 23 further specify that “[s]pecial efforts should be made to ensure the full and equal participation of women and girls in educational programs [and] [e]ducation and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.”

A number of particular elements of the right to education as set out in Principle 23 are important to highlight. First, sub-paragraph (2) draws attention to that aspect of the right to education that focuses on children, and affirms the broadly recognized right to free and compulsory education at the primary level. However, the preface “in particular” as well as the general reference to the right of internally displaced “persons” to education makes it clear that the right to education is by no means limited to children of primary-

¹ United Nations, *Guiding Principles on Internal Displacement*, presented by the Representative of the UN Secretary-General on internally displaced persons, Francis M. Deng, to the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2.

school age. References in subsequent sub-paragraphs to “adolescents” and to “women” underscore that the right to education applies not only to young children but also to older children as well as to adults.

Further, the right to education as affirmed in Principle 23 is not confined to formal schooling but also extends, as sub-paragraph (3) indicates, to general “educational programmes” and to “training” as well. Sub-paragraph (4) specifies that the right to education applies equally to IDPs in camps as it does to those in non-camp situations. Overall, the right of IDPs to education is to be considered a priority, with educational and training facilities to be made available to IDPs “as soon as conditions permit.”

In addition to Principle 23, which specifically addresses the right to education, Principle 1(1), which affirms the principles of equality and non-discrimination, and Principle 29(1), which affirms these same principles in the context of return or resettlement, are also relevant.

Legal Basis

Articulation in the *Guiding Principles* of the right of IDPs to education is grounded in a rich body of international law.² The right to education is enshrined and firmly guaranteed in international and regional human rights law.³ Of particular importance is the Convention on the Rights of the Child

² WALTER KÄLIN, *GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS* 58-60 (2d ed., 2007) [hereinafter *ANNOTATIONS*].

³ Universal Declaration of Human Rights, G.A. Res. 217(a), U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc A/6316 (1966); Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1951; Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222, as amended by Protocols Nos. 3, 5, and 8 which entered into force on Sept. 21, 1970, Dec. 20, 1971 and Jan. 1, 1990, respectively. At the regional level, see American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); Additional

(CRC),⁴ which recognizes in Article 28 the “right of the child to education.” The CRC is the most widely ratified international human rights treaty, enjoying near universal ratification.⁵

International humanitarian law affirms the right to children’s education in situations of armed conflict. In situations of international armed conflict, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) requires parties to the conflict to “take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, ... and [that] their education [is] facilitated in all circumstances.” It further requires occupying powers to facilitate the functioning of educational facilities in occupied territories.⁶ In situations of internal armed conflict, Additional Protocol II to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) requires that children “receive an education, including religious and moral education.”⁷

Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, Nov. 16, 1999, O.A.S. Treaty Series No. 69 (1988), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992); African [Banjul] Charter on Human and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴ Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

⁵ The United States remains one of the few states not to ratify the Convention on the Rights of the Child (the CRC).

⁶ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, arts. 24(1), 50(1).

⁷ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, art. 4(3)(a), entered into force Dec. 7, 1978.

In addition, international humanitarian law, in particular Protocol I to the Geneva Conventions of 12 August 1949 (Protocol I), specifies that civilian objects, including schools, must not be the subject of armed attack or of reprisals.⁸ In this same vein, intentionally directing attacks against civilian objects, which would include schools, constitutes a war crime under the Rome Statute of the International Criminal Court.⁹

Special provisions address children's education in the event of evacuation undertaken in the course of armed conflict. Protocol I provides that "whenever an evacuation occurs...each child's education, including his religious and moral education as his parents' desire, shall be provided while he is away with the greatest possible continuity."¹⁰ Similarly, in situations of non-international conflict, Protocol II requires in cases of evacuation that a child's education be provided with the greatest possible continuity.¹¹

Elaborating upon the general principle, a number of specific aspects of the right to education have been elaborated. The UN Committee that monitors implementation of the International Convention on Economic, Social and Cultural Rights (ICESCR) has specified that education should include the following four essential features: availability, accessibility, acceptability, and adaptability.¹² Within this framework, aspects of particular importance in situations of displacement include availability and economic accessibility, physical accessibility, non-discrimination, respect for cultural identity and language, and issues of curriculum content.

⁸ *Id.* at art. 52.

⁹ Rome Statute of the International Criminal Court, July 1, 2002, art. 8, U.N. Doc. 2187 U.N.T.S. 90.

¹⁰ Protocol I, art. 78(2).

¹¹ Protocol II, art. 28(2).

¹² Comm. on Economic, Social and Cultural Rights, General Comment No. 13, at 6, U.N. Doc. E/C.12/1999/10 (1999).

Guiding Principle 23(2) specifies an obligation on the part of the authorities to provide free and compulsory education at the primary level. This obligation finds its legal basis in Article 26(1) of the Universal Declaration of Human Rights (UDHR), Article 13(2)(a) of the ICESCR, Article 28(1)(a) of the CRC, Article XII(4) of the American Declaration of the Rights and Duties of Man, and Article 4(a) of the Convention against Discrimination in Education.¹³ Beyond primary education, Article 28(1)(b) of the CRC requires that progressive measures be taken for the introduction of free education in general. Secondary education in its different forms, including general education as well as technical and vocational education, is to be generally available and accessible to all.¹⁴ Higher education also is to be made equally accessible to all, on the basis of capacity, by every appropriate means.¹⁵

Physical access to education requires that educational services are available, and that these are within safe physical reach.¹⁶ In normal circumstances, this would be achieved by attendance at an educational institution located at a reasonable geographic distance from the student's home, i.e., a local school. However, it might also be achieved by means of "distance learning" programs or mobile education services.

As with other provisions of international human rights, the right to education is governed by the fundamental principle of non-discrimination.¹⁷ States therefore have an obligation to ensure the right to education, without discrimination of any kind. Indeed, a specific convention is devoted to the

¹³ Convention against Discrimination in Education, 429 U.N.T.S. 93, entered into force May 22, 1962.

¹⁴ CRC, art. 28(1)(b); ICESCR, art. 13(2)(b).

¹⁵ CRC, art. 28(1)(c); ICESCR, art. 13(2)(c).

¹⁶ CESCR General Comment 13, 6.

¹⁷ As articulated in article 2 of the UDHR, article 2(2) of the ICESCR, and article 2 of the CRC. A similar provision also is articulated in regional human rights instruments.

issue of prevention of discrimination in education.¹⁸ In addition, numerous international human rights instruments addressing specific forms of discrimination and the rights of specific groups of persons underscore the non-discriminatory nature of the right to education, including instruments relating to girls and women,¹⁹ racial discrimination,²⁰ persons with disabilities,²¹ and refugees.²²

¹⁸ Convention against Discrimination in Education, May 22, 1962, 429 U.N.T.S. 93.

¹⁹ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, art. 10. *See also* Convention against Discrimination in Education, art. 2(a); Charter of the Organization of American States, 119 U.N.T.S. 3, Dec. 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, entered into force Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, Sept. 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, Jan. 29, 1996, art. 34(h); Vienna Declaration, World Conference on Human Rights, Vienna, June 14-25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), Section II, ¶ 41; Beijing Declaration and Platform for Action, Fourth World Conference on Women, Sept. 15, 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), sects. 27, 30, 71, 82, 84.

²⁰ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, art. 5(e)(v), U.N. Doc. A/6014 (1966) [hereinafter CERD].

²¹ Declaration on the Rights of Disabled Persons, ¶ 6, U.N. Doc. A/RES/33447 (XXX) (1975); *see also* Vienna Declaration and Programme of Action, at 63, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993); *see also* the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, AG/RES 1608 (XXIX-O/99), art. III(1)(a); "Persons with disabilities," General Comment 5, Committee on Economic, Social and Cultural Rights (1994), U.N. Doc. E/1995/22; Declaration on the Rights of Mentally Retarded Persons, G.A. res. 2856 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971), ¶ 2.

²² Convention relating to the status of Refugees, 189 U.N.T.S. 150; *see also* UNHCR Executive Committee Conclusion No. 47 (XXXVIII(p))—1987, No. 59 (XL(f))—

The World Declaration on Education for All emphasizes that “an active commitment must be made to removing educational disparities” so as to ensure that “underserved groups”—with specific reference made to “those displaced by war”—“should not suffer any discrimination in access to learning opportunities.”²³ The Beijing Platform for Action adopted by the Fourth World Conference on Women in 1995 emphasized that states should take action to “facilitate the availability of educational materials in the appropriate language—in emergency situations also—in order to minimize disruption of schooling among refugee and displaced children.”²⁴

It is important to highlight that the principle of non-discrimination does not mean identical treatment. Both the UN Committee on the Rights of the Child and the Human Rights Committee have specified that to address the conditions causing discrimination, “special measures” may be necessary.²⁵ Specifically as regards education, the Committee on Economic, Social and Cultural Rights has specified that the adoption of temporary special measures intended to bring about *de facto* equality for men and women as well as for disadvantaged groups is not a violation of the right to non-discrimination, so long as such measures do not lead to the maintenance of unequal or separate standards for

1989, No. 64 (XLI(a)(ix))—1990, No. 74 (XLV(gg))—1994, No. 77 (XLVI(n))—1995, No. 84 (XLVIII(b)(v))—1997, No. 100 (LV(I)(viii))—2004, A Thematic Compilation of Executive Committee Conclusions, June 2005.

²³ World Declaration on Education for All, adopted by the World Conference on Education for All, Jomtein, Thailand, Mar. 1990, art. 3(4), *available at* http://www.unesco.org/education/efa/ed_for_all/background/jomtien_declaration.shtm

²⁴ Beijing Declaration and Platform for Action, Fourth World Conference on Women, Sept. 15, 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), ¶ 147(g).

²⁵ Comm. on the Rights of the Child, General Comment No. 5 (2003), *General Measures of Implementation of the Convention on the Rights of the Child*, arts. 4, 42, 44, ¶ 6, U.N. Doc. CRC/GC/2003/5 (2003); Human Rights Committee, General Comment No. 18, adopted at its thirty-seventh session (Nov. 10, 1989), ¶ 11.

different groups and provided that they are not continued after the objectives for which they were taken have been achieved.²⁶

Internal displacement often disproportionately affects ethnic, linguistic, and religious minority groups. As earlier noted, Guiding Principle 23(2) affirms that education should respect IDPs' "cultural identity, language and religion." The legal basis for this principle can be found in a variety of provisions in international human rights and humanitarian law. Article 29(1)(c) of the CRC recognizes that a child's education shall be directed to various aims including the development of "his or her own cultural identity, language and values." This provision therefore focuses on the individual heritage of the child. At the same time, Article 29(1)(d) of the CRC refers to preparing the child for "friendship among all peoples, ethnic, national and religious groups and persons of indigenous groups." Taking these provisions together, the UN Committee on the Rights of the Child points to the need for a balanced approach to education, "one which succeeds in reconciling diverse values through dialogue and respect for difference."²⁷

Obligations to respect cultural identity in education continue to apply in situations of armed conflict. Article 24(1) of the Fourth Geneva Convention requires that "education shall, as far as possible, be entrusted to persons of a similar cultural tradition." Several international humanitarian and human rights instruments allow for parents or guardians to provide such education in accordance with their own convictions.²⁸ In cases in which children have been

²⁶ Comm. on Econ., Soc. and Cultural Rights, General Comment No. 13, *The Right to Education*, ¶ 32, U.N. Doc. E/C.12/1999/10 (1999).

²⁷ Comm. on the Rights of the Child, *The Aims of Education*, General Comment No. 1, *The Aims of Education*, ¶ 4, U.N. Doc. CRC/GC/2001/1 (2001).

²⁸ Geneva Convention Protocol II, art. 4(3)(a); UDHR, art. 26(2); ICCPR, art. 18(4); Convention against Discrimination in Education, art. 5(1)(b). *See also* the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, July 18, 1978, OEA/Ser.L.V/II.82 doc.6 rev.1, art. 12(4) (1992); ECHR, Protocol I, art. 2.

evacuated to a foreign country, Article 78(2) of Protocol I requires that education shall be provided “with the greatest possible continuity.”

Several international and regional instruments, as well as authoritative statements, provide guidance as to the content of education. The Charter of the Organization of American States is most precise in prescribing that “the education of peoples should be directed toward justice, freedom, and peace.”²⁹ The Vienna World Conference on Human Rights emphasized that education can be a vehicle for promoting understanding, tolerance, and peace, thereby contributing to reconciliation and rebuilding the social fabric in war-torn societies.³⁰ A similar goal of education has been articulated by the UN Committee on the Rights of the Child.³¹ It also has been emphasized in numerous conclusions adopted by the United Nations High Commissioner for Refugees (UNHCR) Executive Committee.³²

The CRC provides in Article 29(1) a comprehensive list of the goals to which a child’s education should be directed. These include respect for human rights; respect for his or her own cultural identity, language and values, as well as national values; and preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.³³

²⁹ OAS Charter art. 3(n).

³⁰ Vienna Declaration and Programme of Action (Vienna Declaration), adopted by the World Conference on Human Rights, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), Section II, 33.

³¹ Committee on the Rights of the Child, General Comment No. 1, *The Aims of Education*, ¶ 13, U.N. Doc. CRC/GC/2001/1, Apr. 17, 2001.

³² No. 77 (XLVI(n))—1995; No. 80 (XLVII(e)(xi))—1996; No. 85 (XLIX(g))—1998, A Thematic Compilation of Executive Committee Conclusions, June 2005.

³³ See also Recommendation concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental

The right to education applies in times of peace as well as in armed conflict. No specific restriction upon, or derogation from, this right is provided for under international law. In situations of armed conflict, international humanitarian law contains, as elaborated above, a number of provisions safeguarding the right to education. A series of resolutions of the UN Security Council concerned with the “protection of children in armed conflict” have reiterated and reinforced the international norm prescribing continued education in the context of armed conflict.³⁴ Moreover, although not having formal legal standing, there exists a number of international standards and guidelines based on international law which affirm the right to education in emergencies.³⁵

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

IDPs frequently face a number of particular obstacles in accessing the right to education.³⁶ These can arise not only in situations of conflict and post-conflict,

Freedoms, adopted by the General Conference of UNESCO at its eighteenth session, Paris, Nov. 19, 1974.

³⁴ See, e.g., Resolution 1314 (2000), Adopted by the Security Council at its 4185th meeting, U.N. Doc. S/RES/1314, Aug. 11, 2000; Resolution 1539 (2004), adopted by the Security Council at its 48th meeting, U.N. Doc. S/RES/1539, Apr. 22, 2004, ¶ 9; Resolution 1261 (1999), adopted by the Security Council at its 4037th meeting, ¶ 2, U.N. Doc. S/RES/1261, Aug. 30, 1999.

³⁵ These include: *Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction*, Inter-Agency Network for Education in Emergencies, 2004; Kacem Bensalah, *Guidelines for Education in Situations of Emergency and Crisis: EFA Strategic Planning* (2002); The Office of the UN High Commissioner for Refugees [UNHCR], *Education: Field Guidelines* (2003), available at <http://www.unhcr.org/protect/PROTECTION/40586bd34.pdf>; The Office of the UN High Commissioner for Refugees [UNHCR], *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters*, guideline C.1. (2006).

³⁶ Erin Mooney & Colleen French, *Barriers and Bridges: Access to Education for Internally Displaced Children* (2005), available at

but also in situations of displacement caused by natural disaster and, to a certain extent, also in situations of development-induced displacement.³⁷

Lack of Infrastructure

The conditions causing displacement, whether conflict or natural disasters, often lead to the destruction or significant damage of educational infrastructure, including not only physical buildings, i.e., schools, but also the essential administrative infrastructure and human resource inputs. Teachers may be scarce as they too have been uprooted or even targeted to be killed. Even where teachers are available, state budgets and administrative structures struggling to meet emergency needs may nonetheless result in teachers' salaries going unpaid. Furthermore, schools may be forced to close when the community they service is largely displaced and the public resources needed for their maintenance are no-longer made available.³⁸ In areas receiving IDPs, overcrowding of existing local schools can be a significant challenge and a source of tension with the host community.

In IDP camps, particular challenges arise. Unless camps are in close proximity to local schools that can accommodate an influx of IDP students, new educational facilities will need to be put in place for the displaced. Whether education programs in fact are established in IDP camps is dependent on the will, resources, capacity, and access of government agencies as well as international and non-governmental organizations. Where schools in IDP camps do exist, typically these are under-resourced, over-crowded, and limited to primary education.³⁹

http://www.brookings.edu/papers/2005/0111humanrights_mooney.aspx; Erin Mooney & Colleen French, *Education for IDPs: Poor Marks*, 22 FORCED MIGRATION REV. 58 (2005).

³⁷ See Chapter 15 in this volume on development-induced displacement.

³⁸ Susan Saulny, *Students Return to Big Changes in New Orleans*, N.Y. TIMES, Jan. 4, 2006.

³⁹ *Global Survey on Education in Emergencies*, *infra* note 121, at 10.

Another common obstacle is that existing school facilities may be used during humanitarian emergencies for purposes other than education. It is a common occurrence in crisis situations, whether conflict or disaster, for schools to serve as emergency centers or places of temporary shelter for displaced persons. While often a necessary emergency measure, unless alternative locations and accommodation are found, such arrangements impede access to education not only for IDPs but also for non-displaced students. In some situations, schools are taken over by armed actors to be used as military barracks.

Insecurity

Access to education must mean safe access. In conflict situations, and despite the protections provided by international humanitarian law, it is not uncommon for schools to be the targets of armed attack. Even traveling to school may be dangerous, requiring students to traverse areas strewn with landmines or to cross checkpoints set up by military forces or other armed groups, and where children may be subjected to harassment and at greater risk of enforced military recruitment and abduction. Once at school, additional safety concerns can arise. A lack of separate lavatories is a common problem when education is under-resourced, and can put girls at risk of sexual violence. Sexual exploitation by male teachers or classmates can also be a widespread problem, and a major factor in high attrition and non-enrollment rates of female students.⁴⁰

Lack of Documentation

Enrollment in formal educational institutions typically requires presentation of personal documentation including a birth certificate, documentation proving attendance at a prior educational institution, and records attesting to the level of studies completed. However, loss, destruction, or confiscation of identity and other important personal documentation is a common occurrence in situations of displacement. For IDPs to obtain replacement documentation often is very difficult. In a number of countries, it would require that IDPs

⁴⁰ Women's Commission for Refugee Women and Children, *Help Us Help Ourselves: Education in the Conflict to Post-conflict Transition in Liberia*, at 6 (Mar. 2006).

travel back to their area of origin, even if the area remains unsafe. Obstacles relating to documentation often discriminate in particular against IDPs from minority groups.⁴¹ Also affecting access to the right to education in situations of displacement is the loss by displaced teachers of their teaching certificates, without which they may be barred from teaching.

Residency Requirements

In many countries, school enrollment is dependent on proof of residence in the district. This requirement inevitably presents complications for IDP children, especially where registration is a lengthy and cumbersome process. In countries of the former Soviet Union, the legacy of the *propiska* system which tied the enjoyment of many rights and entitlements to the area of permanent residence and served as a control on freedom of movement, has posed significant impediments to IDPs' enjoyment of a number of rights, including the right to education.⁴²

Language of Instruction

Internal displacement often affects minorities, including ethnic and indigenous minorities, who may not speak the local language of instruction in the areas to which they are displaced. Issues concerning the language of instruction may also be an impediment to IDP return. This risk is especially high when IDPs' area of origin comes under the effective control of another linguistic group. That this concern has been brought to the attention of the UN Security Council

⁴¹ Naga Peoples Movement for Human Rights [NPMHR], *Summary Report on the Conditions of the Internally Displaced Persons from the Imphal Valley to the Naga Hills area of Manipur*, Jan. 5, 2002; United Nations High Commissioner for Refugees/Organization for Security and Cooperation in Europe [UNHCR/OSCE], *Ninth Assessment of the situation of Ethnic Minorities in Kosovo*, May 31, 2002, ¶ 50.

⁴² Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, *The Propiska System Applied to Migrants, Asylum Seekers and Refugees in Council of Europe Member States: Effects and Remedies*, Doc. 9262 (Oct. 12, 2001), ¶ 91.

by the UN Secretary-General⁴³ underscores that access to education is not simply a development issue but one that can have significant implications for conflict resolution efforts.

Discrimination

The discrimination that IDPs often suffer on ethnic grounds, or even simply on the basis of being internally displaced, can be so pervasive as to limit IDP children's access to education. For example, there have been cases where IDPs were required to pay school fees twice as high as local students.⁴⁴ In some situations of internal displacement, particularly those resulting from ethnic conflict, parallel education systems have been established along linguistic and ethnic lines. The "two schools under one roof" system that exists in Bosnia and Herzegovina as well as in Kosovo, for example, entails providing education to two distinct ethnic and linguistic groups in the same facilities but using distinct curricula and separate administrative procedures. In both countries, however, this arrangement of segregated educational systems has been found to entrench ethnic differences, perpetuate ethnic tensions, undermine national reconciliation efforts, and work against the integration of IDPs and others from minority groups.⁴⁵

⁴³ See, e.g., Report of the Secretary-General concerning the situation in Abkhazia, Georgia, ¶ 17, U.N. Doc. S/2000/697, July 17, 2000.

⁴⁴ Internal Displacement Monitoring Centre, *Conflict has had Terrible Impact on Already Failing Education System* (2001-2005), available at [http://www.db.idpproject.org/idmc/website/countries.nsf/\(httpEnvelopes\)/460991DF3E39244C802570B8005A7377?OpenDocument](http://www.db.idpproject.org/idmc/website/countries.nsf/(httpEnvelopes)/460991DF3E39244C802570B8005A7377?OpenDocument).

⁴⁵ UNHCR/OSCE, *Ninth Assessment of the situation of Ethnic Minorities in Kosovo*, at 50 (May 31, 2002); The Representative of the Secretary General, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Mission to Bosnia and Herzegovina*, ¶ 47, U.N. Doc. E/CN.4/2006/71/Add.4 (Dec. 29, 2005).

School Fees and Other Costs

International law requires that education, at least at the primary level, be compulsory and free. In practice, however, access to education, including primary education, commonly entails direct and indirect costs. School fees often are levied informally at the primary level, and in many cases they formally exist at the secondary and tertiary levels as well. In addition to tuition fees, there are also often a number of related hidden costs of sending a child to school, including the purchase of uniforms or other appropriate clothing and shoes, textbooks, and supplies. It also is not uncommon for payments to be required to be made directly to teachers, in particular in situations where their official government salaries go unpaid or are inadequate. For IDPs, who typically are in an economically disadvantaged situation, these costs can be particularly prohibitive.

The financial impediments that hinder access to education for many students, including the internally displaced, disproportionately affect girls, as families with limited resources generally tend to prioritize paying for boys' education.⁴⁶ At the same time, the strong desire for education, combined with the imperative to find money to pay for school fees, is among the factors driving girls and women in crisis settings into prostitution and other exploitative sexual relationships.⁴⁷

Economic Responsibilities

IDP children in many cases miss school because they are needed by their families for domestic or agricultural work or to generate income to help ensure their families' economic survival. Attrition and dropout rates are especially high among girls, who typically are burdened by domestic, child-care, or agricultural responsibilities. Family poverty drives many IDP adolescent girls

⁴⁶ UNICEF, *Gender Achievements and Prospects in Education: The Gap Report, Part One*, at 8 (2005). See also Erin Mooney, *Protecting and Reintegrating Displaced Women and Children Post-Conflict*, in SECURITY, RECONSTRUCTION AND RECONCILIATION 72-74 (Muna Ndulo ed., 2007).

⁴⁷ See Mooney, *supra* note 46.

out of school and into prostitution and puts them at risk of trafficking.⁴⁸ Even when children manage to combine carrying out economic responsibilities together with continuing their education, limitations on learning opportunities can arise.

The Experience of Displacement

Displacement and its causes, including armed conflict and disaster, tend to have significant repercussions on a child's material well-being as well as their physical and mental health. Such repercussions impact upon an IDP child's ability to learn even when they are in fact able to access educational facilities.⁴⁹

REGULATORY FRAMEWORK

The general principles underpinning a national education system are often derived from the national constitution. Many national constitutions enshrine the right to education and may also specify particular aspects of that right that must be protected, including the right to free and compulsory primary education. However, more specific legislative protections of the right to education provide the most effective basis for ensuring respect for this right. The national regulatory framework typically takes the form of an education bill or education act. Beyond reinforcing any constitutional provisions enshrining the right to education, this framework must elaborate the content of the right, the means of implementing it, and the institutional mechanisms responsible for doing so.

⁴⁸ Jehan Khaleeli & Sarah Martin, *Conflict, Sexual Trafficking and Peacekeeping*, REFUGEES INT'L (2004); The Representative of the Secretary-General on Internally Displaced Persons, *Report of the Representative of the Secretary-General on Internally Displaced Persons, Profiles in Displacement: Colombia*, ¶ 91, U.N. Doc. E/CN.4/2000/83/Add.1 (Jan. 11, 2000).

⁴⁹ *Profiles in Displacement: Colombia*, *supra* note 48, at ¶¶ 91-92; Chris Kiwawulo, *IDP Education Poor—Report*, NEW VISION, June 13, 2005; Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Angola*, ¶ 4, U.N. Doc. CRC/C/15/Add.246 (Nov. 3, 2004).

State administrative regulations, decrees, and policies also come into play. These can have the advantage of being more flexible than legislative measures, allowing states to respond more rapidly to emergencies or at least to create a system that is readily adaptable and able to address the particular educational needs of affected populations. The enforceability of policies and other non-legislative measures is enhanced when these are based on constitutional and/or legislative provisions recognizing and regulating the right to education.

Legislative as well as non-legislative measures will be most effective when they are comprehensive. They must clearly set out institutional responsibilities, sources of financing, and clear mechanisms for complaint or legal recourse. Without such provisions, non-legislative measures, in particular, risk not being implemented.

Within federal systems, it is common for states, provinces, or cantons to adopt their own education legislation or policies based on the principles set at the national level. However, where education regulation is decentralized, there is a risk that regional authorities will adapt national principles along ethnic, religious, or linguistic lines that may discriminate against minority populations. To best avoid such a situation, national regulation, applicable at all levels of government, should clearly establish that all basic rights apply throughout the federation, including the rights to non-discrimination and equality of access.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

States have the primary responsibility to ensure the right to education. This responsibility includes undertaking “all appropriate legislative, administrative and other implementation measures” to enable realization of this right.⁵⁰ Standards and procedures need to be elaborated to govern educational enrollment; differentiate between formal and informal education; delineate the distinct levels of education; specify the functions of the Ministry of Education; regulate the accreditation of teachers and examination of students; and provide

⁵⁰ CRC, art. 4.

for the issuance of documentary evidence of results. Legislation and policies also will need to be adopted to remove administrative and procedural barriers prohibiting IDP students from attending school or IDP teachers from providing their services.

Prior to Displacement

The right of IDPs to education should be grounded in provisions of domestic legislation affirming the right of education for all. Guarantees in national education legislation that every person of school age residing on the territory of a state has an equal right to education and express prohibitions of “discrimination between pupils or students”⁵¹ provide an unequivocal basis for IDPs to assert their right to education. Specification in domestic legislation that the right to education is guaranteed regardless of the circumstances, including possible conflict or natural disaster, similarly would be useful.

In addition, domestic laws should provide for affirmative measures to be taken to facilitate access to education for disadvantaged groups. The Constitution of Afghanistan (2004), for example, emphasizes that the right to education is held equally by everyone and provides for the implementation of positive measures to promote education for women, girls, and nomadic groups in recognition of disadvantages that these groups typically experience in accessing education.⁵² The Education Act of Sierra Leone (2004) states that education should be designed, among other goals, to “rapidly enhance literacy in Sierra Leone and improve the education opportunities for women and girls.”⁵³

While national authorities may not always be able to prevent conflicts or natural disasters, they can take measures to mitigate the implications of such crises for access to education. Contingency plans should be developed that

⁵¹ See, e.g., Sierra Leone, Education Act 2004, § 4(1); Guatemala, National Education Law, Legislative Decree No. 12-91 (Jan. 12, 1991), arts. 21, 33(3).

⁵² Constitution of Afghanistan (2004), arts. 43, 44, available at http://www.oefre.unibe.ch/law/icl/af_idx.html.

⁵³ Sierra Leone Education Act 2004, *supra* note 51, at § 2(a).

include the safeguarding of educational resources, in terms of both material and personnel, including:

- School registration not being conditional on identity documentation;⁵⁴
- Establishment of a central repository of state examination results and certifications;
- Stockpiling of basic education supplies to be used in event of an emergency;⁵⁵ and
- Establishment of a central registry of certified teachers and their qualifications.⁵⁶

Early warning mechanisms should also be put in place and include educational indicators such as unusually high absenteeism or the disproportionate absence of one ethnic or religious group who may fear attack or discrimination.⁵⁷

During Displacement

Substantive Elements

Given that the right to education for all and without discrimination of any kind should already be enshrined in domestic legislation, in the event of internal displacement, specific mention of IDPs' right to education may appear unnecessary. However, considering the particular obstacles and challenges that IDPs often face in accessing education, including direct discrimination on the basis of their displacement, specific legal reinforcement of their right to education and the prescription of special measures to ensure their access to

⁵⁴ See, e.g., Education Law of Afghanistan, art. 6 (2001).

⁵⁵ Pigozzi, *infra* note 57, at 18; Bensalah, *supra* note 35, at 28.

⁵⁶ See, e.g., Education Act 2004 of Sri Lanka, § 38.

⁵⁷ Mary Joy Pigozzi, *Education in Emergencies and for Reconstruction: A Developmental Approach*, at 6, cited in Marc Sommers, *Children, Education and War: Reaching Education For All (EFA) Objectives in Countries Affected by Conflict* (World Bank Working Paper No. 1, June 2002, at 18).

this right can be important. In particular, it would be appropriate to include such provisions in any domestic legislation or policy specifically addressing the situation of IDPs.

The right to education requires that education be free and compulsory, at least at the primary level. This is a minimum standard. The IDP law in Bosnia and Herzegovina affirms the right of IDPs to education and also to vocational training.⁵⁸ Georgia has passed legislation making education at the third stage, years 10 and 11, also free of charge for persons internally displaced.⁵⁹

Domestic legislation relating to the internally displaced should also reaffirm the principle of non-discrimination and provide for the undertaking of special measures to facilitate access to education for IDPs as well as for disadvantaged groups within IDP populations, including women and girls as well as minorities. The National Policy for Internally Displaced Peoples of Uganda (Uganda's IDP Policy), for example, provides for the adoption of "affirmative action" programs to assist and encourage the participation of IDPs in education. Further, the Uganda's IDP Policy echoes the *Guiding Principles on Internal Displacement* by calling for "special efforts" to be taken to ensure full and equal participation in education by IDP women and girls.⁶⁰

⁵⁸ Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina, Official Gazette, no. 15/05 of Mar. 16, 2005, art. 11(7).

⁵⁹ Decree of the President of Georgia No. 643 of Sept. 25, 1996 and Ordinance No. 491 of Oct. 31, 1997, cited in *The Guiding Principles on Internal Displacement and the Law of the South Caucasus: Georgia, Armenia and Azerbaijan*, 34 STUDIES IN TRANS. LEGAL POLICY 87 (Roberta Cohen et al. eds., 2003).

⁶⁰ Uganda National Policy for Internally Displaced Persons, Office of the Prime Minister, Department of Disaster Preparedness and Refugees, Aug. 2004, § 3.1.1.

Procedural Elements

When displacement occurs, a number of procedural measures may be needed to facilitate and safeguard access to education for IDPs.

Data Collection, Assessment and Analysis

Effective emergency education programs that meet the needs of disaster-affected populations must be based on a clear understanding of the context. Initial assessments must analyze the nature of the emergency and its effect on a population. The capacities of affected people and available local resources should be identified at the same time as assessing their needs and vulnerabilities and any gaps in essential services.⁶¹ Reports should indicate, for example, the number of over-sized classes at the different levels of schooling.⁶² To ensure the effectiveness of programs, emergency education assessments must include the participation of not only the emergency-affected community but also the local government and humanitarian actors. Based on the data collected, a framework for an education response should then be developed, including a clear description of the problem and a strategy for action, specific elements of which may need to include the specific procedural measures indicated below.

Flexible Implementation of Documentation Requirements

Documentation requirements for school enrollment should be flexible and in no cases should they prohibit a child from receiving an education. Any documentation requirements must be reasonable. In Sri Lanka, for example, the Ministry of Education was pressed to issue a national circular relaxing for IDP children the formal registration requirements that were impeding their enrollment in school.⁶³ Generally, including in situations of internal

⁶¹ Minimum Standards for Education in Emergencies, *supra* note 35, at 12, 21-22.

⁶² *Id.* at 67.

⁶³ Manual on Field Practice in Internal Displacement, at 49 (1999).

displacement, safeguards must be in place to ensure that identity documentation and enrollment information is kept confidential.⁶⁴

Recognition of Teacher Qualifications

National education systems generally require the licensing of teachers as a means of ensuring minimum standards of professionalism. In an emergency, the aim should be to recruit qualified teachers with recognized qualifications and expedite their deployment to affected areas.⁶⁵ In the event that teachers' certificates or other documents attesting to their qualifications have been lost or destroyed as a result of the emergency, alternative means of verification, such as testing of applicants, can be introduced. Where the requirements for teacher qualifications vary from one part of the country to the other, a system of mutual recognition would facilitate the deployment of teachers, including displaced teachers.⁶⁶ In some situations, particularly in cases of mass displacement, the usual national standards may need to be adapted and relaxed in order to ensure the necessary resources are in place to enable IDPs' education. In order to ensure that displaced populations do not receive an inferior education, however, such flexible requirements must be temporary and carefully monitored.

Waiver of School Fees at the Primary Level and Support for Continued Education

International law prescribes that primary education should be free in all circumstances (although in practice this obligation is not always respected). Beyond primary education, school fees lawfully legitimately may apply. The

⁶⁴ Minimum Standards for Education in Emergencies, *supra* note 35, at 43.

⁶⁵ *Id.* at 60.

⁶⁶ *See, e.g.*, Agreement, Meeting of the Conference of the Ministers of Education of Bosnia and Herzegovina, Sarajevo (May 10, 2000), art. 7; United States of America, Title IV (commonly known as the Hurricane Education Recovery Act) of Division B of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Public L. No. 109-148); 119 Stat. 2680, § 104(a)(1)(B).

affect of levying fees, however, may be to limit access to education for those without the means to afford these fees and other associated costs. In some instances it may be possible to implement pro-active schemes, such as the provision of education scholarships, to students who otherwise may have to work or provide for themselves and their families. It is important that such measures for IDPs are implemented in the context of a holistic approach that also facilitates access to education for children from similarly impoverished non-displaced communities.

Provision of Education Materials

Where the cost of uniforms, books, and other related materials prevents IDP and other students from attending school, subsidies (whole or partial) for these materials can greatly improve access to education. In Azerbaijan, for example, the law on displacement stipulates that displaced persons who are attending secondary school are to be provided with textbooks and other educational materials free of charge.⁶⁷ In Georgia and Afghanistan, similar provisions exist.⁶⁸

Provision of Basic Education in the Language of the Displaced

Displacement may result in the movement of a linguistic group into an area in which their language is not spoken. In such circumstances, one option is to establish classes in which the core competencies are taught in the language of minority groups. However, when taken to the extreme, such as in the “2 schools under 1 roof” system in Bosnia and Herzegovina, such an approach risks reinforcing ethnic divisions, discrimination, and the marginalization of

⁶⁷ *Id.*

⁶⁸ Decrees of the president of Georgia, No. 685 of Oct. 24, 1996, No. 614 of Oct. 31, 1998, No. 64 of June 4, 1999, cited in *The Guiding Principles on Internal Displacement and the Law of the South Caucasus: Georgia, Armenia and Azerbaijan*, *supra* note 59; see also the Norms on the Resettlement of the Internally Displaced Populations, Afghanistan, art. 8.

the minority groups.⁶⁹ To avoid this, it is important that in addition to any classes offered in the minority language, students can also learn the primary language and have the opportunity to take part in the mainstream classes should they choose. This is also essential to safeguarding in practice their right to continue to have access in the long-term to the full range of educational, and consequently employment, opportunities available in the country.

Effective Student Assessment and Evaluation Methods

Effective student assessment and evaluation methods should be established. These should provide IDP children who have lost their school records and certificates of educational achievement with the opportunity, through for example special written tests, to prove their educational progress and have access to education matching their level of ability.

Special Measures to Ensure Access to Education by all Regardless of Gender, Work Responsibilities or Other Factors

For students with outside responsibilities such as work or family care, flexible scheduling, including variable school hours and shifts, as well as outreach education programs, should be considered.⁷⁰ Girls who are pregnant or have child-care responsibilities must not be prevented from continuing their education; indeed, positive steps should be taken to encourage the involvement of all girls and women in education. For example, child-care facilities should be provided adjacent to schools in order to facilitate young mothers' participation.⁷¹

⁶⁹ The Special Rapporteur, *Report of the Special Rapporteur on the Right to Education*, ¶¶ 93-97, U.N. Doc. A/HRC/8/10/Add.4 (May 27, 2008); Concluding Observations: Bosnia and Herzegovina, Committee on the Rights of the Child, ¶ 58(a), CRC/C/15/Add.260 (Sept. 21, 2005).

⁷⁰ Minimum Standards for Education in Emergencies, *supra* note 35, at 43.

⁷¹ UNHCR Education: Field Guidelines, *infra* note 85, at 1.3.6.

In The Context of Durable Solutions

Guiding Principle 28(1) affirms that competent authorities have the primary duty and responsibility to establish conditions and provide the means for IDPs' voluntary return or resettlement in safety and dignity. Any plan for return or resettlement must ensure access to education. For example, the Law for the Internally Displaced in Peru expressly recognizes this.⁷² In Angola, the Norms on Resettlement of Displaced Populations expressly affirm the right to education for IDPs, including those who have returned and resettled.⁷³

Revision and adaptation of educational curricula can also be an important step towards facilitating durable solutions to displacement, particularly in cases of displacement induced by conflict or systematic violations of human rights. Curricula should be adapted so as to contribute to rebuilding the social fabric and easing any ethnic, religious, or other tensions that may have brought about the conflict and displacement in the first place. In the short term, when a pre-existing curriculum is used, controversial elements should be omitted and there should be ongoing monitoring to identify and eliminate any messages of hate and revenge. In the long term, in order for reconciliation through education to be effective, it is imperative that all ethnic, religious, and cultural groups and their traditions be reflected in a newly developed curriculum. Just as the curriculum requires careful assessment for ethnic or other bias, so, too, do the textbooks from which that curriculum is taught.⁷⁴

Revised curricula and updated textbooks are two steps towards substantive improvement in the delivery of education to reflect changed school demographics and to promote respect for difference. Another step is to ensure that the composition of the teaching staff reflect those changed demographics

⁷² Law for the Internally Displaced, Law 28223, art. 15(h), May 20, 2004.

⁷³ See Angola, Norms on the Resettlement of Displaced Populations, Decree 1/01 of 5 Jan. 2001.

⁷⁴ See, e.g., Agreement Regarding Textbook Review and Removal of Offensive Materials, Bosnia and Herzegovina, May 18, 1998; Agreement on the Review of Textbooks, Dec. 14, 2001, Sarajevo; National Framework for Relief, Rehabilitation and Reconciliation in Sri Lanka, June 2002, at 12.

following IDP return or resettlement. Moreover, where gender or other imbalances exist, targeted teacher training should seek to increase the number of women teachers or teachers from minority communities.⁷⁵

Displacement and conflict, particularly when they are prolonged, can cause significant disruptions in a child's education. In some instances, children may not receive any formal education over the course of several years. If, and when, these children are able to resume their education, they are likely to be placed not in a class of their peers, but with much younger students in lower grades, which is both demeaning to these children and can result in social tensions and psychosocial problems. To address this issue, age limits should not be enforced for emergency-affected children and youth. Special school programs should be developed that compress a standard primary or secondary education into a shorter period. Such bridging programs and accelerated courses will allow students who are behind on their education to catch up to their peers. In addition, second-chance enrollment for dropouts should be permitted.⁷⁶

In order to respond to the needs of the displaced as they return or resettle, a flexible approach should also be taken to certain educational and administrative requirements. For example, in Bosnia and Herzegovina, the authorities agreed to open schools in return areas even in cases where there

⁷⁵ See, e.g., Agreement, Meeting of the Conference of the Minister of Education of Bosnia and Herzegovina, May 19, 2000, Sarajevo, ¶ 6; National Framework for Relief, Rehabilitation and Reconciliation in Sri Lanka, June 2002, at 12.

⁷⁶ Inter-Agency Network for Education in Emergencies, *Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction*, at 43-44 (2004). Consider, for example, the case of Somaliland in which the Ministry of Education, in collaboration with Save the Children UK and Denmark, launched a condensed lower primary education program, whereby the usual four years of primary education can be completed in three years, with the aim being that after three years the pupils be channeled into the formal education system: *The Government Education Policy for Kamaiya Children is Faulty*, MS-Nepal Newsletter 2002, Issue 2.

was not the minimum number of students for a school, as prescribed by the law.⁷⁷

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Realization of the right to education depends very much on the existence of an effective institutional infrastructure to administer and provide for educational needs. This infrastructure is likely to be heavily strained or even damaged as a result of the circumstances creating internal displacement. In addition, displacement generally creates additional needs that demand not only the development of new legal or policy norms, but may also necessitate the creation of new institutional capacities or mandates.

Prior to Displacement

Prevention and Contingency Planning

While conflicts and natural disasters may not always be preventable, steps can be taken to reduce the vulnerability of educational institutions and thereby reduce the disruption that a conflict or disaster may cause to students' education. Disaster prevention or management laws usually designate the Ministry of Education as the primary national authority responsible for reducing the risks to access to education.⁷⁸ The Ministry also usefully can be tasked with coordinating the appointment and activities of disaster control groups or reaction teams within schools⁷⁹ as well as ensuring the safe

⁷⁷ Implementation Plan for the Interim agreement on accommodation of specific needs and rights of returnee children, Sarajevo, Mar. 5, 2002, art. II(2).

⁷⁸ See Reglamento de asignación de funciones del sistema nacional para la prevención, mitigación y atención de desastres a las instituciones del estado, Decreto No. 98-2000, Nicaragua, art. 6(g); Ordinance on Prevention and Control of Floods and Storms and Implementation Provisions, No. 09-L/CTN, March 20, 1993, art. 26(10).

⁷⁹ See Presidential Decree No. 1566, Strengthening the Philippines Disaster Control, Capability and Establishing the National Program on Community Disaster Preparedness, sect. 5(e).

stockpiling of supplies, including copies of the curriculum and all textbooks in use.

Advanced Training on Education in Emergencies

Key personnel in schools and relevant government ministries need to be trained in issues relating to emergencies and education as a means of ensuring they are able to prepare for and respond quickly and effectively in the event of an emergency. To this end, the Inter-Agency Network for Education in Emergencies (INEE) has developed training materials and is implementing a global training program on Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction.⁸⁰

During Displacement

Identification of Institutional Responsibility for IDP Settlements/Camps

Where the focus is on providing educational services in IDP camps and settlements, it is essential that institutional responsibility for the administration and oversight of these facilities be clearly identified. Generally, the Ministry of Education should be responsible for coordinating, for example, the provision of teachers and materials for camps.⁸¹ In other cases, district or provincial authorities may be given the responsibility of organizing the provision of education in camps and settlements. The choice of appropriate institution will depend on the institutional structure and competencies normally in place, particularly whether the regulation of education is centralized in the national authorities or decentralized.

⁸⁰ See Allison Anderson & Dean Brooks, *Implementing Minimum Standards for Education in Emergencies: Lessons from Aceh*, 32 HUMANITARIAN EXCHANGE 23 (2005).

⁸¹ UNHCR Afghanistan, *Strategy for Support to Internally Displaced Persons in the Southern Region in 2005 and 2006*, July 2005, available at [http://www.internal-displacement.org/8025708F004_CE90B/httpDocuments/AA74BFD49ED7626FC12570C700513CB7/\\$file/IDPSTRATATKDH05.pdf](http://www.internal-displacement.org/8025708F004_CE90B/httpDocuments/AA74BFD49ED7626FC12570C700513CB7/$file/IDPSTRATATKDH05.pdf). See also Law of the Azerbaijan Republic on social protection of forcibly displaced persons and persons equated to them, May 21, 1999, art. 11.

Creation of Unit Dedicated to Monitor and Address Educational Needs of the Displaced

Particularly in situations of large-scale displacement, the creation of a unit within the Ministry of Education dedicated to monitor and address the education needs of the displaced can facilitate consideration and coordination of IDPs' educational needs.⁸² The personnel who comprise the unit should be sensitized to the obstacles that IDPs often face in accessing education; they should be aware of IDPs' rights, and be familiar with the Minimum Standards for Education in Emergencies. They should involve all stakeholders including students, parents, and teachers, when making their assessments of the education system and before implementing any decisions that would affect the education of displaced students.

Creation of Community Education Committees

The INEE Minimum Standards for Education in Emergencies as well as the UNESCO Guidelines for Education in Situations of Emergency and Crisis recommend the creation of Community Education Committees (CEC).⁸³ The role of the CEC is to identify and address the educational needs of a community, with representatives drawn from parents and/or parent-teacher associations, local agencies, civil society organizations, community organizations, and youth and women's groups, among others, as well as teachers and learners. As such, a CEC can act as a point of liaison between the IDP community and the Ministry of Education and other relevant institutions. Such committees should be established in IDP camps as well as in areas of IDP return or resettlement. The committee must be inclusive and balanced and should reflect the diversity of the affected population. The CEC should be statutorily recognized and legally registered.

⁸² See, e.g., Interim agreement on accommodation of specific needs and rights of returnee children, Sarajevo, March 5, 2002 and Implementation Plan for the Interim agreement on accommodation of specific needs and rights of returnee children, Sarajevo, March 5, 2002, art. V(5).

⁸³ Minimum Standards for Education in Emergencies, *supra* note 35, at 15-16; Bensalah, *supra* note 35, at 26.

Sustaining an Adequate Number of Teachers

Ensuring the sustainability of the teaching staff is essential for the continuity of education for all students. What is considered an “adequate” number of teachers for any particular country or region must be set by national or local authorities. The maximum class size must be realistic, and every effort must be made to recruit sufficient teachers to avoid major deviations from this standard.⁸⁴

Where financial resources for salaries are strained, a temporary measure may be to develop, in consultation with teachers, alternative remuneration schemes. For example, in IDP return areas, compensation for teachers’ services might initially come in the form of access to plots of land, tools, seed, small livestock, etc.⁸⁵ Compensation for teachers’ services should be at a level that ensures professionalism and continuity of service.

A policy of prioritizing the hiring of trained IDP teachers may also add to the sustainability of the workforce, while providing IDP teachers with income. Hiring IDP teachers can help to support the displaced population and ensure teaching staff that are personally aware of, and sensitive to, the challenges faced by the displaced and who, therefore, should be able to provide the practical and psychological support needed by IDP children.

Affirmative Action in the Training and Appointment of Female Teachers

It often will be appropriate to proactively recruit female teachers and to adjust the recruitment criteria or process to promote gender parity.⁸⁶ The employment of female teachers and/or teaching assistants is important as it provides role

⁸⁴ Minimum Standards for Education in Emergencies, *supra* note 35, at 67.

⁸⁵ UN High Commissioner for Refugees, UNHCR Education: Field Guidelines, Feb. 2003, 2.2.7., available at <http://www.unhcr.org/refworld/docid/3f1d38124.html>.

⁸⁶ Minimum Standards for Education in Emergencies, *supra* note 35, at 66.

models for girls. The presence of female teachers also enhances protection of girls from sexual harassment by male pupils and teachers.⁸⁷

Development of Teacher Training Programs to Meet the Needs of the Crisis

Teacher training programs undertaken in the midst or aftermath of a crisis should address the challenges of value-based education during times of emergency and should incorporate life skills and peace education, as needed.⁸⁸ It is essential that teacher training courses are well structured and well documented, and meet the teacher qualification requirements of the education authorities, as well as including any additional components related to the emergency.⁸⁹ All education personnel, formal and non-formal, should be trained in recognizing signs of distress in learners and steps to take to address and respond to this behavior in the learning environment.⁹⁰ In addition, it is good practice to institute a code of conduct for teachers and educational personnel with the aim of ensuring that schools are safe places, where children are safe from sexual harassment and sexual exploitation and that the teachers behave in a professional manner at all times.⁹¹ Training in the code of conduct should be provided as part of teacher training courses and the code distributed to all educational personnel, whether or not they have been formally trained in its contents.

Supplementary Teacher Training Programs

Teacher training facilities may be damaged or strained as a result of a crisis causing displacement, and may need to be substituted or supplemented. Teacher training can be carried out in a variety of flexible ways including in-service and full-time training, mobile trainers, in-school mentoring, school

⁸⁷ UNHCR Education: Field Guidelines, *supra* note 85, at 1.3.5.

⁸⁸ Minimum Standards for Education in Emergencies, *supra* note 35, at 60.

⁸⁹ *Id.* at 60.

⁹⁰ *Id.* at 58.

⁹¹ UNHCR Education: Field Guidelines, *supra* note 85.

cluster arrangements, and teachers' centers.⁹² Such programs should aim to reach all displaced teachers, including in camps.⁹³ When large numbers of teachers are killed, missing, debilitated, or otherwise unable to resume their duties, rapid training programs are required.⁹⁴

Ensuring a Safe Learning Environment

The state has the obligation to ensure the security of all those under its territorial jurisdiction. When educational institutions are at risk or the access routes are unsafe for students, the state should provide effective policing or other measures to ensure protection and that access routes are safe and secure for all students and education personnel.⁹⁵ The National Education Law of Guatemala, for example, provides for the protection of "educational communities," stipulating that the Ministry of Education should ensure that educational institutions do not suffer any intervention from political parties or the military.⁹⁶

Reconstruction of Schools and Provision of Alternative Shelter

Education need not take place within formal school structures, and in an emergency setting this may not be an option if schools have been destroyed. As an immediate and interim measure, school shelter support, including tents, should be provided to enable the creation of learning spaces. The goal, however, should be the building or rebuilding of schools, which should have priority coverage in programs to address water and sanitation needs.⁹⁷

⁹² Bensalah, *supra* note 35, at 24.

⁹³ See, e.g., UN Office for the Coordination of Humanitarian Affairs, *Consolidated Inter-Agency Appeal 2004—Chechnya and Neighboring Republics*, Nov. 2003.

⁹⁴ See, e.g., Anderson & Brooks, *supra* note 80, at 22.

⁹⁵ Minimum Standards for Education in Emergencies, *supra* note 35, at 45.

⁹⁶ National Education Law, Legislative Decree No. 12-91 (Jan. 12, 1991), art. 100.

⁹⁷ UNHCR Education: Field Guidelines, *supra* note 85, at 2.3.5.

Support to Host Schools

Generally, the preference is for IDPs to be integrated into local community schools. Where IDPs are dispersed within the local community, this is essential. Moreover, local schools will likely have the basic necessary infrastructure, including school buildings and teachers, which simply will not exist in IDP camps and settlements. To be sure, these schools will need additional support. A significant influx of students to one area can cause overcrowding in local schools and can be a practical and financial burden on the host school. The risk in such a situation is that schools will become reluctant to accept internally displaced children. States, therefore, should take the necessary budgetary measures to compensate or otherwise channel additional resources to schools that accept large influxes of displaced children.⁹⁸

Provision of Funding to Support Education in Emergencies

Rapid educational response in emergencies requires quick access to funding, for example, emergency reserves. Funding during protracted emergencies should be sufficient to support education for children and youth that will permit them to continue their progress through a normal school program.⁹⁹ In addition, flexibility in funding, possibly by means of a special fund, would enable reconstruction and re-supply to be undertaken as, and when, emergency-affected areas become accessible.¹⁰⁰

⁹⁸ See, e.g., United States of America, Title IV (commonly known as the Hurricane Education Recovery Act) of Division B of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Public Laws 109-148); 119 Stat. 2680, Section 107(e)(1).

⁹⁹ Minimum Standards for Education in Emergencies, *supra* note 35, at 44.

¹⁰⁰ Bensalah, *supra* note 35, at 25.

Facilitating Access for International Assistance when National Capacity is Insufficient

In particular in crisis situations, the United Nations and international non-governmental organizations often provide critical support to national education efforts. Guiding Principle 25(2) states that “international humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced.” What needs to be emphasized is not just the right of such organizations to offer support, but the obligation on the part of state authorities to not arbitrarily withhold their consent to such assistance, particularly when they are unable or unwilling to provide the required humanitarian access.¹⁰¹ As noted earlier, under the key international as well as regional instruments guaranteeing the right to education, states parties commit to “undertake all appropriate legislative, administrative and other measures” for the implementation of this right “to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”¹⁰²

In the Context of Durable Solutions*Creation of Representative Curriculum and Textbook Review Body*

In the event that a curriculum review is undertaken, a suitable body needs to be established that can effectively represent the views of the diverse constituent groups in society. A similar approach should be taken in relation to textbook review. In Bosnia and Herzegovina, a Curriculum Harmonization Board was created. Members of the Board included one representative of the Ministry of Education, one representative from a pedagogical institute of each ethnic or minority community, and representatives of the international community.¹⁰³ Separate expert groups were formed to conduct a review of

¹⁰¹ *Guiding Principles on Internal Displacement*, principle 25(2).

¹⁰² CRC, art. 4. *See also* ICESCR, art. 2; ACHR, art. 1.

¹⁰³ Agreement, Meeting of the Conference of the Minister of Education of Bosnia and Herzegovina, May 10, 2000, Sarajevo, ¶ 2, available at <http://www.unhcr.ba/protection/refugees&dp/10maya%7E1.pdf>.

textbooks to ensure they did not include any material offensive to the goals and multi-ethnic makeup of the state.¹⁰⁴

Revision of Laws Concerning Composition of School Boards

In a further effort to ensure that institutional infrastructure reflects changed student demographics, laws governing the composition of school boards should be revised and amended as necessary to ensure that the composition of the boards reflects the composition of the school population.¹⁰⁵ In situations of IDP return or resettlement, it may be appropriate in the initial phase to ensure that the boards include representatives of the IDP community.

INTERNATIONAL ROLE

The international community can contribute to the promotion and protection of the right of IDPs to education in a number of ways. International and regional human rights mechanisms play an especially important role in monitoring state compliance with human rights standards. They can assist with identifying gaps in legislation and implementation; recommend legal, procedural, and institutional reform; and provide technical assistance in the development of laws and policies to ensure respect for the right of IDPs to education.

Several monitoring mechanisms exist within the UN and regional human rights systems. Some depend on a country's ratification of a particular human rights treaty. Of particular relevance are the UN Committee on the Rights of the Child and the UN Committee on Economic, Social and Cultural Rights, which are responsible for monitoring the implementation of their respective treaties by state parties. In a number of cases, the Committee on the Rights of the Child has drawn attention to the right of IDP children to education and the

¹⁰⁴ Agreement Regarding Textbook Review and Removal of Offensive Material, Bosnia and Herzegovina, May 18, 1998; Agreement on the Review of Textbooks, Dec. 14, 2001, Sarajevo.

¹⁰⁵ Implementation Plan for the Interim agreement on accommodation of specific needs and rights of returnee children, Sarajevo, Mar. 5, 2002, article VI(9)(b).

application of the *Guiding Principles*.¹⁰⁶ The Committee on Economic, Social and Cultural rights has also on occasion referred to the challenges faced by IDPs in accessing education.¹⁰⁷

A number of thematic special mechanisms of the UN Human Rights Council also are relevant. The mandate of the UN Special Rapporteur on the right to education is of particular importance. Educational issues for IDPs also can be addressed by the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons. Also relevant is the mandate of the Special Representative of the Secretary-General for Children and Armed Conflict. This mechanism has devoted significant attention both to issues of education in conflict as well as to the situation of IDPs, often linking the two issues.¹⁰⁸

¹⁰⁶ See, e.g., Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Uganda, ¶ 63, U.N. Doc. CRC/C/UGA/CO/2 (Nov. 23, 2005); Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Croatia, ¶ 60, U.N. Doc. CRC/C/15/Add. 243 (Oct. 1, 2004); Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Turkey, ¶ 60, U.N. Doc. CRC/C/15/Add.152 (July 9, 2001).

¹⁰⁷ See, e.g., Committee on Economic, Social and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights: Serbia and Montenegro, ¶¶ 37, 64, U.N. Doc. E/C.12/1/Add.108 (June 23, 2005); Committee on Economic, Social and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights: Georgia, ¶¶ 12, 31, U.N. Doc. E/C.12/1/Add.83 (Dec. 19, 2002).

¹⁰⁸ The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the General Assembly*, U.N. Doc. A/55/442 (Oct. 3, 2000); The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the General Assembly*, U.N. Doc. A/57/402 (Sept. 24, 2002); The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the General Assembly*, U.N. Doc. A/58/328 (Aug. 29, 2003).

At the operational and programmatic level, international organizations and donor governments can provide valuable practical, technical, material, and financial support to educational programming. In addition to assistance in the development of educational infrastructure, this support might include, for example, technical assistance in the drafting of education legislation and the development of curricula.

As regards emergency education, three international agencies have particular expertise and competence: the United Nations Children's Fund (UNICEF), the United Nations High Commissioner for Refugees (UNHCR) and, though less directly operational in nature, the United Nations Educational Scientific and Cultural Organization (UNESCO).

UNICEF has lead responsibility in the international response to education in humanitarian emergencies. Activities undertaken in this regard include: setting-up temporary learning spaces and re-opening schools; supporting the educational re-integration of teachers and children (with a focus on girls); providing learning materials; and organizing recreational activities.¹⁰⁹ Following the immediate emergency phase, UNICEF's role includes promoting the resumption of quality educational activities in the areas of literacy, numeracy, and life skills such as HIV/AIDS prevention and hygiene, as well as establishing community services around schools such as water and sanitation. Another form of support offered by UNICEF is the distribution of pre-packaged kits containing school supplies and teaching materials aimed at swiftly providing short-term literacy and numeracy education during the early emergency phase. Sometimes referred to as "school-in-a-box" kits, the appropriateness of these generic kits has sometimes been questioned on the basis that they do not take into account the particular social context and scholastic traditions of the society and students.¹¹⁰ Any decision about the use of these kits should be taken only after appropriate consultation with national authorities and the communities affected.

¹⁰⁹ Core Commitments for Children in Emergencies, UNICEF, Mar. 2005, at 13-14.

¹¹⁰ Marc Sommers, *Educating Children During Emergencies: A View from the Field*, Women's Commission for Refugee Women and Children (1999).

UNHCR's role in ensuring educational opportunities among displaced populations is principally focused on refugees, in line with its statutory global responsibility for providing assistance and protection to refugees. However, within its *UNHCR Education: Field Guidelines*, a clear role is identified for UNHCR with regard to the provision of education for the internally displaced as well. This role, which necessitates close coordination with UNICEF, includes assisting local schools to accommodate substantial influxes of IDP students; promoting curriculum design aimed at countering the trauma and stress suffered by IDP children; and support for the construction of low-cost semi-permanent schools and the provision of teacher incentives.¹¹¹ Moreover, in light of UNHCR's recently specified lead responsibilities for the protection of conflict-induced IDPs as well as for camp coordination and management in IDP situations, it will be important for UNHCR to devote close attention to issues of IDP education.

UNESCO's role in supporting educational programming in situations of internal displacement and humanitarian crises generally is more limited and less direct when compared with the role of UNICEF and UNHCR. Among UNESCO's more direct contributions in conflict-affected countries are those made through its Program for Education for Emergencies and Reconstruction (PEER) unit, which devises educational programming and interventions in the Horn of Africa, but which as of yet have not been systematically replicated in other regions of the world.¹¹² UNESCO nonetheless has become increasingly involved in research on education responses in emergency and conflict situations. In 2006, UNESCO's International Institute for Educational Planning developed the *Guidebook for Planning Education in Emergencies and Reconstruction* (the *Guidebook*).¹¹³ The *Guidebook*, which aims to support educational authorities in providing equal access to quality education for children affected by conflict or disaster, makes extensive references to the

¹¹¹ UNHCR Education: Field Guidelines, *supra* note 85, at 3.1.4, 4.1.2.

¹¹² Marc Sommers, *Children, Education and War: Reaching Education For All (EFA) Objectives in Countries Affected by Conflict*, Working Paper No. 1, World Bank, at 13 (2002).

¹¹³ *Guidebook for Planning Education in Emergencies and Reconstruction*, UNESCO/IIEP (2006).

challenges faced by IDPs and provides suggestions for how best to address those challenges.

Another UN agency that provides critical support underpinning the work of UNICEF, UNHCR, and others is the World Food Program (WFP). In many situations, WFP provides food for students and teachers, usually in the form of school meals, as part of its general emergency response. WFP's school feeding programs and food-for-work schemes for teachers in emergency settings provide critical support facilitating access to education. In the immediate aftermath of the tsunami of December 2004, for example, WFP provided food to those affected by the devastation, with particular attention paid to the internally displaced who were living in schools, mosques, hospitals, with host families, and in remote communities.¹¹⁴ Following the immediate response phase, WFP implemented school feeding programs in all tsunami-affected countries.¹¹⁵

In addition to the work of UN agencies, numerous international NGOs are actively engaged in supporting educational programs for refugee and internally displaced children. Chief among these are the International Rescue Committee (IRC) and the International Save the Children Alliance. In 1997, the IRC founded its Program for Children Affected by Armed Conflict, among the main activities of which is ensuring education in emergency environments.¹¹⁶ Save the Children also has an extensive history of working on issues of education in conflict and other emergency environments. Education-related activities carried out by the organization range from feeding programs to the development of informal and flexible educational programs to meet the needs of children who would otherwise not be able to attend school for reasons, for example, of work or family obligations.¹¹⁷ Globally, Save the

¹¹⁴ World Food Programme: Annual Report 2004, WFP, at 26.

¹¹⁵ World Food Programme: Annual Report 2005, WFP, at 20-22.

¹¹⁶ IRC Child & Youth Education Fact Sheet, July 2005, at 2.

¹¹⁷ Hope and Opportunity: International Save the Children Alliance Annual Report (2005).

Children has issued recommendations to governments and donors for how to address the challenges faced by children in conflict-affected countries.¹¹⁸

At the UN World Summit in 2005, heads of state and governments pledged that “children in armed conflicts [will] receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society.”¹¹⁹ Donors, however, traditionally have been reluctant to fund education in humanitarian disasters, considering this to be an issue of development rather than emergency relief. There is some indication this approach is beginning to change.¹²⁰ Overall, however, it remains the case that support for education in emergencies, including for IDPs, continues to be severely under funded.¹²¹

In addition to financial support, donors also have been urged to take an active interest in ensuring both the quality and coverage of emergency education response, including the enrollment and retention of learners from vulnerable groups.¹²² The United Kingdom’s Department for International Development (DFID) has issued a study on the impact of conflicts on education with a view to enhancing the effectiveness of its education interventions.¹²³ The Swedish International Development Agency (SIDA) has produced guidelines for

¹¹⁸ Save the Children, *Rewrite the Future: Education for Children in Conflict-affected Countries*, at 35 (2006).

¹¹⁹ G.A. res. 60/L.1, ¶ 132, U.N. Doc. A/60/L.1, (Sept. 15, 2005), art. 118.

¹²⁰ Susan Nicolai & Carl Triplehorn, *The Role of Education in Protecting Children in Conflict*, HUMANITARIAN PRACTICE NETWORK PAPER 16-17 (2003).

¹²¹ Women’s Commission for Refugee Women and Children, *Global Survey on Education in Emergencies*, at 24 (2004). See also Save the Children, *Last in Line, Last in School: How Donors are Failing Children in Conflict-affected Fragile States* (2007).

¹²² Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction, Inter-Agency Network for Education in Emergencies 24 (2004).

¹²³ DFID, Education, Conflict and International Development, Feb. 2003.

humanitarian assistance in the education sector.¹²⁴ Both publications refer to the situation of internally displaced children, with the DFID study making particularly detailed observations about the challenges faced by internally displaced children and the priorities of humanitarian actors in addressing these challenges.

The World Bank, for its part, has suggested a framework by which states can be guided in reconstructing the education system in conflict-affected countries. First, states must adopt sound policies and possess committed leadership. Secondly, the state must have an adequate operational capacity at all levels to translate sound policies and strong leadership into effective action. Thirdly, financial resources must be made available to support effective programs. Finally, attention must be paid to results and accountability for learning and outcomes.¹²⁵

SUMMARY OF RECOMMENDATIONS

To protect the right to education in situations of internal displacement and ensure equal access and enjoyment of the right to education among IDPs, domestic legislators and policy-makers in countries affected by, and at risk of, displacement would do well to take a number of specific steps. These include:

1. Review all relevant domestic legislation, policies, and administrative guidelines, including but not limited to general education legislation and policy as well as IDP-specific legislation and policy, to assess their impact on the right to education for IDPs;
2. Identify any legislative and administrative barriers needing to be addressed to enable IDPs to access education on par with other persons in the country;
3. Develop and adopt the necessary legislative, procedural, and administrative reforms to ensure that IDPs enjoy equal and unhindered access to free primary

¹²⁴ SIDA, *Guidelines for Humanitarian Assistance in the Education Sector*, 2002.

¹²⁵ World Bank, *Reshaping the Future: Education and Postconflict Reconstruction*, at 30 (2005).

education and are able to access education and attain the same educational standards on par with the population;

4. Prepare for the possibility of displacement by developing contingency planning for education in emergencies as well as procedural safeguards and institutional capacity to enable continued access to education in the context of emergencies, including displacement;

5. Prioritize education at the earliest stages of an emergency concurrently with the provision of humanitarian assistance, including by providing, with international support if required, educational services including in IDP camps and settlements;

6. Relocate IDPs from temporary emergency shelters in schools and other educational facilities into adequate and appropriate alternative accommodation as soon as possible;

7. Issue replacement identity documentation to IDPs as soon as possible and without unreasonable conditions, such as having to return to the place of origin;

8. Relax registration requirements for school enrollment to take into account the particular challenges faced by IDPs, including loss of identity documentation and school records or transfer papers that under normal circumstances may be required for school registration;

9. Recognize IDP teachers' certification and, in the event of teacher shortages, adapt certification processes and training programs and provide incentives to expedite direct teaching resources to areas affected by internal displacement as temporary measures, while ensuring quality education;

10. Sensitize teachers through training and other means to the particular needs of IDPs, including their psycho-social needs and potential risks for discrimination;

11. Ensure, both during displacement as well as upon return or resettlement, that IDPs have access to education without discrimination of any kind and in a language that they understand;
12. Provide opportunities for accelerated learning for IDPs and others whose education was disrupted by conflict or disaster as well as alternative schooling (e.g., evening classes) or skills-training programs for IDP children and adolescents whose household or economic obligations impede regular school attendance;
13. Adopt special measures for IDPs, such as exemption from school fees, creation of scholarship schemes, provision of learning materials and other resources (e.g., uniforms), and support (e.g., meals, transportation) free of charge where necessary to overcome the particular obstacles that IDPs face in accessing education;
14. Monitor and report on IDPs' access to education in reporting to the UN treaty bodies, in particular to the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights, taking into account recommendations made by these bodies and other international and regional human rights mechanisms when revising domestic legislation and policy;
15. Call upon expertise and technical support from the international community, in particular from UNICEF, NGOs specialized in education in emergencies, the UN Special Rapporteur on the Right to Education, and regional organizations' experts on the right to education as well as from the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons.

Chapter 8

Protection of Family Life

Karen Gulick*

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.

Chapter 9

The Recovery of Personal Documentation

Conor Foley and Barbara McCallin*

INTRODUCTION

The personal documentation of internally displaced persons (IDPs) is often lost during their flight from conflict or disaster. Many IDPs from marginalized groups may have never possessed such documents. IDPs' existing documents may also be invalidated as a result of changes to the legal or administrative regime.

The use of documentation varies widely from country to country as do the consequences of not possessing them. In many contexts, however, IDPs' access to benefits and legal rights are contingent on the production of documents such as identification cards, passports, birth and marriage certificates, educational diplomas, and certification of health and welfare rights or property title. In such cases, inadequate procedures to provide or renew missing or invalid documents for displaced persons can lead to violations of their rights.

Domestic procedures on issuance and recognition of documentation are rarely adapted to situations of forced displacement and frequently result in unforeseen obstacles for IDPs in obtaining or renewing personal documents. Missing documentation also presents an obstacle to return and other durable solutions, for example, in the case of disputes over property and inheritance rights, perpetuating the vulnerability of groups such as female-headed households or minorities whose members may have traditionally been less likely to possess documented rights (or be entitled to them in accordance with local practices).

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This chapter¹ addresses two categories of documents. Those related to the civil status of an individual, establishing family relations, identity, nationality, and property rights and those entitling IDPs to particular benefits in order to ameliorate their condition. Governments confronted with high numbers of IDPs with neither documentation nor evidence to establish their civil status will face serious difficulties in restoring all missing documentation. Consequently, many states opt to establish an IDP status for the purpose of dispensing certain rights and humanitarian assistance. The creation of an “IDP card” based on IDP status can be expedient for addressing emergency needs but is also associated with serious risks, including the possibility of creating a rigid legal category that arbitrarily excludes other *de facto* IDPs in need of assistance, complicates local integration, or serves to limit the rights that IDPs should enjoy on an equal basis with other citizens.

LEGAL FRAMEWORK

Relevant Guiding Principles

Principle 20 of the *Guiding Principles on Internal Displacement* (the *Guiding Principles*) provides that:

1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the

¹ This chapter is based on the experience of the Norwegian Refugee Council’s (NRC) Information, Counseling and Legal Assistance (ICLA) projects. It draws on Conor Foley’s ‘Study on the Recovery of Personal Documentation: the practice of the Norwegian Refugee Council,’ May 2006, which is available on the website of the NRC Internal Displacement Monitoring Centre: <http://www.internal-displacement.org>. Thanks to Paul Nesse (NRC) for reviewing the initial draft document.

course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.

3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Although Principle 20 of the *Guiding Principles* relates the “right to documents” specifically to the right to “recognition as a person before the law,” it could also be related to a broader set of human rights. The second paragraph of Principle 20 includes a non-exhaustive list of documents required to enjoy other rights such as education, adequate housing, health care, or other social benefits. Documents can also be necessary for the effective realization of liberty and security of the person, freedom of movement, the right to vote, and the right to property and possessions. The last of these issues is of particular importance when people have been arbitrarily evicted from their homes in the course of displacement or are seeking the restitution of their housing, land, and property rights.²

The accepted principle that human rights guarantees provided must be practical and effective suggests that where IDPs are denied substantive rights because they lack necessary documents, the authorities in question may, under certain circumstances, be under a positive obligation to remedy the situation.³ Guiding Principle 4 rules out discrimination of any kind and specifies that certain vulnerable IDP groups should receive protection and assistance that takes into account their special needs. Principle 3 affirms national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction and that IDPs have the right to request and to receive such assistance without being punished for doing so.

² See Chapter 10 of this volume on property rights.

³ KEIR STARMER, EUROPEAN HUMAN RIGHTS LAW, THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 193-209 (2000).

Relevant International Law

The right of every human being to be recognized as a person is widely recognized in international law.⁴ Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) specifically state that the right to “recognition everywhere as a person before the law” applies to all people “without distinction of any kind.”⁵ Indeed this right is considered to be such a basic prerequisite for the exercise of other individual rights that it is widely held to be non-derogable and is specifically designated as non-derogable in the ICCPR.⁶

International human rights law also provides certain specific safeguards for the right to legal recognition. The ICCPR provides that “every child shall be registered immediately after birth and shall have a name”⁷ while the Convention on the Rights of the Child (CRC) states that “where a child is illegally 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 speedily re-establishing his or her identity.”⁸ In addition, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

⁴ Universal Declaration of Human Rights [UDHR], art. 6; International Covenant on Civil and Political Rights [ICCPR], art. 16; American Convention on Human Rights [ACHR], art. 3; African Convention on Human and Peoples Rights [AfCHPR], art. 5; Convention on the Elimination of All Forms of Racial Discrimination [CERD], art. 5.

⁵ UDHR, art. 2; ICCPR, art. 16.

⁶ ICCPR, art. 4(2); ACHR, art. 27(2).

⁷ ICCPR, art. 24(2).

⁸ CRC, art. 8(2). *See also* Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986).

requires states parties to officially register marriages in order to ensure that the equal rights of both parties are fully respected.⁹

International refugee law and humanitarian law also set out specific obligations related to documentation. The 1951 Convention Relating to the Status of Refugees (the Refugee Convention) explicitly requires that the authorities “shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities,”¹⁰ and also to issue identity papers to refugees not possessing a valid travel document.¹¹ These documents should be accepted as proof of identity “in the absence of proof to the contrary.”¹² The Refugee Convention also states that rights “previously acquired by a refugee and dependent on personal status,” such as those related to marriage, shall be respected by contracting states.¹³

The Convention (IV) Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) requires occupying powers to “take all necessary steps to facilitate the identification of children and the registration of their parentage.”¹⁴ When civilians are interned by occupying powers, the Fourth Geneva Convention specifies that “family or identity documents in the possession of internees may not be taken away without a receipt being given, that internees shall never be left without identity papers, and that, if they do not possess any identity documents, the detaining authorities must issue them

⁹ CEDAW, art. 19(2); *See also* Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1964.

¹⁰ 1951 Convention Relating to the Status of Refugees [Refugee Convention], art. 25(2).

¹¹ *Id.* art. 27.

¹² *Id.* art. 25.

¹³ *Id.* art 12(2).

¹⁴ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949 [the Fourth Geneva Convention], art. 50(2).

special documents which will serve as their identity papers for the duration of their internment.”¹⁵ The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) also states that when children are evacuated to a foreign country, “the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross.”¹⁶

The right to non-discrimination dictates that women and men shall have equal rights to obtain necessary documents and have them issued in their own names. In refugee settings, for example, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has urged states to “issue individual identification and/or registration documents to all refugee women”¹⁷ and also called upon states and the UNHCR to “ensure the equal access of women and men to refugee status determination procedures and to all forms of personal documentation relevant to refugees’ freedom of movement, welfare and civil status.”¹⁸

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

A general obstacle to the implementation of Principle 20 is the frequent imbalance between state requirements, as prescribed by state law, directives and procedures for documentation to be held by those under its jurisdiction, and the state’s capacity and willingness to issue these documents. The lack of awareness or will of officials implementing these rules at the central or local

¹⁵ *Id.* art. 97(6).

¹⁶ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 78(3).

¹⁷ UNHCR Ex. Com. Conc. 64 (XLI) Refugee Women and International Protection, viii (1990).

¹⁸ UNHCR Ex. Com. Conc. 73 (XLIV) Refugee Protection and Sexual Violence, ¶ (c) (1993).

level, or even in some cases corruption, also contributes to the non-respect of regulations.

Conflicts or natural disasters often disrupt the regular functioning of institutions and put tremendous pressure on the system to deliver documentation to a large number of people through procedures that are not adapted to situations of mass displacement. This raises issues of resources, capacity, and procedures. Documents are usually issued on the basis of other documents or evidence proving the identity or status of a person. In the absence of exceptional procedures taking into account the fact that most displaced persons are unable to provide such evidence, there is a significant risk that displaced persons remain without documentation. In addition, civil and land registries are often incomplete (especially in informal societies) or have been destroyed or taken away during the conflict, which increases the difficulty for the authorities to establish the identity and status of a person and therefore issue new documentation. In Afghanistan, Sudan, Burundi, northern Uganda, and the Democratic Republic of Congo, for example, official registers of births, deaths, and marriages are frequently incomplete and significant sections of the population have never been issued official documents. This is particularly the case in rural areas, where indigenous people or certain ethnic minorities are less likely to be registered. Women are also disproportionately excluded from official records. Once displaced, the initial absence of documents increases their vulnerability and poses additional obstacles to proving their identity or qualifications and claiming their rights.

In such circumstances, governments may prefer to issue temporary documents or grant rights through IDP registration—and may even create for them a separate status. In this case, too, it can prove logistically difficult to differentiate displaced persons from other vulnerable categories in need of assistance. Also, in certain cases, displaced persons do not wish to be identified as such because they believe it would put them at risk. Linking assistance to registration and/or status might oblige IDPs to choose between their physical security and humanitarian assistance. Registration can be perceived as a threat if there is a suspicion that the data provided may be passed on to other agencies such as the armed forces, police, or military groups who may suspect them of affiliation with opposition groups.

Regulations that should facilitate recognition of individuals before the law and individual enjoyment of rights can instead become an unreasonable demand by the state and—correspondingly—an unreasonable burden of proof on the side of the individual. The imposition of deadlines for people to apply for certain types of documents, for example, can create problems for people who do not file a request on time for lack of information, or for practical or security reasons. Complex procedures, fees, and corruption are additional obstacles to IDPs' access to documentation.

Existing documents may have become invalid following regime change or division of the country. The will of the new authorities or breakaway regions to assert their power over their territory and population often result in the creation of new rules and requirements, including new documentation. At the same time, documents from the previous regime or breakaway region may be declared invalid, thereby depriving displaced persons of related rights. In such circumstances, IDPs can find themselves separated from their administrative records.

Kosovo is a good example of the difficulties created by the existence of competing systems and institutions within a country, and demonstrates how the issue of documentation can affect many aspects of life, from identity to ownership, education, work qualifications, and pension issues. Between the withdrawal of Serbian forces from Kosovo further to NATO air strikes in 1999 and Kosovo's declaration of independence in 2007, the United Nations Interim Administrative Mission in Kosovo (UNMIK), along with the Provisional Institutions of Self-Government (PISG), administered the province. The Serbian authorities do not recognize documents issued by UNMIK on the grounds that the province is still legally part of Serbia. Similarly, Kosovo Courts do not recognize birth, death, and other registry book certificates issued by the parallel registry offices in Southern and Central Serbia. Ownership certificates issued by those offices on the basis of land registry books relocated from Kosovo are also not recognized. For their part, registry offices in Southern and Central Serbia do not recognize certificates from the registry books that were kept in Kosovo after 1999. Administrative bodies in Serbia proper do not recognize the registration of births, deaths, and marriages in

Kosovo after 1999.¹⁹ Requests linked to property restitution or inheritance procedures are therefore made much more complex because they require multiple searches to obtain ownership and identity documents.²⁰

The lack of mutual recognition of documents in Kosovo can prevent IDPs from accessing other rights, in particular pension rights since working booklets proving the number of years of service are either lost or impossible to obtain. In the absence of adequate documentation, IDPs requesting pension benefits cannot enjoy the full amount to which they are entitled. Access to education can also be complicated where documents are not recognized.

Access to documents can also be affected by the need to travel long distance in order to reach the institutions in charge of delivering the documents. This raises issues of costs that not all IDPs can afford, as well as security concerns when the documents can only be retrieved in the place of origin or by crossing insecure areas.

When documents are required, IDPs often lack information and knowledge on which institutions to approach or procedures to follow in order to obtain them. This is particularly the case where civil recognition and ownership rely on customary systems of relations to land, neighbors, and local power structures and have not involved documents. Individuals and groups that culturally or traditionally did not need or use documents in their place of origin or habitual residence have limited experience in relating to formal and bureaucratic systems or institutions. The dispersal of these groups and traditional leaders may render the determination of identity and ownership particularly difficult. Natural disasters add another layer of complexity since physical reference points or boundaries such as poles, trees, or walls may have disappeared.

¹⁹ See reports and activities of Praxis, a Belgrade-based NGO offering legal assistance to the displaced of Serbia and Kosovo, at: <http://www.praxis.org.rs>.

²⁰ See reports and activities of Civil Rights Project, an Information Counselling and Legal Assistance program, run by the Norwegian Refugee Council.

REGULATORY FRAMEWORK

The regulatory framework related to documentation is highly contextual and will depend on the characteristics of the society where it applies. Some countries are highly regulated with large state bureaucracies, in which possession of personal documentation is not just a legal requirement, but also an absolute necessity to participate in social, political, and economic life. In others, while the state may theoretically require all citizens to possess personal documentation, the implementation is flexible and, in practice, this is not such a day-to-day necessity. The need and urgency of finding ways to issue new identification will largely be determined by the negative consequences that different societies impose on those who do not possess it. In some of the places where the Norwegian Refugee Council (NRC) has programs, such as parts of Sudan and Uganda, the Democratic Republic of Congo and Afghanistan, the state is so weak that most official functions, such as the issuing of personal documentation, have largely collapsed and so displaced people may be at no greater disadvantage than the settled population. Nevertheless, practical measures need to be taken to ensure that IDPs are not discriminated against with regard to certain rights which the settled population may find it easier to assert simply because they have lived in the same place for longer.

Local specificities will also determine whether the more appropriate way to address documentation issues is through general legislation, IDP-specific legislation, or at the policy level. While IDP-specific legislation can be proposed as a way to address the particular difficulties affecting the delivery of documents during displacement, it might be more time-efficient to use existing laws and propose adapted procedures through administrative instructions that can be prepared more quickly. An important variable is the centralized or decentralized nature of the state. In decentralized countries, the adoption of a framework legislation or policy might be necessary to ensure a consistent approach countrywide while at the same time accommodating regional specificities. A country with a centralized system can address the same issue directly either through amendment to the existing legislation or administrative instructions, which will apply throughout the country. Where relevant, customary law mechanisms should also be taken into account and

integrated in or recognized by the statutory law system to facilitate issuance of documents and access to rights.

In some countries, impressive laws have been drafted relating to internal displacement. However, there is often a large gap between law and practice. Too often monitoring bodies make recommendations, which states are content to adopt at the policy level. Unfortunately, these often either make little practical difference or actually add to the administrative chaos that often accompanies major displacement crises. Creating new laws, commissions, and other institutions is not necessarily the best solution. States would often be better advised to strengthen and reform the mechanisms that already exist. This is particularly the case with regard to the issuing of new documents, where the solutions often depend on an act of political will.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

The substantive and procedural elements discussed below and related recommendations shall be adapted and interpreted according to the specific context of the country.

Prior to Displacement

Contingency Plan

In situations where displacement is imminent or frequent, it is important to establish a contingency plan to facilitate issuance of documents and registration of affected populations. Since regulations established in normal circumstances are not usually adapted to situations of internal displacement, the conditions required to trigger departure from established rules should be specified—these might include the declaration of a state of emergency, or a certain threshold of displaced persons. Regulations can also limit the scope of the special regime to regions affected by the conflict. A contingency plan should endeavor to secure existing records. Updated copies of records registries shall be kept in a safe place to facilitate renewal of documentation and continuous updating of records. Such a contingency plan should also indicate the institutions responsible for its implementation.

During Displacement

Establishment of Documentation Needs and Requirements

IDPs have the right to have their documents issued or replaced like any other citizens. Laws and regulations should determine the type of documents needed and the procedures for obtaining such documents. Procedures should be transparent and made known to the public in order to limit abuses. The list of documents and the procedures should take into account the scope of displacement and the number of people in need of new documents, as well as the capacity of institutions to respond to those needs. This means in practice that states should limit to the minimum the various types of documents required to avoid vicious circles whereby one or more documents is required to obtain another document, leaving a significant proportion of IDPs without any documentation at all. In Colombia, for example, to obtain a basic identity card two preliminary documents are required.²¹ As a consequence, in 2002, it was estimated that only one-third of IDPs had identification documents and only 13 percent were registered with the civil registry office.²²

Legislation should consider alternative and simple identity determination procedures, including a broad range of records and documents such as electricity or telephone bills, rental and bank receipts. A balance should be found between the need for legal certainty, the risk of abuse, and the right of IDPs to obtain the documentation required to benefit from humanitarian assistance and other rights. Clear guidelines should be set regarding elements that can substitute for written proof and be accepted by the institutions in charge of processing claims for documentation. Customary law and traditional methods for identification such as the use of witnesses should be considered and articulated with the formal legal system in place where civil records have been lost or destroyed, or when the formal system was incomplete. Safeguards such as punitive measures in case of false testimonies or forged documents can

²¹ Internal Displacement Monitoring Centre [IDMC], *Lack of Identity Documents Deprives the Displaced from Emergency Assistance*, Country profile for Colombia (2002), available at <http://www.internal-displacement.org>.

²² *Id.*

be included to limit the risk of abuses resulting from the adoption of a lower evidentiary threshold.

The acceptance of flexible and customary procedures is also essential to protect the rights of certain groups such as indigenous people, Roma, or women who are disproportionately excluded from official records. In the case of women, for example, documents can be essential to claim inheritance rights. Marriages contracted under customary law that represent the majority of cases in many countries with less formalized legal systems are often not recognized by statutory law. When questions of land inheritance arise, women are left without legal standing. In these cases, recognition of customary marriages could protect women although customary law regulating inheritance rights is often patriarchal and tends to dispossess widows, to the advantage of male relatives.

The following examples show how informal mechanisms can be used to establish identity, age, or ownership. In Nigeria, the confirmation of a village chief or a relative is an informal and accepted way of identification. In Eritrea, three witnesses are needed for a confirmation of identity. To ensure accuracy of testimonies, witnesses can be held responsible for their declaration. In other countries, the location where relatives are buried is considered as a proof of ownership. In Sudan, a doctor establishes age certificates, which are required to allow people to work. Birth registries from IDP or refugee camps can also be a basis to establish birth certificates, which is often the first step to obtaining other personal documents. In Honduras, birth registries from clinics located in camps hosting refugees from El Salvador have been used as a basis for UNHCR to issue birth certificates that were later stamped and recognized as official by El Salvador at the time of repatriation. Many other possibilities for using informal mechanisms exist and states should choose the solution that best meets their needs in accordance with their specific context.

Temporary Documents

Some countries have also chosen to issue temporary documents to IDPs to allow them to have full access to rights entitled by the possession of documents despite the fact that they are not in a position to produce the required elements of proof. Such a solution can be envisaged in the short term to respond to an emergency situation but should not delay the delivery of permanent documents. Any regulation allowing for temporary documents should include provisions detailing modalities to transform temporary documents into permanent ones.

IDP Cards as a Temporary Substitute for Permanent Documents

Internal displacement is not a legal category but a situational fact. The *Guiding Principles* are careful not to use such terms as “definition of an IDP,” “IDP status,” or “IDP determination” to avoid putting IDPs into a legal category that the Principles make clear cannot be attributed. One of the reasons for this is that IDPs should not need to be registered to enjoy their legal rights as citizens. However, in many instances, states have created a special IDP status to identify who is an IDP for planning purposes, to determine the number and location of persons in need of assistance, and to identify beneficiaries. The delivery of an IDP card identifies potential beneficiaries and can be used as a temporary substitute for lost documents, which will allow access to rights such as health care or entitlement to collective accommodation or food assistance. In such cases, IDP cards have been nominative to avoid abuses or selling of IDP cards. While it can be expedient to create an IDP status to address the difficulty of issuing new documents based on reliable evidence, creating an IDP status is a time-consuming process in terms of staff and procedures since it involves a determination process, a regular update of data, an opportunity to appeal negative decisions and defining of criteria for the end of the status. Additionally, states should be cautious not to create a legal category that could prejudice other vulnerable groups in need of assistance such as the domiciled population or refugees. The best option remains to provide IDPs with the same documents as any other citizen.

In cases where countries have decided to create an IDP status as a means to addressing their needs, the determination process should be based on the

definition given by the *Guiding Principles* and be simple and inclusive with minimum requirements with regards to proof of residency and identity, to allow for a quicker identification and delivery of assistance. There should be a general presumption in favor of claimants. Regulations should consider *prima facie* recognition of IDPs based on well-known facts of a general nature that led to the displacement. Wide temporal and/or geographical criteria encompassing periods and regions where displacement has taken place can also be added to identify IDPs, although they should be modified when new circumstances arise.

In certain countries such as the Balkans or Georgia where IDP status offers significant benefits such as access to health care, education, accommodation and pensions, states are understandably keen to avoid abuses and impose stricter criteria that can be detrimental to IDPs. In Azerbaijan, and in Georgia until 2003, for example, IDPs buying property would lose their status. This requirement delayed the local integration of IDPs who were reluctant to buy property for fear of losing the benefits linked to the status.²³

Link between Profiling, Registration and Documentation

Profiling of an IDP population is an approach used to gather demographic information and numbers on IDPs through methods and techniques that do not necessarily entail individual registration. The approach presents the major advantage of providing a good picture of the IDP population while respecting the confidentiality and anonymity of individuals, as names are not registered. The *Guidance on Profiling Internally Displaced Persons*, edited by the NRC's Internal Displacement Monitoring Centre and the United Nations Office for the Coordination of Humanitarian Affairs' (OCHA) Displacement and Protection Support Section, provides a detailed framework for collection and analysis of IDP-related information, including guidance in data collection methodologies and IDP profiling.²⁴

²³ ICLA Azerbaijan, Apr. 2006.

²⁴ *Guidance on Profiling Internally Displaced Persons* (Anne Davies and Norwegian Refugee Council (NRC) Internal Displacement Monitoring Centre and the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) eds., Apr.

When the purpose of an IDP status or card is to facilitate access to certain services and be used as a substitute for identity documents, however, there is definitely a need for individual names to appear on the card and registration is therefore necessary. In such cases, emphasis should be placed on the confidentiality of the collected data. Registration can also be considered as a protection tool to quantify and assess the needs of IDPs as well as facilitate access to basic rights.²⁵ In the absence of personal documentation and complete civil registries, registration can be a means to facilitate issuance of temporary or permanent identity documents or IDP cards.

Confidentiality

Collection of personal information for the purpose of issuing personal documentation or IDP cards should be in line with data protection norms to protect the security of IDPs. Systems should be implemented to safeguard information, be it paper (secure location) or electronic (secure location associated with encryption programs). Regulations should provide clear guidelines on the use of data collected by the administration. These guidelines should cover:

- the purpose for which the information has been collected;
- the type of staff authorized to collect, enter, access and use the information;
- the procedures regulating sharing of personal data and persons with whom data can be shared;
- guarantees that the information will be stored in a secure location; and

2008), available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/7620BC6F3CED0587C125739B00383CE0/\\$file/IDP_Profiling_Guidance_2008.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/7620BC6F3CED0587C125739B00383CE0/$file/IDP_Profiling_Guidance_2008.pdf).

²⁵ Executive Committee Conclusion No. 91, *Registration of Refugees and Asylum Seekers* (2001).

- destruction of data once the purpose of its collection has been served.²⁶

Such measures are essential to ensure that IDPs come forward to apply for documentation or IDP status. In Colombia, for example, many IDPs are reluctant to identify themselves as IDPs because they fear that public officials will not respect the confidentiality of the information received and will share it with paramilitary groups from whom they could face reprisals.²⁷ Consequently, many Colombian IDPs do not register and are deprived of assistance.

Public Information and Measures to Ensure Access to Documentation

Regulations should detail measures to inform IDPs about their rights and duties and bodies responsible for implementation. Public and media campaigns should be associated with visits to IDP camps or locations and provision of legal assistance. In Colombia, UNHCR, the Colombian Registrar, and a number of NGOs have carried out such an initiative jointly. Mobile documentation units have been established to visit areas inhabited by IDPs and help them complete applications for personal identity documents.²⁸ In Sri Lanka, NRC's legal clinics were often attended by local, district, and national officials, including police officers and the Government Secretary (GS) in the area. This presence was very significant at a practical level, for example for the issuing of National Identity Cards, as the GS is responsible for issuing the forms and people who have lost their original documents must also fill in a police report. Digital cameras were also used to obtain photographs necessary

²⁶ See also Inter-Agency Standing Committee [IASC], *Procedural Standards for RSD under UNHCR's Mandate*, UNHCR, Sept. 1, 2005, and the *Draft Guidelines on Profiling Internally Displaced Persons (IDPs)*, at 51-53 (May 2006).

²⁷ Amnesty Int'l, *Colombia: the Paramilitaries in Medellin: Demobilization or Legalization?*, AI Index: AMR 3/019/2005, Sept. 1 2005.

²⁸ *Colombia: UNHCR expands IDP programme*, Press Briefing, Geneva, Dec. 3, 2004.

for the issuance of personal documents.²⁹ Specific outreach measures should be added for groups that are less likely to have had documentation such as women or indigenous people.

Determination of Administrative Requirements to Obtain Documentation

Documentation Fees

Regulations should consider exemption of documentation fees for IDPs who are disproportionately affected by the loss of documents and who often find themselves with very limited financial means. In Burundi, for example, the cost of an identity card represents an average day's salary and marriage documents and birth certificates can cost up to three times as much,³⁰ representing an unreasonable burden that prevents IDPs from access to documentation. Required basic identity documents should be free of charge while other civil documents should be free or require only minimal fees. Monitoring mechanisms should be established to prevent abuse of position by which officials responsible for delivering documentation collect unlawful fees or bribes from IDPs.

Place of Application

IDPs should not have to go to their place of origin to apply for documentation and/or collect information required to obtain new documentation. In many cases, this would put their security at risk or entail traveling costs that IDPs cannot necessarily afford. In Azerbaijan, for instance, the main obstacle for IDPs to obtain their IDP card is the existence of a centralized system for distribution that means that IDPs located in various parts of the country must travel to Baku to apply for and receive their documents.³¹ To meet "place of application" requirements necessitates that offices collecting claims from IDPs are evenly distributed throughout the country or that outreach efforts are

²⁹ ICLA Sri Lanka, Mar. 2006.

³⁰ ICLA Burundi, Mar. 2006.

³¹ ICLA Azerbaijan, Apr. 2006.

undertaken through mobile teams or other means to ensure easy access for IDPs. A possible alternative is to allow submission by mail. Further to repeated advocacy efforts, Praxis, a Serbian NGO providing legal aid convinced authorities to instruct their offices to accept requests received by mail. This solution not only saved time and money to IDPs but also allowed them to avoid having to use the cumbersome power-of-attorney procedure necessary for IDP representative to submit their requests.

Residency Requirement

While a residency requirement is often necessary to locate IDPs in need and facilitate identification, there should be flexibility in the type of proof establishing residency. Many countries require proof of residency to issue personal documentation or IDP cards, such as a certificate proving accommodation in a camp or collective center, or a rental receipt or contract. People living in informal settlements are, in effect, penalized by such regulations. This is the case in Serbia, where many Roma IDPs living in informal settlements cannot provide residency documents that are a prerequisite for obtaining IDP status and other documents.

In the case of a country seceding, the residency requirement should not be used in a manner that results in IDPs becoming stateless or deprived of the citizenship of the new country where they are currently displaced. In Croatia, some IDPs have been denied citizenship on the ground that they were displaced from one part of Croatia to another during the war and therefore do not satisfy the requirement of five years permanent residency.³²

Deadlines

In relation to the issuance of personal identity documents, deadlines should have no relevance, as personal documents should be issued at any time depending on needs and circumstances. With regard to application for IDP status, deadlines are of limited use since new displacements can always occur. Deadlines are also not consistent with the *Guiding Principles*, which make no reference to any time limits in this context. In Colombia, the Office of the

³² NRC's Civil Rights Project in Vukovar, May 2006.

High Commissioner for Human Rights (OHCHR) has criticized the “restrictive interpretation of the rules, as exemplified by the introduction of deadlines.”³³

In the Context of Durable Solutions

Sharing Information on Property Registers, Cadastre and Civil Registration

In the case of secession or where one part of the country is not in the control of the official government, efforts should be made to exchange information on cadastre and civil registration to facilitate issuance of permanent documents as a step towards normalization and durable solutions such as local integration, resettlement, or return of IDPs.

Recognition of Documents

States should facilitate dialogue and coordination with recognized or *de facto* regimes controlling other parts of the country, whether or not the conflict in that region is resolved yet, for the benefit of the displaced population. To the extent reasonable, identity documents should be acknowledged despite unresolved political disagreements on territorial control and legitimacy. Mutual recognition of documents would facilitate IDPs’ access to documentation irrespective of whether they are displaced in a state-controlled area or not. In the case of former refugees returning to their countries and going through a phase of internal displacement, efforts should also be made to acknowledge and recognize documents of neighboring countries and international agencies, such as UNHCR, to facilitate their reintegration.

Issuance of Permanent Documents

When IDP status or temporary documents have initially been issued to allow IDPs to benefit from certain rights despite missing personal documentation, all efforts should be made to plan for and issue permanent documents as soon as

³³ See U.N. Doc. E/CN.4/2002/17, ¶ 235 (Feb. 28, 2002), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238_025668700518ca4/34c2bdd5aa7c0d8bc1256b9d005ab9bd/\\$FILE/G0211115.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238_025668700518ca4/34c2bdd5aa7c0d8bc1256b9d005ab9bd/$FILE/G0211115.pdf).

possible to facilitate their return to normal life and enjoyment of their citizens' rights.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

During Displacement

Bodies Responsible for Issuing Documentation

Depending on the scope of displacement and need for documentation, countries should consider reinforcing their offices usually responsible for delivery of personal documentation in terms of staffing and material needs. This can represent a significant logistical challenge since conflict-induced displacement also tends to have a disruptive impact on institutions. Such bodies should also be responsible for disseminating information on procedures and requirements as well as providing support in completing forms, including through the establishment of mobile offices.

Staff Training and Capacity-building

Staff in charge of collecting claims and issuing documentation should receive regular training and guidance on all valid and new applicable procedures. Training should be provided in all offices to ensure consistency of implementation throughout the country.

Centralized Review and Quality Control of Decisions Issued

A centralized control at the ministerial level should be established to ensure consistency of decisions throughout the country.

Material used to Collect and Process Information adapted to Needs and Local Skills

Using old collecting methods can sometimes prove more useful and efficient than hi-tech solutions that, in the absence of adequate training and maintenance of the equipment, become counter-productive.

INTERNATIONAL ROLE

The support of the international community can take multiple forms, corresponding to the different mandates and roles of international actors ranging from inter-governmental organizations to NGOs and various donors. Since international standards applying to documentation are rather general and the way the issue is addressed is so contextual, international support will often have to be tailored to each country. This is however different for issues related to IDP status and registration where methods and procedures used in other countries can apply more generally. Since the issuance of documentation is principally the responsibility of authorities, cooperation with authorities is crucial to avoid duplication and/or the creation of parallel registries. The main criteria for intervention by the international community should be to ensure that its support to documentation does not result in discrimination against IDPs or the rest of the population. On the one hand, legislation and procedures should not discriminate against IDPs, and on the other hand, the focus on IDPs should not disadvantage the rest of the population in terms of access to documentation. International actors (inter-governmental and NGOs) dealing with documentation issues should also coordinate their approaches and activities to ensure that a coherent and consistent message is delivered to national interlocutors at various levels, be it local or national.

International actors can help by supporting authorities or by directly assisting IDPs through the provision of legal assistance. Support to the authorities can take the form of monitoring and capacity-building associated with technical and logistical support. Through its protection and assistance activities, the international community can be made aware of shortcomings and concerns related to documentation. This passive or active monitoring can result in technical and legal advice. Specific recommendations can also be formulated in relation to law, procedures, and institutional arrangements, including lessons learned from other countries when those are applicable and concrete. The international community can also initiate or support national campaigns informing people on required procedures and location of offices where documents can be obtained.

Capacity-building projects should be designed in close cooperation with the authorities to ensure that they correspond to existing needs and that solutions

proposed are adapted to the local context and capacity. In most post-conflict situations, an administration disrupted and weakened by the conflict will have to face an increased demand for delivery of documents or registration of displaced persons. The international community role will then be to advocate for and assist with more equipment and staff for institutions dealing with delivery of documentation. This support should, however, not be a substitute for the responsibility of authorities. The introduction of new registering or filing techniques such as computer data entry can be necessary to improve the professionalism of cadastre and civil registry agencies and strengthen their capacity. Training of staff using those techniques is essential to build in-country capacity to run and maintain the system in the short and long-term. When procedures or legislation have been changed, the international community can also support the authorities in organizing legal training for state officials in charge of implementing the new measures.

Provision of legal aid to displaced persons is another way to disseminate certain advocacy messages and basic standards while at the same time providing concrete and direct assistance to those who need it. Legal assistance allows IDPs to reclaim and exercise their rights by requesting authorities to abide by the rules. In that sense, it plays a crucial role in reinforcing the rule of law in a post-conflict environment and puts the emphasis on the responsibility of the state towards its citizens. International organizations such as UNHCR or the NRC have extensively used legal aid to support IDPs' access to documentation. Legal aid consists of legal advice and assistance in filling forms, gathering required documentation, or preparing court cases. Both UNHCR and NRC have integrated mobile teams in their legal assistance programs to facilitate access to isolated or vulnerable IDPs.

United Nations High Commissioner for Refugees

UNHCR has long experience in cooperating with states to facilitate or carry out registration and documentation of displaced persons (refugees, asylum seekers, and IDPs). UNHCR assumes an operational role for registration and documentation for the displaced and other persons of concern, only if

government capacity is lacking.³⁴ UNHCR executes its activities in support of, and complementary to, the authorities, with a strong emphasis on developing their capacities.

Norwegian Refugee Council

NRC is a humanitarian NGO assisting refugees and displaced persons. One of the NRC's core activities is to provide information and legal advice to those two categories to facilitate durable solutions and access to rights. In addition to information on the situation in home areas, the Information Counseling and Legal Assistance (ICLA) Programme has focused on repossession of housing, land, and property. NRC's lawyers and advisors also contribute to helping refugees and IDPs obtain citizenship, identity papers, and other personal documents to facilitate freedom of movement and return as well as access to education, health care services, the labor market, or pension entitlements.

SUMMARY OF RECOMMENDATIONS

1. In situations where internal displacement is imminent or frequent, it is important to establish a contingency plan to facilitate issuance of documents and registration of affected populations through measures adapted to the situation created by displacement.
2. During displacement situations, laws and regulations should limit to the minimum the type and number of documents required for the issuing or replacement of missing documents to ensure that IDPs can exert their right to have their documents replaced without discrimination due to their situation.
3. Temporary documents allowing IDPs to have full access to rights can be used as a short-term solution to address situations where large numbers of people need documentation without being in a position to produce the required elements of proof. Regulations allowing for temporary documents should

³⁴ The 2001 Executive Committee Conclusion No. 91 on registration reaffirms the State responsibility and sets out certain standards to be met for the registration and documentation of refugees and asylum seekers by both States and UNHCR.

include provisions detailing modalities to transform temporary documents into permanent ones.

4. When IDP status is used for planning purposes to determine the number and location of persons in need of assistance and identify beneficiaries, IDP cards can also be used as a temporary substitute for missing documents allowing for access to a wide range of rights.

5. Access to permanent documents should be encouraged and facilitated at the same time as temporary measures are put in place. To the extent possible, permanent documents used by the general public should be issued from the start.

6. Collection of personal information should be in line with data protection norms to protect the security of IDPs.

7. States should plan for public information campaigns and develop legal assistance programs including through mobile teams to ensure that IDPs are informed about their rights and possibility to obtain personal documentation.

8. Mobile offices should be developed to facilitate access of IDPs to institutions delivering personal documentation.

9. Administrative requirements to apply for documentation should be kept to a minimum. States should consider exemption from documentation fees for IDPs, a sufficient number of offices collecting claims evenly distributed throughout the country to facilitate access, and the possibility to request documentation by mail.

10. The requirement to produce proof of residency should be used in a manner which will not prejudice IDPs living in informal settlements and who cannot produce official documents establishing their place of residence.

11. In the case of secession or where one part of the country is controlled by authorities other than the official government, efforts should be made to share information on cadastre and civil registration to facilitate issuance of permanent documents. In such cases, mutual acceptance of documents should

be considered despite political disagreements, without necessarily implying any political recognition.

12. States should accept alternative and simple identity determination procedures, including those with a low evidentiary threshold in recognition of the difficulties faced by displaced persons to produce other proof.

13. When a state has established IDP status, determination of such status should remain in line with the definition of the *Guiding Principles on Internal Displacement* and avoid restrictive criteria that would leave genuine IDPs outside the scope of the status. Since being a displaced person is a fact and not a legal category, the existence of an IDP status should not restrict in any way the right of displaced persons to receive assistance and protection from the state independently of their legal status.

14. Bodies responsible for issuing documentation should be clearly identified and their capacity reinforced in terms of number of staff and training.

15. A centralized review and quality control of decisions issued should be put in place.

16. The material and techniques used to collect and process information should be adapted to needs and local skills.

17. Agencies in charge of issuing documentation should be provided with the resources necessary to the completion of their tasks.

Chapter 10

Property

Rhodri C. Williams*

INTRODUCTION

This chapter focuses on remedies for violations against internally displaced persons' (IDP) rights to the housing, land, and property they occupied and used prior to their displacement. The most well-known remedy for such violations is restitution, an approach popularized through successful implementation programs in Bosnia and elsewhere, as well as the recent adoption by the UN Sub-Commission on Human Rights of *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (often referred to as the *Pinheiro Principles* in honor of the Special Rapporteur who drafted them).¹ However, under some circumstances, alternative or mixed approaches including elements such as compensation and provision of alternative land or housing can also provide an effective remedy for IDPs.

Violations and abuses of rights in housing, property, and land often accompany displacement. One of the key contributions of the 1998 *Guiding Principles on Internal Displacement* (the *Guiding Principles*) to the protection of IDPs involved the recognition that a wide range of practices commonly leading to displacement were “arbitrary,” in the sense of being inconsistent with states’ obligations under international law. The obligation to avoid arbitrary displacement identified in the *Guiding Principles* is broad, protecting all persons whether they face displacement within their own countries or abroad, and implying affirmative obligations on the part of states to prevent circumstances that could result in displacement.

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¹ U.N. Commission on Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) [hereinafter *Pinheiro Principles*].

Recent practice and scholarship reflect a growing recognition that a central sub-category of acts constituting arbitrary displacement involve the physical removal of individuals and groups from homes and land they occupy and depend upon for shelter and livelihood. These acts are most clearly arbitrary where they strip their victims of recognized property rights without adequate process or compensation. However, human rights law is also increasingly cognizant of rights to privacy and tenure security in homes (as well as in land, at least as a guarantee for the right to an adequate standard of living) that are not contingent on outright ownership. In fact, recent emphasis on such rights has come about partly in response to the clearly documented vulnerability of individuals and communities deprived of access to their settled homes and lands, regardless of whether they formally owned them.

Where removal of people from homes and lands they occupy are undertaken in a manner that violates international law, they have come to be referred to as “forced evictions” in violation of the right to adequate housing (see “Legal Framework,” below). Like arbitrary displacement, forced evictions can affect individuals or groups and can take place in a wide variety of contexts ranging from ethnic conflict to development projects.² In fact, the similarity between the two concepts is striking, given that both essentially consist of the involuntary removal of people from their places of habitual residence in violation of international law. However, the relationship between arbitrary displacement and forced evictions remains largely undefined. Recognition of the significance of rights to homes and land is a development that has come to the fore since the 1998 adoption of the *Guiding Principles*, based on separate and parallel standard-setting processes.³ However, given that such rights are widely recognized, well-supported in international law, and directly significant to the prevention of internal displacement, failure to respect them (and, in

² See Chapter 15 in this volume on development-induced displacement.

³ The U.N. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context has been particularly active in this area. See <http://www2.ohchr.org/english/issues/housing/index.htm>.

particular, forced evictions) should be seen as equivalent to arbitrary displacement in the sense of the *Guiding Principles*.⁴

Involuntary removal of people from their homes and deprivation of their property rights are not always illegal under international law. Governments can (and often do) expropriate property, restrict its value through regulations, carry out evictions, and relocate communities. However, as long as governments' motivations and methods in undertaking such acts are not arbitrary or discriminatory, these acts will not be seen as violations of human rights. In the terminology of human rights jurisprudence, such acts unquestionably interfere with the rights of those affected, but do so in accordance with law and in order to further legitimate public aims. Although affected individuals and groups suffer unquestionable harm as a result of such interferences, safeguards such as fair procedures and adequate compensation can render this harm proportional to the broader aims such measures serve, preventing a violation from occurring.

Even in the case of large-scale planned expropriations or relocations affecting significant populations, respect for human rights standards can prevent interferences with the rights of those affected from rising to violations.⁵ Such

⁴ A first step in this direction has been taken in the form of the *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, ¶ 19, U.N. Doc. E/CN.4/2006/41 (Mar. 21, 2006).

⁵ See U.N. Commission on Human Rights, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, U.N. Doc. E/CN.4/2006/41 (Mar. 21, 2006). The World Bank, the Organization for Economic Co-operation and Development, and the Asian Development Bank have also developed policies for the resettlement of development-affected populations meant to ensure that their livelihoods and standard of living are restored to at least their pre-displacement levels. See World Bank Operational Policy 4.12—Involuntary Resettlement (Jan. 2001), available at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/CA2D01A4D1BDF58085256B19008197F6>; Organization for Economic Co-operation and Development, *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects* (1991), available at [http://www.oilis.oecd.org/olis/1991doc.nsf/ENGDATCORPLOOK/NT000009A6/\\$FILE/DCE1443.PDF](http://www.oilis.oecd.org/olis/1991doc.nsf/ENGDATCORPLOOK/NT000009A6/$FILE/DCE1443.PDF); Asian Development Bank, *Policy on Involuntary Resettlement*

affirmative measures in scenarios ranging from development to planned evacuations are discussed in the chapter in this volume on development-induced displacement. The focus of this chapter, by contrast, is on the measures states are obliged to take with respect to IDPs who have suffered imminent or actual violation of their rights to property, housing, and land. Such violations generally take two forms, with the first being those that are planned and manifestly illegal, such as ethnic cleansing. In cases where states directly breach their international law obligations through engaging in such acts or culpably failing to prevent them or to mitigate foreseeable harm resulting from them, they are required to provide a remedy to those affected.

A second category of violations can arise where states are not directly responsible for events that have taken place on their territory, but fail to fulfill their primary responsibility for resolving any resulting displacement in a manner consistent with the victims' human rights. Unplanned events that give rise to interferences with housing and property rights are one example. For instance, even if the government is not directly responsible for natural disaster-related displacement, it is responsible for preventing or remedying resulting human rights violations. As set out in Guiding Principle 21, competent authorities remain responsible for protecting property left behind by IDPs against "destruction and arbitrary and illegal appropriation, occupation and use" regardless of the cause of displacement.

In traditional international law, the preferred remedy for wrongful acts is restitution, or the physical restoration of what the victim lost by virtue of the breach. Where restitution is not feasible, alternative remedies include financial or in-kind compensation for damages incurred. In the context of human rights, restitution may not be a relevant response to violations causing intangible harms such as torture or wrongful imprisonment, with regard to which compensation and rehabilitation are typically more practical means of providing a remedy to victims. However, violations of rights to property, homes, and lands provide an important exception to this state of affairs. It is often feasible (though rarely easy) to restore victims' possession of real property, housing, or land with the full rights they enjoyed before the violation

occurred. As a result, restitution has become a common component of peace negotiations to end conflict characterized by mass-displacement or ethnic cleansing. In several cases, post-displacement restitution programs have been implemented on a mass scale.

The attraction of restitution programs in the wake of arbitrary displacement is not limited to their utility as a remedy. In light of states' responsibility to end internal displacement, restitution and other remedies can contribute to the creation of durable solutions for IDPs. Restitution is often intuitively associated with the durable solution of return to homes of origin; in cases where forced evictions are used to carry out displacement, restitution is typically portrayed as a way of undoing its effects. However, restitution can also facilitate voluntary resettlement or local integration when beneficiaries choose to sell, exchange, or rent reinstated properties. In fact, the attraction of restitution should not necessarily be that it facilitates return but that it facilitates choice, giving IDPs a basis for either returning or resettling should they so choose. Alternate approaches to restitution, such as compensation, provide a legal remedy but involve the *a priori* exclusion of return as a durable solution.

LEGAL FRAMEWORK

The issue of remedies for housing, property, and land is an area where significant developments have occurred in international law and practice since the adoption of the *Guiding Principles* in 1998. As a result, where property restitution and the closely associated right to return to homes of origin were viewed as gray areas in international law in the course of drafting the *Guiding Principles*, they may broadly be viewed now as emerging rights.⁶

⁶ Simon Bagshaw, *Property Restitution for Internally Displaced Persons: Developments in the Normative Framework*, in HOUSING AND PROPERTY RESTITUTION RIGHTS FOR REFUGEES AND DISPLACED PERSONS 376 (Scott Leckie ed., 2003).

Relevant Guiding Principles

The most relevant of the *Guiding Principles* to remedies for violations of rights in property, housing, and land is that set out in Principle 29(2). However, the uncertain state of international law in this area at the time dictated that such remedies were framed as a matter of state responsibility rather than individual right:

Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

In justifying inclusion of this provision, the first edition of the *Guiding Principles on Internal Displacement: Annotations (Annotations)* noted a “certain trend in general human rights instruments, along with the progressive development of international law” to provide restitution of property to IDPs or compensation for its loss.⁷ Many of the instruments subsequently quoted related to the general right to a remedy or specific awards of remedies in judicial proceedings.⁸ As a result, it is reasonable to conclude that Principle 29(2) is properly viewed as setting out a remedy in the event of violations involving failure to respect the general right “to be protected against being arbitrarily displaced from [one’s] home or place of habitual residence” (Principle 6); the state obligation to “protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands” (Principle 9); and the prohibition on arbitrary destruction, appropriation, occupation or use of IDPs’ property and possessions (Principle 21).

⁷ Walter KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 72 (1st ed. 2000) [hereinafter ANNOTATIONS].

⁸ *Id.* at 72-3.

The obligation to provide remedies under Principle 29 (2) is closely related to the obligation to facilitate durable solutions and permit return of IDPs under Principle 28(1). Inclusion of the latter provision was quite explicitly based on the right to a remedy for arbitrary displacement. “As states have a duty not only to avoid but to redress violations of international human rights and humanitarian law, the party responsible for illegal displacement is obliged to allow and facilitate the return of displaced persons in all situations.”⁹ Restitution of property is clearly likely to be an indispensable element of any such “facilitation” of return, especially where such property has been adversely occupied.

Relevant International Law

Right to Remedy

Remedies for violations of housing and property rights derive from a long international law tradition according to which states are required to make good breaches of their international obligations. While such obligations were seen as adhering only to other states prior to World War II, the rise of international human rights law saw states take on obligations with respect to other states to provide effective remedies to those individuals within their jurisdiction whose human rights had been violated.

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ... such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”¹⁰

⁹ *Id.* at 70.

¹⁰ *Factory at Chorzow*, (Germ. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 1928). See also the advisory opinion of the International Court of Justice (ICJ) on the

Article 8 of the Universal Declaration of Human Rights (UDHR) provides that an individual has “...the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹¹

Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the

Israeli “security fence” in the Occupied Palestinian Territories. After finding that seizures of land and property related to construction of the fence violated international law, the court explicitly relied on the Permanent Court of International Justice’s conclusions in *Factory at Chorzow* in describing Israel’s obligation to make reparations: “Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, at 152 (July 9). *See also*, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc A/56/10, chapter II.

¹¹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., art. 25(1), U.N. Doc A/810 at 71 (1948) [hereinafter UDHR].

competent authorities shall enforce such remedies when granted.¹²

Article 25 of the American Convention on Human Rights (ACHR),¹³ Article 26 of the African Charter on Human and Peoples' Rights (ACHPR),¹⁴ and Article 13 of the European Convention on Human Rights (ECHR)¹⁵ similarly provide for a person's right to a remedy before a competent authority.

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that:

[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICCPR]. See also Articles 9(5) and 14(6) (setting out a right to compensation for persons unlawfully arrested or detained, as well as persons convicted of a criminal offense on the basis of a miscarriage of justice).

¹³ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

¹⁴ The African Charter on Human and Peoples' Rights [ACHPR] is less explicit, though Article 26 calls for states-parties to "guarantee the independence of the Courts and ... allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter ACHPR].

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁶

Paragraph 18 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*¹⁷ provides that:

[i]n accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, ... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Principle 2.2 of the *Pinheiro Principles* provides that “States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice.”

¹⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), U.N. Doc. A/6316, 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]. The UN Committee on Economic, Social and Cultural Rights [CESCR] has repeatedly found that the obligation to realize economic and social rights “by all appropriate means” entails the domestic provision of “judicial or other effective remedies.” CESCR, General Comment 3, (Fifth Session, 1990), ¶ 5. *See also*, CESCR, General Comment 9 (Nineteenth Session, 1998).

¹⁷ U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005).

Right to Property

Under traditional international law, restitution came to the fore as a remedy for nationalizations of property owned by foreigners that did not meet minimum procedural standards.¹⁸ Under contemporary human rights law, an individual right to property has been asserted but tends to be accorded relatively weak and conditional protection, leaving states broad discretion to expropriate property and regulate its use.¹⁹

Article 17 of the UDHR provides that “(1) [e]veryone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.” Article 21 of the ACHR, Article 14 of the ACHPR, and Article 1 of the First Protocol to the ECHR also provide for the right to property. Articles 16 and 23 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) provide for women’s equal rights to own and dispose over property and Article 5(d)(v) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) provides for the right to own property without discrimination on the basis of race.

International humanitarian law sets out specific obligations on the parties to armed conflict not to subject civilian property and possessions to pillage; direct or indiscriminate attacks; use in order to shield military operations or objectives; or destruction or appropriation as reprisal or collective punishment.²⁰ Persons evacuated from their homes in the context of armed

¹⁸ PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 235 (7th ed. 1997).

¹⁹ Catarina Krause, *The Right to Property*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* (Asbjørn et al. eds., 1995).

²⁰ *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287, arts. 28, 33(2) and (3), 53 [hereinafter Fourth Geneva Convention]; First Additional Protocol to the Geneva Conventions, arts. 51(4), (7), 52; Second Additional Protocol to the Geneva Conventions, art. 4(2)(g); Rome Statute for the ICC, art. 8, ¶ 2(b)(xvi). ICRC,

conflict must be transferred back to their homes and allowed to recover their property as soon as hostilities have ceased.²¹

Right to Housing

Although remedies such as restitution are often intuitively associated with the right to property, rights to housing are typically less conditionally framed and more broadly accepted. As a result, housing rights have played a significant role in defining contemporary understandings of restitution in displacement settings. The concept of inherently illegal “forced evictions” derives from housing rights. Such evictions result from states’ failure to uphold legal security of tenure, a key element of the right to adequate housing. While housing rights are primarily economic and social in nature, they are reinforced by the right to privacy, a civil and political rights concept that includes the right to be free from interference in one’s home. Where restitution is justified as a remedy for violations of housing rights, the implication is that victims will be reinstated in their rights over the homes from which they were displaced, whether they owned them or not.

Article 12 of the UDHR provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” Article 25 (1) provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.”

Article 17 of the ICCPR provides for the right to freedom from interference with the home. Article 11 of the ACHR and Article 8 of the ECHR also provide for this right.

Customary International Humanitarian Law, Volume I: Rules, Rules 52, 133; *see also* Rules 7, 8, 9, 11, 12.

²¹ Fourth Geneva Convention, art. 49(2); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, Rule 133 (Jean-Marie Henckaerts & Loise Doswald-Beck eds., 2005).

Article 11(1) of the ICESCR provides for the right to adequate housing. CERD Article 5(e)(iii) prohibits racial discrimination in the enjoyment of the right to housing. CEDAW Article 14(2)(h) prohibits discrimination against women in rural areas in the enjoyment of “adequate living conditions, particularly in relation to housing.” Article 27 of the Convention on the Rights of the Child (CRC) requires parties to take appropriate measures to ensure the right of every child to an adequate standard of living, including with regard to housing. Article 26 of the ACHR incorporates by reference the goal of “[a]dequate housing for all sectors of the population” in Article 31(k) of the 1970 Buenos Aires Protocol to the Charter of the Organization of American States. Article 31(1) of the European Social Charter (revised) provides for the right to adequate housing.

The UN Committee on Economic, Social and Cultural Rights’ (CESCR) General Comment 4: The Right to Adequate Housing (Art. 11(1) of the Covenant) (sixth session, 13 Dec. 1991) sets out seven criteria for whether housing is “adequate” in the sense of the ICESCR, including legal security of tenure against forced evictions.²² Paragraphs 1 and 4 of the UN Commission on Human Rights Resolution 1993/77 (1993) define forced evictions as a “gross violation of human rights” and call for “immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted.” UN CESCR General Comment 7: The Right to Adequate Housing (Art. 11(1) of the Covenant): Forced Evictions (sixteenth session, 20 May 1997), paragraph 3, provides that “[t]he term ‘forced evictions’ ... is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” Paragraph 19 in *Basic Principles and Guidelines on Development-Based Evictions and Displacement*,²³ provides that “States

²² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing* (art. 11(1) of the Covenant), Dec. 13, 1991, U.N. Doc. E/1992/23, available at <http://www.unhcr.org/refworld/docid/47a7079a1.html>.

²³ U.N. Doc. E/CN.4/2006/41 (Mar. 21, 2006).

must recognize that the prohibition of forced evictions includes arbitrary displacement that results in altering the ethnic, religious or racial composition of the affected population.”

Right to Land

Although a general right to land is not recognized as such, there are strong arguments that such a right may be implicitly situated within the right to an adequate standard of living, at least with regard to agriculturalists, pastoralists, and others with a special dependency on, or attachment to, their land. For such groups, access to sufficient land to be able to carry out their livelihoods may be essential to securing an adequate standard of living and even a fundamental condition for survival.²⁴ More broadly, the right to self-determination accords all “peoples” the right to dispose over their natural resources and not to be deprived of the means of their subsistence.²⁵ Rights to traditional lands are also explicitly granted to indigenous and tribal groups.²⁶

²⁴ Similar arguments have supported reading a right to adequate water into Article 11 of the CESCR. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, *The Right to Water*, ¶ 3 (2002). See also UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, ¶8(e) (1991): “Within many States parties increasing access to land by landless or impover-ished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to sub-stantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement[.]”

²⁵ CCPR, art. 1(2); CESCR, art. 1(2).

²⁶ See *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Sept. 5, 1989, art 13, 1 [hereinafter ILO Convention 169]; see also U.N. Declaration on the Rights of Indigenous People, Sept. 13, 2007, art. 10, U.N. Doc. A/RES/61/295.

Right to Return

The right to return in international human rights law has traditionally been paired with the right of individuals to leave their countries; as a result, it has pertained only to countries of origin not homes of origin.²⁷ Nevertheless, given the post-Cold War trends toward repatriation of refugees and internal displacement, return as a right to homes of origin is increasingly seen as a necessary category of durable solutions.²⁸ It is also inherent in the right to freedom of movement and choice of residence within a country.²⁹

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

While sporadic or isolated interferences with property rights can be dealt with through ordinary administrative or judicial dispute resolution mechanisms, a fundamental challenge arises where hundreds or thousands of claimants depend on quick determination of their claims as a first step in ending their displacement. Such so-called “mass claims” situations threaten to overwhelm normal domestic fact-finding and dispute-resolution procedures, particularly where the latter are primarily based on time-intensive judicial evaluation of individual cases. On the other hand, few countries have experience with setting up provisional determination processes that can expedite such processes without compromising their fairness and accuracy. As a result, one of the fundamental obstacles to providing a remedy for violations of property and possessory rights is the logistical challenge of addressing large numbers of claims in mass-displacement settings.

²⁷ See UDHR, art. 13(2) (guaranteeing the right of every person “to leave any country, including his own, and to return to his country”); ICCPR, art. 12(4) (guaranteeing that “[n]o one shall be arbitrarily deprived of the right to enter his own country”); ACHPR, art. 12(2); ACHR, art. 22(5); Fourth Protocol to the ECHR, art. 3(2).

²⁸ See Pinheiro Principles, *supra* note 1, § IV.

²⁹ See UDHR, art. 13 (1); ICCPR, art. 12 (1); ACHPR, art. 12 (1); ACHR, art. 22 (1); Fourth Protocol to the ECHR, art. 2(1).

In contemporary post-displacement practice, restitution continues to be preferred over alternate remedies because it uniquely facilitates choice between all three possible durable solutions (return, local integration where displaced, or resettlement elsewhere in the country or abroad). However, the fact that restitution opens the possibility of mass return also tends to make it politically controversial in the wake of conflicts where the parties have a vested interest in consolidating territorial gains achieved through ethnic cleansing. As a result, the greatest challenges in implementation of Guiding Principle 29(2) commonly involve overcoming obstacles to restitution of housing, land, or property (rather than obstacles to compensation or other remedies).

The primary obstacle to restitution is the fact that housing, land, and property are inherently valuable assets and therefore rarely remain unoccupied after being abandoned by their rightful owners or users. In fact, in some cases, the violent acquisition of homes and land is one of the central objectives of conflicts giving rise to displacement. In obstructing restitution, one of the simplest ways to proceed is to deny the existence of a prior, cognizable possessory right on the part of the claimant. Where IDPs' rights were relatively weak or not recognized under domestic law, those opposed to restitution (or, indeed, any remedy at all) may argue that they never existed in the first place. Such arguments are of particular concern where indigenous or tribal people have been displaced from their lands; such lands are often held in informal, collective forms of tenure (including access rights) that do not easily lend themselves to recognition and protection under conventional statutory law. For instance, the denial of traditional access rights to Kuchi pastoralists in post-Taliban Afghanistan has become a significant displacement issue and a political flashpoint.³⁰ Marginalized ethnic minorities and women or unaccompanied children are also disproportionately likely to suffer from non-recognition of rights to housing, land, or property that were weak or ambiguous, if defined at all, prior to their displacement.

³⁰ Internal Displacement Monitoring Centre [IDMC], Afghanistan, *Fighting in the South sets off New Wave of Displacement* (Dec. 22, 2006).

Where the rights at stake were unambiguous and well-recognized, a common obstructive tactic involves assertions that such rights were legitimately canceled under domestic law during the period of displacement. One of the most common variations on this tactic has been the abuse of “laws on abandonment.” Such laws typically take the form of statutes of limitation or prescription that condition rights to certain types of property on their active use or continual possession by the rights-holder. The policy behind such statutes is usually to ensure the rational distribution of scarce or valuable properties (whether arable land or urban apartments) by allocating them away from those who manifestly do not need them. In conflict situations, the same local authorities that have induced or condoned the displacement of ethnic minorities often go on to pass or apply abandonment laws, effectively appropriating the property of those displaced without taking into account the reasons that they fled.

Abandonment laws stand in contrast to eminent domain proceedings, such as those used in slum clearance programs, where the explicit intent of the authorities is to expropriate property and displacement can be a side-effect. While such expropriations involve affirmative government intervention of a nature that often renders any underlying discriminatory intent obvious, the application of abandonment laws in the wake of accomplished displacement allows government authorities to achieve the same ends while maintaining that they are simply upholding the law.³¹ However, discriminatory intent becomes increasingly apparent where, as in Sri Lanka, prescription might be tolled by such statutorily-defined circumstances as temporary insanity, but is not suspended under conditions of outright internal conflict and mass-displacement.³²

³¹ For instance, expropriation of the land of people belonging to the Iranian Arab minority in Khuzestan has raised questions of discrimination in light of available alternative land that could have been used without causing displacement. U.N. Commission on Human Rights, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, Addendum: Mission to the Islamic Republic of Iran, ¶¶ 79-80, U.N. Doc. E/CN.4/2006/41/Add.2 (Mar. 21, 2006).

³² UNHCR and Sri Lanka Human Rights Commission, Land, Housing and Property, *Proposals to the Parties for Comprehensively Addressing Land, Housing and*

Another common obstacle to property restitution, and one that often accompanies the use of abandonment laws to terminate the rights of those displaced, is the allocation of abandoned properties to be used or occupied by third parties. In some cases, such “secondary occupants” are accorded ostensibly *de jure* legal rights to abandoned properties. However, whether such competing rights are asserted or not, the mere physical presence of secondary occupants in claimed property presents a *de facto* obstacle to restitution and return. Even in the absence of official reallocation of properties, secondary occupants may take over abandoned properties on their own initiative or even coerce the owners or residents to sign their rights over in ostensibly voluntary private contracts, which are often relied on later in asserting that those displaced bargained away their restitution claims.

In cases where the right to restitution is conceded in principle, implementation may pose huge challenges. Claims procedures are often inherently complex and give rise to plentiful opportunities for legalistic obstruction and delay. Bureaucratic resistance can come at the beginning of the process, with imposition of fees and excessive documentation requirements and may continue with attempts to narrowly limit claims or slow processing. However, the most challenging aspect of restitution programs is typically enforcement, as the need to give effect to displaced persons claims often implies the requirement that secondary occupants who refuse to vacate face the credible threat of forcible eviction from claimed properties. Evictions can be a trigger for destabilizing protests, which, whether spontaneous or manipulated, often become an excuse for inaction by reluctant local authorities.

While restitution programs face formidable legal and practical challenges, however, the alternatives are no less problematic. The most fundamental problem with compensation (whether financial compensation or “in kind” via the provision of alternate land or property) is that it forecloses the option of return, abridging the right of displaced persons to free choice among durable solutions. Cash compensation, in particular, is often seen as a means of thwarting return movements by simply buying them out and studies indicate that one-time lump sum compensation payments are not particularly effective

ways of promoting lasting durable solutions for victims of displacement.³³ As a result, cash compensation alone is generally not even seen as a viable means of promoting sustainable resettlement.

Compensation may...be seen as a means of legitimizing ethnic cleansing and other human rights violations. Moreover, the payment of cash compensation may only serve to compound the situation of those displaced. Throwing money at displaced persons whose livelihoods are dependent on access to land, such as farmers and pastoralists will not necessarily solve their problems in the same way as would allocation of equivalent land elsewhere in the region or country.³⁴

While restitution may require mobilization of considerable political capital in order to see through unpopular evictions of secondary occupants, compensation programs compete directly with other post-crisis budgetary priorities, imposing a significant and measurable cost on society. As a result, compensation obligations are often honored in the breach or subject to delays.

However, even “in kind” compensation does not provide a panacea. In many post-conflict settings, available land is in no less demand than budgetary funds, complicating resettlement efforts. Pursuant to the 1991 peace settlement in Cambodia, for instance, alternative land was offered (on application, rather than as a matter of right) to ease the repatriation of some 360,000 refugees who were not accorded any legal remedy for the previous loss of their homes and lands.³⁵ However, this effort was largely unsuccessful due to the fact that

³³ International Crisis Group [ICG], *Blood and Soil: Land, Politics and Conflict Prevention in Zimbabwe and South Africa* 163-164 (International Crisis Group Press, 2004).

³⁴ Bagshaw, *supra* note 7, at 381.

³⁵ See Rhodri C. Williams, *Stability, Justice and Rights in the Wake of the Cold War: The Housing, Land and Property Rights Legacy of the UN Transitional Authority in Cambodia*, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED

even ostensibly available land was in fact subject to claims by powerful speculators. Donor funded allocation of land to returning indigenous refugees in early 1990s Guatemala was seen as initially more successful, but reports indicate that many beneficiaries effectively became displaced again, either because of the poor quality of the land they received or because of lack of infrastructural support promised by the government.³⁶

REGULATORY FRAMEWORK

Attempts to deal systematically with violations involving housing, land, and property are complicated by the fact that a great deal of variety exists both between states and within states regarding how property is recognized, protected, and regulated. Moreover, there has been a gradual but important change over time related to the nature of this problem. Specifically, while early attempts to respond to the post-Cold War re-emergence of ethnic conflict were complicated primarily by disparities between capitalist and socialist property regimes, contemporary displacement is increasingly concentrated in developing countries and even failed states, presenting an urgent need to take into account customary and informal property systems.

Until the end of the Cold War, formal property law regimes in developed countries could roughly be divided into capitalist and socialist systems. In practice, most socialist countries tolerated some degree of private ownership, and blanket nationalization of property remained the preserve of only the most radical communist regimes such as the Khmer Rouge in Cambodia. However, socialist property law did proceed from the assumption of superiority of social ownership, according to which the state freely expropriated and held property on behalf of the people and made it available to individuals and groups for socially useful purposes.³⁷

NATIONS AND OTHER PEACE OPERATIONS: A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM (S. Leckie ed., 2008).

³⁶ See Yodit Fitigu, *Guatemalan Refugees Return to a Hard Life*, REFUGEES INT'L REPORT (Jan. 5, 2002).

³⁷ Andrzej K. Kosminski, *Restitution of Private Property: Re-Privatization in Central and Eastern Europe*, 30(1) *Communist and Post-Communist Studies* (1997).

In much of Eastern Europe and the Soviet Union, socialist property relations were characterized by three Cold War trends relevant to contemporary restitution. First, many communist governments engaged in extensive nationalization of categories of private property such as agricultural land, apartment buildings, and industrial complexes in the decades following World War II, in many cases perpetuating property confiscations previously imposed by the Nazis.³⁸ By the 1960s, many socialist countries began mass-producing new housing in an attempt to support planned industrialization of urban areas and socialist new towns. Finally, as these efforts failed to keep up with demand, many regimes allowed public bodies such as socially owned enterprises to construct apartment buildings on state-owned land and allocate apartments to their members or employees. With the general collapse of communist regimes in the 1990s, socialist property relations were abandoned. However, in the context of remedies for property violations, they left several important legacies.

First, the manner in which social property was privatized in the early 1990s created an important precedent for later post-conflict restitution processes. Many states chose to convert socially-owned property through a combination of modalities, including sale by open tender, more restricted purchase by voucher, and restitution of older properties to their pre-nationalization owners. Restitution, which also came to be known in this context as “re-privatization,” was seen as reflecting an inter-generational commitment to upholding property rights unjustly curtailed up to four decades previously. However, in contrast to contemporary ethnic cleansing, post-World War II nationalizations were not necessarily illegal at the time they were undertaken. Re-privatization was therefore primarily a matter of political discretion rather than international obligation. Moreover, many re-privatization programs were framed in terms that excluded large classes of potential beneficiaries, raising an inference that

³⁸ See U.S. Department of State, Bureau of European and Eurasian Affairs, *Property Restitution in Central and Eastern Europe* (Oct. 3, 2007), available at <http://www.state.gov/p/eur/rls/or/93062.htm>.

they were based more on ethnic or political consolidation than genuine transitional justice concerns.³⁹

Whatever the merits of national re-privatization programs in the former Soviet bloc, the conditions under which they flourished also supported less problematic efforts to redress intergenerational harms that generated important mass-claims processing techniques. The easing of Cold War tensions and the opening of archives throughout Eastern Europe created an opportunity for victims of crimes by the Nazis and allied regimes during World War II to seek redress.⁴⁰ The compensation programs eventually crafted for victims of German forced labor programs and dispossessed Swiss bank deposit holders built on the experiences of other contemporary bodies (such as the UN Compensation Commission formed after the first Gulf War) in crafting procedures for fairly and expeditiously processing tens of thousands of claims.

A second and more problematic legacy of socialist property relations was the ambiguous nature of the “occupancy rights” that residents held to “socially owned” apartments commonly built by the state or public bodies during the communist period. Such occupancy rights were typically protected by law and permanent in duration, provided that the legal beneficiaries continued to use the apartment for their own residential needs. In the numerous ethnic conflicts that flared up in Europe during the transition from communism, those displaced often saw their rights cancelled on the cynical justification that they had, by virtue of fleeing, failed to meet this use requirement without justified grounds. This form of confiscation of the homes and possessions of displaced persons was consolidated in some countries by the reallocation of “abandoned” apartments to others who were allowed to purchase them in the context of general privatization programs. Although this process was arrested in some countries, such as Bosnia and Kosovo, tens of thousands of displaced victims of apartment confiscations from other post-communist countries such

³⁹ ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTIONS AND NEGOTIATION HISTORICAL INJUSTICES* 118 (2000).

⁴⁰ Jonathan Steinberg, *Reflections on Intergenerational Justice*, in *THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE* (Alice H. Henkin ed., 2002).

as Croatia, Georgia, and Azerbaijan have been denied any legal remedy to date.

While conflict in many post-communist countries has been addressed or at least stabilized into a “frozen conflict” footing, conflict and disaster-related displacement continues to occur on a mass scale in much of the developing world, raising the need to understand and recognize less formalized property systems in order to provide aggrieved groups and individuals with redress. In less developed contexts characterized by small populations or plentiful land, property is typically held in common by the groups that use it. Such “customary” tenure forms are the starting point from which many of the world’s modern codified property regimes evolved. In accordance with such systems, individuals’ relations to specific plots of land tend to be based on their ongoing use of them, whether through clearance and sedentary cultivation or regular access. In the context of such systems, individuals typically have no right to make transactions regarding the land they use without the consent of the broader community.

According to a well-known economic formulation, transitions from customary tenure to formal individualized systems of land ownership tend to occur “when the benefits from doing so exceed the costs,” in the context of increased population growth and land scarcity.⁴¹ In theory, as development occurs, state recognition and protection of individual rights to property encourages owners to make long-term investments in land, increasing its productivity in ways that benefit society as a whole. In countries where such transitions occurred organically, individualized property rights have increased tenure security and optimized land use. In colonial settings, however, the arbitrary imposition of individualized property rights—including the right to exclude others from accessing property and the right to sell property without consulting the broader community—often resulted in continuing legacies of inequality, dispossession, and conflict.⁴²

⁴¹ Klaus Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report 9 (2003).

⁴² *Id.* at 11-15.

As a result, while much of the developed world has completed the transition to formal and individualized property rights and by and large benefit from their existence, many developing countries have only partially adopted such systems, with the resulting pluralistic land administration framework fostering ongoing legal uncertainty and, in some cases, conflict. In post-colonial settings, formal property rights tend to extend only to urban areas and agricultural land under commercial cultivation, while much of the countryside typically remains held in informal and often unrecognized collective tenure forms. This gives rise to a number of problems in providing both retrospective remedies and prospective tenure security where rights in such formally unrecognized or unregulated possessory rights have been violated. In countries with fully statutory property administration systems as well, failure to provide the possibility of legal recognition or protection for informal rights to housing and land can worsen the situation of vulnerable minorities, such as Roma in informal settlements in many European countries.

In summary, much of the existing contemporary practice in redressing violations of property and possessory rights is related to the end of the Cold War, privatization of socialist property frameworks, intergenerational redress for World War II crimes, and the resurgence of ethnic conflict in Eastern Europe and the Caucasus. Post-Cold War efforts to provide reparations and redress have led to notable successes ranging from the compensation program for World War II forced labor victims to accomplished property restitution programs in Bosnia and Kosovo. However, such programs tend by their nature to presume the existence of sophisticated and unitary regulatory frameworks for property relations and high levels of domestic capacity to implement them. They have also tended to be expensive and resource intensive. The challenge for the future in redressing violations of property rights is therefore likely to revolve around what lessons such models can realistically provide in development contexts with plural legal regimes, low domestic capacity, and fewer resources.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Prior to displacement

Many measures can be taken to preemptively safeguard rights in property and possessions, both as a means of preventing property disputes from giving rise to conflict and displacement and, should displacement occur, as a way to clearly demarcate such rights, facilitating their eventual restoration. While a great deal has been written on this subject, most prescriptions for avoiding conflict over housing, land, and property involve general measures necessary to ensure respect for human rights and facilitate equitable access to housing and land for all parts of the population.⁴³ Given that such measures, whether substantive, procedural, or institutional in nature, do not involve specific responses to displacement, they fall outside the general scope of this study.

Provisional Suspension of Transfers of Property in High-Risk Areas

A very specific element of regulation for preventing displacement is the imposition of provisional bans on transfer of property rights in areas under threat of ethnic cleansing or conflict. Such measures may be of assistance in protecting legal rights to, if not possession of, homes and properties. For instance, in Colombia, attempts to place temporary liens on property transactions in areas threatened with displacement have been attempted within the framework of a broader set of early warning systems adopted by the authorities.⁴⁴ This system begins with Colombia's 1997 law on internal displacement, which stipulates that the Colombian authorities responsible for agrarian reform "shall maintain a registry of the rural properties abandoned by

⁴³ See, e.g., Nicolas Pons-Vignon & Henri-Bernard Solignac Lecomte, *Land, Violent Conflict and Development*, (OECD Development Centre, Working Paper No. 23, 2004); USAID Office of Conflict Management and Mitigation, *Land and Conflict: A Toolkit for Intervention* (2004).

⁴⁴ Human Rights Council, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: Mission to Colombia, ¶¶ 42-43, U.N. Doc. A/HRC/4/38/Add.3 (Jan. 24, 2007).

those displaced by violence and it shall inform the competent authorities in order that they prevent any alienation or transfer of property titles of these assets when such action is carried out against the will of the title holders of the respective rights.”⁴⁵ This general rule was more closely regulated in a 2001 decree that required local committees dealing with internal displacement to compile comprehensive reports on the existing legal tenure over properties in areas deemed at risk of violence and displacement, and pass these reports on to authorities competent to prevent any transfers of title as well as to deny title to persons claiming to have acquired such land through possession.⁴⁶ Although these measures were later given the force of law through inclusion in an amended statute on agrarian reform, they appear not to have been consistently implemented in practice, with one report finding that they may have only been applied with regard to about 5 percent of the officially registered displaced population of Colombia.⁴⁷

During displacement

Prevention of Destruction and Arbitrary Occupation of Abandoned Property

As a general matter, states should prevent destruction of abandoned property in accordance with international humanitarian law and ensure that it is not destroyed, appropriated, or altered by other persons. In particular, all security forces remaining in the affected area should be instructed to take all reasonable steps to maintain civil order; protect abandoned properties from destruction, looting, unlawful occupation, or appropriation; and to refrain from damaging or arbitrarily appropriating such property themselves. Any use or

⁴⁵ Law 387 of 1997 by means of which measures are adopted for the prevention of forced displacement, and for the assistance, protection, socioeconomic consolidation, and stabilization of persons internally displaced by violence in the Republic of Colombia, *Diario Oficial* No. 43,091 of July 24, 1997, art. 19(1).

⁴⁶ Decreto Numero 2007 de 2001 (Sept. 24, 2001), art. 1.

⁴⁷ Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado, VI Informe a la Corte Constitucional: La restitución como parte de la reparación integral de las víctimas del desplazamiento en Colombia—Diagnóstico y propuesta de líneas de acción, 27 (June 2008).

requisitioning of private property by the security forces should be based on legal regulations requiring the rights-holders to such properties to be informed of the approximate duration of time that they would be unable to access their property and paid just compensation.

Regulation of Temporary Humanitarian Re-allocation of Abandoned Property

In cases in which it is necessary to use abandoned property to meet the urgent humanitarian needs of other displaced populations, such use should be based on written regulations set out in a law or decree. In order to safeguard the rights of displaced owners, residents and users, these regulations should specify the following:

- Allocations are explicitly temporary in nature, lasting no longer than necessary under the circumstances and with specific provisions regarding the procedures for the pre-displacement occupants of the abandoned properties to be reinstated with their full legal rights to the property.
- Allocations must be in the public interest. In the case of displacement, this means that allocation of abandoned homes to displaced persons must be based on strict criteria of humanitarian need, excluding applicants who have other means to house themselves and their families. Abandoned homes should not be allocated to public officials charged with upholding the law, such as politicians, civil servants, military officials, judges, or police officers.
- Allocations must be necessary. In the case of displacement, this implies that (1) such allocations may only proceed based on specific findings that no other means of sheltering displaced persons exist; and (2) that such allocations must explicitly be temporary and should immediately be terminated when the humanitarian need no longer exists (e.g., when beneficiaries can repossess their own property or when other more appropriate forms of temporary shelter become available).
- Looting of personal possessions or damage to or alteration of temporarily allocated abandoned properties should be expressly

forbidden and sanctioned, with the responsible authorities bearing ultimate responsibility for resulting damage.

In Bosnia, most wartime occupation of abandoned property was based on local regulations and decrees allowing allocation for use. Although such allocations were usually formally temporary, the lack of effective procedures allowing return of such properties to their rightful owners rendered the resulting occupations potentially permanent. In Kosovo, the international community has administered abandoned property at the request of claimants, according to detailed regulations. In the case of Bosnia, such arrangements were deemed to have been a proportionate response to the wartime displacement crisis, but subject to the requirement that they not be perpetuated beyond the crisis period in a manner that would interfere with the rights of the displaced.

The Constitutional Court considers that [a wartime law temporarily reallocating abandoned homes] initially served a legitimate aim The relevant aim was the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war. Indeed, the war in Bosnia ... caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities...at the time ... enacted a law which temporarily solved the housing problems caused by the great number of [IDPs].

However in the present case, the appellant has still not been able to realize his rights. Therefore, the ‘interference’, which initially could have been justified and in compliance with the principle of ‘necessity’, can no longer, five years after the end of the war, represent a necessary “interference in a democratic society” with the appellant’s right to return to his home.⁴⁸

⁴⁸ Constitutional Court of Bosnia, Case No. U-14-00, ¶¶ 24, 25.

Inventory of Condition and Contents of Abandoned Property

Where abandoned property is under the protection of local authorities, and particularly where it is to be temporarily reallocated, inventories should be taken of significant personal possessions left in each property as well as the general state of the property and the fixtures therein at the time of allocation. Such inventories should be signed by those temporarily allocated the property for use and the latter should be informed of their responsibility for the contents and condition of the property as well as any sanctions for theft or damage to the property. In Bosnia, wartime regulations on allocation of abandoned property often required inventories to be taken, but this was rarely done in practice.

Safeguarding Registration Information and Documentation

Records establishing legal rights in property should not be altered or tampered with in cases of displacement and abandonment of property. Such records should be secured and safeguarded from theft or destruction in all displacement situations.

States and other responsible authorities or institutions should ensure that existing registration systems are not destroyed in times of conflict or post-conflict. Measures to prevent the destruction of housing, land and property records could include protection *in situ* or, if necessary, short-term removal to a safe location or custody. If removed, the records should be returned as soon as possible after the end of hostilities. States and other responsible authorities may also consider establishing procedures for copying records (including in digital format), transferring them securely and recognizing the authenticity of said copies.⁴⁹

⁴⁹ Pinheiro Principles, *supra* note 1, Principle 15.4.

Creation or Facilitation of a Survey of Property and Possessions Subject to Claims

As set out above, inventories of abandoned properties should be a routine part of any temporary allocation regime or post-disaster planning process. Where such a survey is organized by victims of displacement, it should be facilitated. The authorities in Georgia are currently carrying out a survey of property subject to claims by IDPs from the breakaway regions of Abkhazia and South Ossetia.⁵⁰ Although this survey is somewhat belated in relation to the early 1990s secessionist conflicts that gave rise to displacement there and comes during a time of high political tension, it does seek to address an issue that will have to be resolved in order for any resolution of the conflict to be made in a manner that respects the rights of the displaced. Other surveys of claimed properties in frozen or unresolved conflicts include those made by displaced Palestinians, displaced Muslims in Sri Lanka, and Bhutanese refugees in Nepal.⁵¹ According to Principle 15.6 of the *Pinheiro Principles*:

[s]tates and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property or place of habitual residence. Such information should be sought whenever information is

⁵⁰ Presidential Decree No. 124 of Feb. 14, 2006, on Measures to be Taken with Respect to Recording of Rights to Immovable Property existing in the Autonomous Republic of Abkhazia and the Tskhinvali Region; *see also* Presidential Decree No. 255 of Apr. 8, 2006, on Approval of the Procedure for Preliminary Registration of Immovable Property Existing in the Autonomous Republic of Abkhazia and the Tskhinvali Region (Georgia).

⁵¹ *See* Centre On Housing Rights and Evictions [COHRE], *Hoping to Return Home: Housing, Land and Property Restitution Rights for Bhutanese Refugees and Displaced Persons*, COHRE Country Report 38-39 (Mar. 2008).

gathered from refugees and displaced persons, including at the time of flight.

Suspension of Prescription and Use Requirements

In cases of conflict, natural disaster, or other serious crises causing displacement, requirements related to the use or possession of property in affected areas should be waived in favor of those displaced in order to avoid any deprivation of their rights in the property as a result of their involuntary absence. Such requirements should not be re-imposed until such time as it is manifestly possible for those displaced to safely resume possession and use of the properties in question. In Colombia, the law on internal displacement states that “disruption of possession or abandonment of real or personal property due to a situation of violence that compels forced displacement of the possessor shall not interrupt the term of prescription in his favor.”⁵²

In the Context of Durable Solutions

Establishment of a Right to Restitution and Other Remedies

As the conditions that caused displacement recede, all competent authorities should undertake concrete commitments to provide appropriate remedies for the loss of rights, value, use, and/or access to housing, land, and property. Where displacement resulted from conflict, it is particularly important that any ceasefire or peace agreement include provisions explicitly entitling those displaced to redress for the loss of their homes and lands. In the wake of natural disasters, a commitment should be made to uphold rights and facilitate return to housing, land, and property wherever possible and to provide adequate compensation and relocation assistance in all other cases.

In terms of peace treaties, the strong individual rights to return and property restitution set out in Annex 7 of the 1995 Dayton Peace Accords (DPA) that ended the conflict in Bosnia stand out as a watershed. “All refugees and displaced persons have the right freely to return to their homes of origin. They

⁵² Law 387 of 1997, art. 27. *See also* Decreto 2007 de 2001, art. 7.

shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”⁵³

Prior to the DPA, remedies for property violations tended to be framed in ambiguous terms where they were included at all. For instance, a series of early 1990s agreements that ended a long-running conflict in Guatemala set out far more ambiguous rights (essentially requiring the government to do little more than request secondary occupants of confiscated land to vacate it) and included some guarantees that applied only to refugees, prejudicing the rights of IDPs.⁵⁴

The competent authorities in displacement settings should also explicitly recommit themselves to pre-existing domestic legal guarantees of housing and property rights, particularly where they protect marginalized groups. For instance, a 2005 Colombian law granting reduced criminal accountability to right-wing paramilitary groups in exchange for their demobilization has been criticized on numerous fronts, but not least because of its failure to create a clearly workable mechanism for return of the huge tracts of land confiscated by such groups in apparent violation of numerous legal and constitutional guarantees.⁵⁵

Revocation of Temporary Allocation Regimes and Cancellation of their Effects

Where the abandoned property of displaced persons has been subject to a temporary humanitarian allocation regime, beneficiaries should be required to move into other types of humanitarian shelter as soon as circumstances allow, allowing prior owners, residents, and users to resume the exercise of their pre-

⁵³ General Framework Agreement for Peace in Bosnia Herzegovina, 35 I.L.M. 75 (1995), Annex 7, ch. 1, art. I(1).

⁵⁴ Andrew Painter, *Property Rights of Returning Displaced Persons: The Guatemalan Experience*, HARV. HUM. RTS. J. 9 (1996).

⁵⁵ Centre On Housing Rights and Evictions [COHRE], *Defending the Housing Rights of Displaced Persons in Colombia*, COHRE Fact Finding Mission Report (2005).

displacement rights over such properties. Where abandonment or prescription laws (see obstacles section, above) have been used to curtail the pre-displacement rights of property owners and users, the first step in providing a remedy is the revocation of such decisions in all cases during the period of involuntary displacement and the prospective tolling of any prescription provisions until the conditions have been created for safe return. This approach was taken in Bosnia where wartime abandonment laws had been used to temporarily allocate abandoned properties and threatened to permanently cancel occupancy rights to apartments due to displaced residents' ostensibly unjustified failure to use them. Restitution laws passed in Bosnia in 1998 began by canceling all wartime abandonment laws, setting the stage for restitution to reverse their effects.⁵⁶

Principle 19 of the *Pinheiro Principles* addresses the abuse of abandonment or prescription laws by asserting that states should not prejudice restitution processes through the application of "arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations." Principle 19 also asserts that states should provide remedies for those harmed by prior application of such laws.

Review of Private Property Transactions and Cancellation for Duress

In addition to situations such as the above where *de jure* or *de facto* government authorities have taken steps to dispossess displaced persons, the *Pinheiro Principles* also address private transactions of property that have taken place under duress in situations of generalized violence or ethnic persecution. In situations of mass displacement, and particularly where individuals were displaced based on their ethnic or religious identity, it may be possible to presume the existence of a general atmosphere of coercion during the time and in the places where conflict and forced evictions occurred. Such a

⁵⁶ Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37(3) N.Y.U. J. INT'L L. & POL. 486 (2006).

presumption can allow for the following:

- All cases of private transfers of homes and property that happened in the relevant time and place to be subject to systematic reexamination, with the possibility of voiding contracts found to be the result of coercion;
- Shifting of the burden to persons seeking to uphold contracts on sale or exchange undertaken in the relevant time and place to prove no coercion existed (particularly where the party that claims coercion received inadequate compensation for their property); and
- In cases where there is clear evidence of ethnic or sectarian cleansing, all contracts on sale or exchange undertaken in the relevant time or place might simply be voided *ex lege*.

During the war in Bosnia, the UN Security Council condemned coerced property exchanges, affirming its “endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so.”⁵⁷ After the conflict, the Bosnian Constitutional Court recognized that private wartime sales and exchanges of property were presumptively invalid due to the pervasive atmosphere of ethnic intimidation that prevailed at the time.

In the present case, the Constitutional Court finds it clearly established that the appellant concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina. It is also clear that the contract was not in conformity with what would have been her wishes under normal conditions, and it must be assumed that [the party defending the contract] was, at least in a general way, well

⁵⁷ UN Security Council, Resolution 820 (1993), ¶ 7.

aware of the reasons which made her willing to accept the contract.⁵⁸

This determination was reflected in legal provisions shifting the burden to those seeking to uphold wartime contracts as a defense to restitution claims to prove that the transaction had been voluntary.

In case of a dispute as to the validity of the contract on exchange, the competent authority shall suspend proceedings and shall refer the parties to the competent court according to the provision of the Law on Administrative Procedures...regulating preliminary issues, in order to rule on the allegation. Notwithstanding the provisions of the Law on Civil Procedures...the burden of proof shall lie upon the party claiming to have acquired rights to the apartment through the contract on exchange to establish that the transaction was conducted voluntarily and in accordance with the law.⁵⁹

Similar practices have occurred in Colombia, where forced transfers of land and property have taken the guise of ostensibly voluntary contracts on sale, where the land has been deeded under duress to loyal but relatively unknown appointees (*testaferrato*) of notorious warlords.⁶⁰

The *Pinheiro Principles* set out a rule, well-supported in international practice, that states “shall not recognize as valid any housing, land and/or property transaction, including any transfer that was made under duress, or which was otherwise coerced or forced, either directly or indirectly, or which was carried

⁵⁸ Constitutional Court of Bosnia, Case No. U-15-99.

⁵⁹ Federation of Bosnia and Herzegovina, Law on Cessation of the Law on Abandoned Apartments, consolidated text as most recently amended in May 2003, art. 2a.

⁶⁰ Los señores de las tierras, *Semana* (May 28, 2004).

out contrary to international human rights standards.”⁶¹ In practice, states should repudiate such transactions at the first opportunity, ensuring that remedial programs extend to the victims of private land grabs as well as official reallocations of property.

Establishment of Procedures for Receipt, Processing, and Adjudication of Claims

Decisions regarding what type of system to entrust with handling claims for redress for property violations have important institutional implications that will be discussed in the corresponding section below. However, such decisions are also inherently substantive with important procedural implications, as they tend to revolve around the question of whether to affirm the application of existing laws to such claims or to develop new, special legislation—and procedures—for resolving them.

The most straightforward approach to resolving property-related claims is to simply affirm the competence of existing fact-finding and dispute-resolution bodies, typically courts, traditional councils, or competent administrative bodies to apply existing substantive and procedural rules in deciding such claims. However, displacement scenarios are often characterized by the temporary accretion of a large number of claims based on the same or similar events and circumstances. As a result, many of the most successful redress mechanisms have foreseen the creation of ad hoc bodies, or commissions, that apply provisional rules, constituting a temporary *lex specialis* exception to the generally applicable substantive and procedural laws of the country in question.

In post-conflict settings, in particular, the creation of ad hoc remedy mechanisms may be necessary due to broader breakdowns of the rule of law.⁶² In many cases, domestic adjudication systems are either non-functional or

⁶¹ Pinheiro Final Report, UN Restitution Principles, Principle 15.8.

⁶² Ingunn Sofie Aursnes & Conor Foley, *Property Restitution in Practice: The Norwegian Refugee Council's Experience* 27 (Apr. 2005).

perceived as unacceptably partial or compromised in the wake of conflict. As a result, Principle 12.5 of the *Pinheiro Principles* recommends that:

[w]here there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

From a procedural viewpoint, one of the most important decisions in mass claims settings is whether to institute provisional programs that respond to the scale and temporary nature of such caseloads. In situations such as ethnic cleansing, where dispossession and displacement may temporarily constitute the norm rather than the exception, forcing claimants to individually prove the merits of their case in lengthy judicial proceedings may be both unnecessary and unfair. Where the facts of generalized dispossession are well-known, there is little justification for exposing claimants to the high evidentiary burdens, lengthy appeals processes, expenses, and uncertainty typically accompanying ordinary judicial redress. These considerations argue in favor of provisional, administrative remedies in the case of mass-claims settings involving violations of property-related rights.

The development of such rules—which can be applied either by existing institutions or by ad hoc “property commissions”—should be undertaken on the understanding that such provisions complement, rather than contradict or entirely bypass, the broader domestic legal framework. Where such rules have not been based on—or at least made compatible with—pre-existing rules, the effectiveness of the remedies provided can suffer.

For example, the regulations passed by the Coalition Provisional Authority (CPA) in Iraq authorizing the creation of an Iraqi Property Claims

Commission (IPCC) to restore property confiscated under the Baathist regime has been criticized for setting out substantive rules for restitution that bear little relationship to longstanding property rules in the Iraqi Civil Code.⁶³ As a result, the IPCC statute failed to provide explicit guidance on a number of significant issues and was initially perceived as competing with, rather than complementing, Iraq's struggling judicial system.⁶⁴ By contrast, the special laws providing for post-war property restitution in Bosnia were based on domestic legal constructs and explicitly invited the application of non-contradictory provisions from the laws on general administrative procedure, providing an important mechanism for addressing inadvertent gaps in the law. "The procedure for the return of apartments to the possession of the occupancy right holders determined by this Law shall be carried out in accordance with the Law on Administrative Procedures, unless otherwise stipulated by this Law."⁶⁵

A related challenge in setting up provisional property commission systems involves the need to ensure that compatibility with general principles of domestic law does not lead to the exclusion of classes of victims whose rights to property and possessions are cognizable under international law but were not recognized or regulated by domestic law prior to their displacement. This point applies with particular force in cases of unrecognized customary tenure forms. However, women or marginalized minorities are also liable to find their pre-displacement *de facto* rights ignored in remedial programs because they were not accorded *de jure* recognition. In practice, remedial programs for property-related violations have taken a multitude of forms, reflecting local circumstances and political conditions.

⁶³ Dan Stigall, *Courts, Confidence and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission* [IPCC], ARMY L. 33 (Mar. 2005).

⁶⁴ *Id.* at 30-41.

⁶⁵ Law on the Cessation of the Application of the Law on Abandoned Apartments, Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98, art. 18.

In the Czech Republic, special laws were passed in the early 1990s providing rules for restitution and compensation in favor of those whose property had been nationalized by the prior communist regime. However, no dedicated institution was created to oversee the process and the bulk of claims were ultimately resolved in ordinary courts.⁶⁶

In Turkey, where around one million people fled fighting in the early 1990s, so few abandoned properties were thought to have been occupied that the government advised returnees to seek to eject any secondary occupants through ordinary civil proceedings. However, because virtually all IDPs were deemed entitled to compensation for the time they had been denied access to their homes and lands, a special law was passed in 2004 providing for the creation of ad hoc provincial damage assessment committees to take and decide claims.

In South Africa, a 1994 law provided for remedies for tens of thousands of non-whites whose land had been confiscated during the Apartheid era. The law created a special Land Claims Court, served by an administrative commission, to rule on claims. However, amendments five years later sped the process up by shifting the resolution of the bulk of claims from the Court to the central and regional Land Claims Commissions.

In Bosnia, the Dayton Peace Accords (DPA) created a quasi-international body, the Commission for Real Property Claims (CRPC), to take and resolve restitution and compensation claims. However, the CRPC fit poorly into the domestic legislative framework and did not have the local investigative capacity necessary to address the over 200,000 claims it received. As a result, it was ultimately relegated to a secondary role in a decentralized restitution process in which ad hoc local administrative bodies applied special domestic restitution laws under the scrutiny of a large international field monitoring presence.

⁶⁶ Rhodri C. Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, sec. II. A (*International Center for Transitional Justice, Occasional Paper*, 2007).

In Kosovo, exclusive jurisdiction for property claims was exercised by ad hoc, internationally-run bodies, the Housing and Property Directorate (HPD) and Housing and Property Claims Commission (HPCC). The HPD and HPCC applied rules for restitution and compensation set out in binding regulations by the UN Special Representative of the Secretary General (SRSG) in Kosovo.

In Afghanistan, no special laws or bodies were set up to assist the hundreds of thousands of IDPs and repatriating refugees with restoration of their property after the fall of the Taliban regime in 2001. As a result, remedies for property and land violations have been sought, with mixed results, through traditional dispute resolution bodies in informal proceedings in which customary norms have been given at least as much weight as statutory law. Current efforts to set up a Land Commission are likely to face significant challenges due to the weak role of the central government in Afghanistan's provinces.

Determination of the Geographic and Temporal Scope of Provisional Remedial Programs

Provisional remedial programs are typically developed in response to particular sets of events that caused displacement and dispossession, such as natural disasters or armed conflicts. In such cases, it is necessary to define the specific dates and locations within which alleged property violations must have taken place in order to be cognizable. Such clear jurisdictional rules can help prevent provisional mechanisms from being swamped with unrelated claims. In the case of natural disasters, such definition should typically be fairly straightforward. However, where displacement is related to conflict, there may be reluctance on the part of some parties to admit to having engaged in activities that led to displacement and temporal and/or geographic demarcation of the conflict may take on political sensitivities as a result.

The Turkish compensation law explicitly redresses property and other violations that took place in the southeastern provinces of the country, where conflict in the early 1990s led to large-scale displacement. While this geographic limitation is relatively uncontroversial, some observers have asserted that the temporal cut off date for claims under the same law is set too formalistically, excluding the claims of a significant number of persons

displaced after the conflict had begun but before a state of emergency was declared.⁶⁷

By contrast, the property restitution laws in Bosnia were set to cover the entire period during which displacement and dispossession could conceivably have taken place. The period covered starts with the date when hostilities began (well in advance of the formal declaration of a state of war) and ending on the date the laws themselves were passed, in recognition of the fact that low-intensity ethnic cleansing had continued even after the formal ceasefire and entry into force of the DPA.

Determination of the Substantive Scope of Remedial Programs

A fundamental substantive determination to be made in setting up remedial programs for property violations is precisely which categories of rights in housing, land, and property were sufficiently significant that they should, where abridged, be subject to a remedy. As a general rule, remedial programs should seek to restore rights to homes and lands that IDPs depended on for their shelter or livelihoods even in cases where they did not formally own them. While ownership rights are typically the starting point in defining the substantive scope of contemporary remedial programs, reinstatement of less perfected rights in homes and lands are often included in order to support sustainable return. Such rights can include forms of tenancy, access rights to grazing land or, as in Bosnia, Kosovo, and elsewhere, conditional rights under socialist law to occupy “socially-owned” property such as apartments. Customary forms of land tenure should be given effect for remedial purposes even if they have not been given full prior recognition in the broader domestic legal framework of the country involved.

⁶⁷ Internal Displacement Monitoring Centre of the Norwegian Refugee Council [IDMC/NRC] and Turkish Economic and Social Studies Foundation [TESEV], *Overcoming a Legacy of Mistrust: Toward Reconciliation between the State and the Displaced*, Update on the Implementation of the Recommendations Made by the UN Secretary-General's Representative on Internally Displaced Persons following his Visit to Turkey (June 2006).

As discussed in the “legal framework” section of this chapter, above, non-proprietary rights to housing and land are increasingly recognized under international law. As a result, the substantive scope of restitution rights is defined expansively in the recent *Pinheiro Principles*. According to Principle 2.1, this right applies with regard to three primary categories, comprising housing, land, and property. The inclusion of both housing and property as distinct categories indicates that displaced people are entitled to the restitution of their homes under the *Pinheiro Principles*, whether or not they formally owned them.⁶⁸ By extension, land subject to restitution might have either been owned outright or held under long-term lease or informal or customary arrangements.

Principle 13.6 affirms the rights of “users of housing, land and/or property, including tenants” to seek restitution and Principle 16.1 states that such claimants should be “able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.” However, depending on the nature of the right, it may be appropriate to attach conditions to its reinstatement. For instance, in situations where displaced persons had rights to access or cultivate land that were conditioned on their active exercise, it may be reasonable, in a situation of land-scarcity, to condition in-kind restitution on resumption of use of the land within a reasonable period, once other basic conditions for safe and dignified return have been met.

However, the need for caution in imposing such conditions is reflected by the case of Bosnia, where a number of restrictions were placed on the restitution of socially-owned housing that were not applicable to the restoration of private property. These included a preclusive claims deadline as well as time limits for returning to the apartment after it was vacated. However, most of these conditions were ultimately repealed as unfair to IDPs and refugees in a context

⁶⁸ *Id.* This understanding is supported by the fact that the “overarching principles” section of the text refers to the right to privacy and respect for the home (Principle 6) and the right to adequate housing (Principle 8), both of which protect possession rather than ownership. Protection of property interests is also referred to in Principle 7.

where those not displaced from their apartments had been allowed to privatize them after the conflict without any such requirements.⁶⁹

The recognition and inclusion of weaker residential rights in remedial programs is particularly important for marginalized groups. Where remedial programs are limited to full-fledged ownership rights, they risk exacerbating the effects of pre-displacement discrimination by restoring holders of recognized rights to their full pre-displacement status while leaving others bereft of even the minimal tenure security and shelter they previously enjoyed.

For example, although the Bosnian restitution program extended to contingent rights to use socially owned apartments, it did not go as far as reinstating weaker rights to occupy apartments previously administered as social housing by local Centers for Social Work. However, despite being subject to formal means-testing criteria, such apartments were disproportionately allocated to Roma families who tended to occupy them on an open-ended, if not permanent, basis. As a result, the failure to provide for the restitution of rights in such apartments effectively denied many Roma families the right to return to their pre-war homes.⁷⁰

Roma communities in the former Yugoslavia provide further example of how pre-displacement discrimination of vulnerable groups can lead to post-displacement exclusion. Many Roma communities had built up homes and infrastructure in informal settlements over the course of generations, but had never been recognized as having formal rights to their homes due to their social marginalization.⁷¹ As a result, despite relatively broad language on what type of property can be repossessed in the Bosnian restitution laws, Roma have faced particular difficulties repossessing and reconstructing their homes in informal settlements.

⁶⁹ Williams, *supra* note 56, at 518.

⁷⁰ Paul Prettitore, *Exercise of Fundamental Rights by the Roma of Bosnia and Herzegovina: Access to Personal Documents and the Right to Housing*, ROMA RIGHTS (Mar. 2003), available at http://lists.errc.org/rr_nr3_2003/noteb7.shtml.

⁷¹ *Id.*

However, where previously unrecognized or informal tenure rights are included in remedial programs, a great deal of caution needs to be exercised to ensure that any necessary equation of such informal prerogatives with existing statutory property rights systems does not adversely affect vulnerable sub-populations such as female-headed households.

For example, in Uganda, new provisions allowing the recognition of customary tenure in the 1998 Land Act would seem likely to facilitate return and recovery of property held by displaced ethnic groups in northern Uganda. However, in the event of return to land currently off-limits due to conflict, there are some concerns that the titling aspect of the Land Act—through distribution of certificates recognizing customary ownership—may introduce a zero-sum element to customary land tenure, leading to the exclusion of women, whose rights to access land were strong and recognized under customary rules but still weaker than those attributed to men.⁷²

Determination of the Nature of the Remedy to be Provided

One further substantive determination in remedial programs relates to the form that remedies should take in individual cases where a violation is found. As a general matter of both international law and recent practice, restitution is preferred over other remedies such as compensation or provision of alternative land. Restitution tends to be preferred in displacement settings because it provides displaced persons with maximum choice of durable solutions, facilitating actual return should the beneficiary so choose. This preference was most recently emphasized in the *Pinheiro Principles*, which deem compensation acceptable only in cases where restitution is “factually impossible,” where the claimant freely chooses compensation, or where “the terms of a negotiated peace settlement provide for a combination of restitution and compensation.”⁷³ The *Pinheiro Principles* go on to strictly define factual

⁷² Civil Society Organisations for Peace in Northern Uganda [CSOPNU], Land Matters in Displacement, *The Importance of Land Rights in Acholiland and What Threatens Them* (2004).

⁷³ *Pinheiro Principles*, *supra* note 1, Principle 21.1.

impossibility,⁷⁴ and to exhort parties to peace settlements to include provisions “demonstrably prioritizing the right to restitution as the preferred remedy.”⁷⁵

Based on practice, the definition of “impossibility” of restitution in the *Pinheiro Principles* may be excessively narrow. For instance, in some protracted displacement contexts, it may be deemed impossible to restore property that has been sold to bona fide third party purchasers. Moreover, in the wake of natural disasters, the likelihood that similar devastation could recur might render the restitution of properties in affected areas effectively impossible. However, in all such cases, consideration must be given to alternate remedies such as compensation or the provision of equivalent property or land.

As the *Pinheiro Principles* point out, restitution and compensation are not mutually exclusive. For instance, in cases where houses were confiscated and systematically destroyed in the course of conflict, victims should be entitled to restitution of their land as well as compensation for the destruction of their homes. In practice, however, such complete remedies are rare.

For example, in Bosnia, where up to a third of the housing stock was destroyed or damaged, payment of compensation was impossible for the cash-strapped postwar authorities and undesirable for international donors who feared being seen as “underwriting ethnic cleansing.”⁷⁶ As a result, legal

⁷⁴ *Id.* Principle 21.2. This provision reads as follows: “States should ensure, as a rule, that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. Even under such circumstances the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.”

⁷⁵ *Id.* Principle 12.6.

⁷⁶ Charles Philpott, *From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina*, 18(1) INT’L J. REFUGEE L. (2006).

remedies for property violations were limited in Bosnia to restitution, which delivered properties to claimants in whatever condition the vicissitudes of war left them in. Donor-funded reconstruction was available upon application rather than as of right, and tended to be granted only to “minority” returnees to ethnically cleansed areas.⁷⁷

Bosnian restitution programming also generally excluded compensation for the period that displaced persons were prevented from reoccupying their homes due to the presence of secondary occupants.⁷⁸ In fact, although compensation of this nature is well-founded and might serve as a good incentive for speeding up restitution processes, it is rarely seen in practice. However, one prominent example is provided by the Turkish compensation law, which provides redress for lack of access to homes and properties during displacement as well as other material losses related to human rights abuses and displacement during the early 1990s.⁷⁹

The Turkish focus on compensation is facilitated by the fact that most abandoned properties were not taken over by secondary occupants, relieving local officials of the necessity of administering a full-fledged restitution program as well. However, this remedy also comports with recent rulings by the European Court of Human Rights, providing an insight into the interplay between regional human rights bodies and domestic practice.⁸⁰

⁷⁷ Marcus Cox & Madeline Garlick, *Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina*, in HOUSING AND PROPERTY RESTITUTION OF REFUGEES AND DISPLACED PERSONS (Scott Leckie ed., 2003).

⁷⁸ Philpott, *supra* note 76, at 69. The author notes that only those claimants who managed to have their case heard by the Human Rights Chamber, a human rights high court set up in Bosnia pursuant to the DPA, were accorded such compensation.

⁷⁹ Law 5233 on the Compensation of Damages that Occurred due to Terror and the Fight Against Terrorism (July 2004) (Turkey), *available at* <http://www.brookings.edu/projects/idp/Laws-and-Policies/turkey.aspx>.

⁸⁰ *See Dogan and Others v. Turkey*, App. No. 32270/96, 68 Eur. Ct. H.R. (2004).

In cases where long and unresolved histories involving waves of conflict and discriminatory property takings have led to multiple competing claims for properties, there may not be a clearly legitimate *status quo ante* on which to found a restitution program. For instance, centuries of land conflict in Afghanistan have led some observers to advocate general land reform as the key to resolving conflict.⁸¹ In situations where nearly everyone can credibly claim to be a victim of property-related violations, equitable prospective access to land and property may effectively be viewed as a remedy in addition to (or even in lieu of) retrospective restoration of rights.

In South Africa, a centuries-long history of colonial and Apartheid-era confiscations justified not only allowing restitution for violations as far back in time as 1913, but also promoting land reforms meant to increase overall black access to, and ownership of, land as an indirect means of countering the effects of pre-1913 discrimination.⁸² Such approaches to remedying historic injustices beyond living memory are not without controversy, as witnessed by the debate over compensation for slavery in the United States. The terms of this debate were touched on by the UN Sub-Commission on Human Rights, which proposed not only “solemn and formal recognition” of responsibility for historic injustices, but also “a concrete and material aspect” such as debt cancellation and return of cultural objects to groups affected by such injustice.⁸³

Determination of who is entitled to a Claim

Remedial programs should specify who is entitled to lay claims to property. While the titular holders of rights in confiscated property should clearly be entitled to claim, such rights should also be extended to “subsidiary claimants” such as spouses and family members. This is reflected in Principle 18.2 of the

⁸¹ See Liz Alden Wiley, *Rural Land Relations in Conflict: A Way Forward* (Afghanistan Research and Evaluation Unit, Briefing Paper, 2004).

⁸² Ruth Hall, *Land Restitution in South Africa: Rights, Development and the Restrained State*, 38(3) CAN. J. AFR. ST. (2004).

⁸³ U.N. Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2001/1 (Aug. 6, 2001).

Pinheiro Principles, which sets out the right of subsidiary claimants such as family members, spouses, and legal heirs to claim their homes on the same basis as the formal holder of rights to such properties or “primary claimants.”

In cases of inter-generational restitution with relatively broad temporal parameters, direct descendants of injured rights-holders should explicitly be eligible to claim for remedies. For example, the heirs of early victims of Apartheid land confiscations were deemed entitled to claim restitution under South Africa’s program, which accepted claims going as far back as the passage of the discriminatory Natives Land Act in 1913.

Finally, where confiscated lands or properties were held collectively by members of groups, remedial programs should provide for groups to be able to lay collective claims. This principle is particularly important where indigenous groups or traditional agriculturalists have been dispossessed, as a general danger exists in such cases that the sudden introduction of individual rights concepts in the context of the provision of a remedy may lead to intra-group exclusion and disputes. The South African post-apartheid restitution framework allowed for ethnic groups to submit collective claims for land, a provision that necessitated labor-intensive processes of determining which people remained valid ancestors of ethnic groups dispossessed decades previously, as well as mediation between competing branches of such groups.⁸⁴ However, despite the efforts involved, the acceptance of group claims arguably bolstered the popular legitimacy of the process by recognizing the harm dispossessions incurred against the integrity of groups as well as the rights of individuals.

Determination of Administrative Conditions that may be imposed on Claims

As a general rule, displaced claimants should be exempted from administrative fees and other burdensome administrative requirements. Likewise, applications for remedies should not be rejected on the basis of formal errors or omissions.

⁸⁴ Ruth Hall, *Rural Restitution* (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, Sept. 2003).

The imposition of preclusive deadlines for submitting claims is an appropriate device, in principle, for ensuring legal certainty in situations where remedies are meant to be provided through a provisional mechanism applying procedures not foreseen in the ordinary law of a country. In order to ensure that such processes do not extend indefinitely and facilitate a rapid return to handling complaints through the ordinary channels in the domestic legal system, deadline regimes are a useful device for capturing a precise and finite universe of claims that will be addressed. However, in practice, the imposition of such deadlines is almost always controversial.

In South Africa, for instance, although an estimated 3.5 to 6 million people were affected by Apartheid era evictions, only about 80,000 claims (albeit with many on behalf of large dispossessed groups with many members) were received by the time a four-year deadline from the entry into force of the restitution law ran.⁸⁵ In Bosnia, deadlines to claim socially owned apartments were extended numerous times, but observers have noted that given the highly politicized atmosphere during the early days of restitution there, they may still have unnecessarily precluded many from claiming. Because no ordinary remedies for the loss of such apartments existed and no compensation was available for those who had not claimed, this group—comprising up to 9,000 families—arguably suffered the arbitrary denial of a legal remedy.⁸⁶

A clear precondition for the imposition of preclusive claims deadlines is the crafting of public information campaigns designed to reach all potential claimants and accessible procedures for making claims. However, states should also consider providing some form of appeal for time-barred claimants in order to allow them to present evidence that they were unaware of the deadline or unable to claim prior to its closure.

⁸⁵ *Id.*

⁸⁶ Williams, *supra* note 56, at 540.

Public Information, Legal Support, and Outreach to Disadvantaged Individuals or Groups

States should provide clear public information and outreach on property remedial programs to all parties affected by the process. In addition to the equitability concern that all persons should be aware of their rights, such outreach can serve pragmatic ends, increasing the effectiveness of remedial programming. For instance, clear information and targeted outreach can help to control popular expectations about what the program can achieve, ensure the submission of well-framed and documented claims, and discourage the submission of ineligible claims which the institutions administering such programs would otherwise have to spend time and resources ruling inadmissible.⁸⁷

In Bosnia, internationally funded public information campaigns targeted both claimants and secondary occupants. Information regarding deadlines for claiming was disseminated throughout the region as well as in many countries with sizeable Bosnian refugee populations. Later, the focus shifted to secondary occupants in an attempt to destabilize the sense of entitlement that many had developed to the properties they occupied but also inform them of their procedural rights in the process of vacating such properties.⁸⁸

Updated public information on property remedies may be helpful as well. In Bosnia, monthly updated statistics on the implementation of restitution claims in each municipality in the country were published, showing that the process was finite and accelerating a competitive dynamic between cities and regions to complete the process.⁸⁹

⁸⁷ Peter Van der Auweraert, presentation at Joint Training for Compensation Commissions organized by UNDP and Turkish Ministry of Interior, Mersin, Turkey, June 15-20, 2006.

⁸⁸ Williams, *supra* note 56, at 526.

⁸⁹ These statistics, as well as guidelines on how they were compiled, are available at: <http://www.ohr.int/plip>.

Generally speaking, remedial processes should be accessible to potential claimants. For instance, where such persons are displaced across a wide area or have sought shelter abroad, the deployment of regional or mobile claims collection centers should be considered, as well as the possibility of submission of claims by mail. The *Pinheiro Principles* advocate measures to relieve the burden on claimants by allowing submission of claims by proxy, for instance lawyers with powers of attorney.⁹⁰ In the case of the UN Claims Commissions, states hosting populations of people who fled Kuwait during or after the Iraqi invasion were invited to act as proxies, systematically collecting claims from such persons and submitting them on their behalf.⁹¹

In addition, outreach information and claims forms should be formulated in multiple languages, as necessary to ensure accessibility to displaced ethnic minority groups. Finally, assistance in filling out such forms should be provided for the disabled, illiterate, or unaccompanied minors. As set out in the *Pinheiro Principles*, remedial mechanisms should be available to displaced persons without adverse distinction on the basis of gender,⁹² age,⁹³ disability,⁹⁴ or conditions and location of displacement.⁹⁵

Finally, practice indicates that even the best remedial programs stand to benefit from the provision of legal aid to claimants and other affected parties throughout the process.⁹⁶ The *Pinheiro Principles* also urge the provision of

⁹⁰ *Pinheiro Principles*, *supra* note 1, Principle 13.5.

⁹¹ See Hans van Houtte, Hans Das & Bart Delmartino, *The United Nations Claims Commission*, in *THE HANDBOOK OF REPARATIONS* (P. DeGreiff ed., 2006).

⁹² *Pinheiro Principles*, *supra* note 1, Principles 3, 4.1-4.3, 12.2, 14.2.

⁹³ *Id.* Principles 3, 12.2, 13.3, 14.2.

⁹⁴ *Id.* Principles 3, 13.10, 14.2.

⁹⁵ *Id.* Principles 13.4, 13.5, 13.9.

⁹⁶ See Aursnes & Foley, *supra* note 62.

such assistance to claimants.⁹⁷ As discussed later in this chapter, considerable international expertise exists in supporting remedial programs though building the capacity of domestic legal aid and information centers.

Determination of what Evidence is required in Support of Claims

Chapter nine on the recovery of personal documentation in this volume provides more detailed guidance on how domestic authorities should implement their responsibilities, as identified in the *Guiding Principles*, to assist IDPs with recovering or receiving such documentation as is necessary to exercise their rights, including in the area of remedies for property-related violations. With specific regard to mass claims processes involving property rights, states should generally take an accommodating approach to the problems displaced persons will inevitably have in documenting their claims.

In practice, claims should generally be admitted for processing based on a fairly low evidentiary threshold. Claimants should establish their own identity and identify the property they are claiming, but should not necessarily be required to substantiate their claim fully in advance. Although any available documentation should be submitted in support of claims, adjudicators should be required to establish relevant facts *ex officio* where this documentation is insufficient to establish the validity of the claim. The *Pinheiro Principles* recommend that public bodies make documentation relevant to restitution claims available free of charge.⁹⁸ In Bosnia, claims adjudicators stood under an *ex officio* duty to establish the relevant facts where submitted documentation alone was not dispositive.⁹⁹ Likewise, in Kosovo, HPD caseworkers were expected to take initiative in establishing information relevant to claims.¹⁰⁰

⁹⁷ Pinheiro Principles, *supra* note 1, Principle 13.11.

⁹⁸ *Id.* Principle 15.5.

⁹⁹ Williams, *supra* note 56, at 504.

¹⁰⁰ See Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT'L & COMP. L.Q. (Apr. 2004).

In establishing the nature of claimants' pre-displacement rights to claimed properties, considerable leeway should be given to adjudicators to take into account non-standard documentation. For instance, in light of the fact that displaced persons are often forced to leave behind personal documentation in the course of flight, records such as electricity bills or rental receipts that link individual claimants to properties may be accepted in lieu of more formal documentation such as lease agreements or title deeds.

In the case of claims to property held in informal or customary tenure, no documentary evidence whatsoever may be available. In order to give effect to such rights, adjudicators in such situations should be provided with guidelines on the admissibility of witness statements in establishing claimants' links to claimed lands. In the case of groups displaced from the same area, it may be necessary to reconstruct local knowledge and attribution based distributions of land and resources through participatory "community-mapping" processes.

Finally, adjudicators should be given the ability to officially take into account well-known or well-documented circumstances and generalized patterns of displacement. Where facts related to claims are of a general nature and are generally known, it would not be fair to claimants to force them to demonstrate or document such facts in each individual case. Under normal circumstances, norm-breaking behavior such as the wrongful deprivation of property rights would be considered exceptional and a claimant alleging such an act would be required to make a specific and well-documented showing. However, in situations where such deprivations were undertaken in a widespread or systematic manner, the threshold of evidence may be lowered in order to reflect the fact that such acts were not exceptional, avoiding unnecessarily burdening claimants. In many cases, such as Bosnia or South Africa, restitution programs deem certain patterns of deprivations of rights to have been wrongful, meaning that individual claims for restitution are deemed valid where a claimant can show that they were the rights-holder to a specific property before such a deprivation occurred.

Where other individuals are alleged to have forced restitution claimants to sell or exchange their properties in the context of ethnic cleansing or persecution, consideration may be given to shifting the allocation of burdens in order to require the party seeking to uphold the exchange or sale to demonstrate that it

was not made under duress. As discussed above, this approach was taken in Bosnia based on constitutional court precedent.

Setting Presumptions in Favor of Claimants

The creation of presumptions in favor of claimants is closely related to considerations of evidentiary burdens. In Bosnia, for instance, claimants to socially owned apartments were initially required to demonstrate that they had left their apartments for reasons directly related to the conflict in order to qualify for restitution. Abuse of this provision led to an amendment creating a conclusive presumption that anyone in Bosnia who left their apartment after the outbreak of the conflict did so for reasons related to the conflict.¹⁰¹ The *Pinheiro Principles* have adopted this principle generally with regard to prescription or abandonment statutes, recommending that states adopt presumptions relieving claimants of the need to establish the specific reasons for their flight in order to qualify for restitution.¹⁰²

Establishment of Procedures for Receipt, Screening, and Registration of Claims

As claims are received, the competent authorities should be given clear instructions on how to screen such submissions for obvious errors (e.g., claims for which the body has no jurisdiction) or omissions. Claims that pass this initial screening process should be registered, ideally in a centralized system, providing the basis for easy identification of case-files and orderly processing of claims. Evidence accompanying claims should also be kept in a secure place.

The benefits of computer technology in mass-claims proceedings become particularly evident at the point of claims processing. Where technology permits, full information on claims can be entered into a database at the outset, allowing cases to be grouped according to relevant characteristics (e.g., type of property claimed or all claims for a particular location) for consistent data

¹⁰¹ Williams, *supra* note 56, at 496.

¹⁰² Pinheiro Principles., *supra* note 1, Principle 15.7.

collation and efficient processing. Given reliable scanning technology, accurate copies can be taken of all accompanying evidence, allowing claimants to retain the originals. Although the resources and capacity for such processes will be lacking in many post-displacement contexts, international actors have been able to provide assistance developing databases and training in settings such as Bosnia, where claims processing initially began on the basis of paper files and typewritten decisions.

Order of Processing of Claims

As a rule, claims should be processed in a predictable order as a means of safeguarding the transparency and efficiency of the process. Transparent processing narrows the discretion on the part of administrators to expedite or delay action on particular claims, reducing the scope for corruption and undue influence. It also allows both claimants and (in the case of restitution programs) temporary occupants to plan ahead, based on a relatively accurate sense of how soon their case is likely to be handled in the order of processing.

Chronological processing is a useful default, as the date on which claims are received is probably the most easily identifiable organizing principle for processing, particularly in situations with relatively low technology claims intake. On the other hand, chronological processing may be perceived as inequitable where some groups had better or quicker access to information about claims processes than others. In addition, where registration of claims is fully computerized and case-files can easily be grouped according to other principles than the date of filing, the adoption of alternative criteria for ordering claims processing becomes more readily feasible.

Exceptions to chronology (or other organizing principles) should be transparent and based on clear policy rationales. In Bosnia, prioritization of claims outside chronological order only produced good results when based on the status of the subsequent occupant rather than the status of the claimant (e.g., in situations where evidence existed that occupants had other housing possibilities and could be summarily evicted). However, in Kosovo, there have been calls for prioritization of claims in manners that would facilitate group

return by allowing all the claims for particular villages to be decided simultaneously.¹⁰³

Rules of Decision Balancing the Rights of Claimants with those of Secondary Occupants

The finding of a valid claim does not always mean that the claimant will be entitled to in-kind restitution. Where such restitution is impossible, the claimant may instead be entitled to financial compensation or alternative property of an equivalent nature. Where the property has been destroyed or fundamentally altered, restitution is usually deemed impossible. However, restitution may also be impossible where a subsequent user or owner has developed bona fide property interests in the claimed property. In such cases, the extent to which subsequent users had reason to know of the wrongfulness of the underlying deprivation of the claimant's right is likely to be a factor in judging good faith.

In addressing this problem, Principle 17 of the *Pinheiro Principles* proceeds from the premise that the rights of displaced persons to restitution are presumptively superior to those of secondary occupants to retain possession of claimed properties. Secondary occupants are entitled to fair procedures and to be temporarily allocated alternative housing or land if they have no means to provide for their own needs.¹⁰⁴ However, the *Pinheiro Principles* endorse the eviction of secondary occupants from claimed property where “justified and unavoidable for the purposes of ... restitution” and note that protections accorded to secondary occupants should not prejudice the right of claimants to repossess their property “in a just and timely manner.”¹⁰⁵

¹⁰³ See, e.g., Anneke Smit, *Pushing Restitution, Not Reconciliation*, BALKAN RECONSTRUCTION REP. (Dec. 2003).

¹⁰⁴ *Pinheiro Principles*, *supra* note 1, Principles 17.1, 17.3.

¹⁰⁵ *Id.* Principles 17.1, 17.2. See also Principle 17.3 (specifying that failure to provide alternative land or housing to entitled secondary occupants “should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land and property restitution”).

According to Pinheiro Principle 17.4, even properties that have been purchased after their abandonment may, in principle, be subject to restitution. Determinations of whether claimants or subsequent purchasers are entitled to possession of the disputed property should hinge on whether the purchase was made in good faith. In post-conflict situations, this requirement will generally be interpreted to mean that the purchaser should not have had reason to know that the property might be subject to justified restitution claims.¹⁰⁶

In the Czech Republic, claimants were presumptively entitled only to compensation where another private person had purchased the claimed property, unless that person was shown to have acquired the property illegally or participated in the persecution that led to the claimant's dispossession. In South Africa, claimants are generally given precedence over subsequent owners, but the latter are entitled to compensation for the restituted property. In Kosovo, where Albanians were deprived of rights to socially owned apartments and subsequent purchasers often privatized them under general legislation, the subsequent purchasers may be entitled to compensation in cases where apartments they purchased are to be returned to displaced claimants.

Bosnia provides an example of the most stringent approach, with secondary occupants' rights to remain in claimed property cancelled *ex lege*, and no compensation forthcoming except in the case of necessary improvements made to the properties. In Bosnia, secondary occupants entitled to alternative accommodation (see next point) could be evicted without it if all other procedural requirements had been met. By contrast, in Croatia, repossession of private properties was made contingent on the secondary occupant first receiving alternative accommodation, often in the form of a permanent home, a requirement that significantly delayed resolution of the process.

¹⁰⁶ The Principles note that “[t]he egregiousness of the underlying displacement ... may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases.” *Id.* Principle 17.4.

Determination of the Rights of Secondary Occupants

Regulations on restitution should set out what rights subsequent occupants enjoy even in cases where they are not entitled to remain in claimed properties. In doing so, such regulations should take account of the following:

- Subsequent occupants must vacate claimed property according to legal deadlines, but they should not be rendered homeless as a result. The competent authorities are obliged to provide alternative accommodation to those who have no possibility of housing themselves. In Bosnia, the restitution laws set out means-testing criteria for secondary occupiers and placed the burden initially on them to demonstrate entitlement to alternative accommodation. The laws also specified that enforcement of restitution claims had to go forward even without alternative accommodation if all other legal conditions had been met.¹⁰⁷
- Subsequent occupants should not be subjected to evictions that are arbitrary under international law (see the “Legal Foundations” section above). For example, they should only be evicted according to a lawful decision and in the presence of public officials. Evictions should not be carried out in the middle of the night, in unsafe circumstances, or with any unnecessary use of force.
- Subsequent occupants should have notice of an opportunity to participate in remedial proceedings, whether hearings or presentation of submissions in *ex parte* proceedings. They should be able to present any evidence of rightful possession of claimed properties or entitlement to alternative accommodation or compensation. There should also be at least a limited opportunity to appeal decisions in favor of claimants.
- Under limited circumstances (see directly above), subsequent occupants may be entitled to compensation. This includes where they made *necessary* improvements to claimed properties, such as repairs that had to be made in order for the property to continue to be habitable or usable. In cases where coerced sales contracts are

¹⁰⁷ Williams, *supra* note 56, at 527.

annulled in the course of restitution programs, subsequent occupants who concluded such sales should, in principle, recover whatever price they paid or property they exchanged for the claimed property.

- Subsequent occupants should be allowed to harvest any crops they previously planted on agricultural properties in the course of vacating them.
- Subsequent occupants may have properties elsewhere and should be provided with updated information about how long it will take for their claims to be processed and what type of interim shelter possibilities exist in cases where it is necessary for them to vacate occupied properties before repossessing their own.
- Providing occupants with full information on restitution procedures can help to counter any sense of entitlement they may feel to remain in other people's property while simultaneously informing them of existing protections such as the right to alternative accommodation if they cannot house themselves otherwise. In some cases, such information may provide an incentive for occupants to voluntarily vacate claimed properties, avoiding the necessity of eviction proceedings.

Determination of Procedures for Appeal of Claims

In restitution settings, both claimants and other interested parties should have some means of appealing decisions on restitution to bodies with a general competence to ensure that the first instance adjudicator applied the law properly. In order to facilitate an efficient appeals process, it is important that first instance decisions be justified (e.g., that they include information on the legal rules and the facts that were relied on by the adjudicator) and that deadlines and procedures for appeal be included in the decision itself. Decisions must also be communicated to all interested parties in a manner that allows timely appeals to be made.

However, in cases where the circumstances of displacement justify strong presumptions in favor of claimants, secondary occupants should not be encouraged to engage in frivolous appeals simply to slow the process down. In some cases, it may be possible to either limit the grounds for appeal of

positive decisions in order to exclude arguments that have no chance of success (such as reliance on earlier decisions on temporary allocation that have later been cancelled *ex lege*). Under such circumstances, it may also be justified to provide that appeals against positive decisions should not delay the enforcement of decisions unless suspension is specifically ordered by an appeals body in accordance with law.

Determination of Rules for Enforcement of Decisions on Claims

Regulations on restitution may set out special provisions on enforcement of decisions in favor of claimants. However, to the extent possible, these decisions should be compatible with, and integrated into, existing domestic procedures for enforcement of administrative decisions.¹⁰⁸ Law enforcement officials should have the same obligations to assist and protect officials carrying out their restitution duties and to prevent and prosecute the obstruction of legal enforcement proceedings as they would in any other comparable situation.

Threats or attacks on the personnel involved in claims adjudication and enforcement or the parties to claims should be investigated and prosecuted. “Looting” of possessions and fixtures by vacating subsequent users or others should also be subject to prosecution. Unless inventories have been taken, however, evidentiary problems will be hard to overcome in pursuing prosecutions for looting. In Bosnia, official documents related to restitution cases such as decisions routinely included notice of the criminal penalties for looting, threatening public officials in the course of their duties, etc. in order to discourage such acts.

Vetting of the Residential Situations of Persons in Positions of Public Responsibility

Persons in positions of public responsibility, and especially those with a direct role in restitution processes, should not occupy property that may be subject to claims. In Bosnia, vetting processes were directed at police officers, judges

¹⁰⁸ See Pinheiro Principles, *supra* note 1, §20.

and prosecutors, elected officials, and (national and international) employees of some international agencies, removing potential vested interests of such officials in obstructing the broader restitution process.¹⁰⁹

Establishment of Further Conditions Allowing Exercise of Pre-Displacement Rights

Restitution beneficiaries should be reinstated in all their prior rights to the property as well as any subsequent legal rights adhering to such properties. For instance, in Bosnia, those who repossessed socially owned apartments were entitled to purchase them as part of a general privatization scheme that non-displaced apartment residents had already benefited from.¹¹⁰

The case of customary and informal rights represents a particular challenge, as even the retrospective restoration of such rights implies a minimum degree of prospective recognition. The *Pinheiro Principles* call upon states to accompany restitution of customarily held land with titling or other measures to provide prospective tenure security.

States should ensure that any judicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property is accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure. These determinations shall comply with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.¹¹¹

¹⁰⁹ Philpott, *supra* note 76, at 59-61.

¹¹⁰ Williams, *supra* note 56, at 518.

¹¹¹ Pinheiro Principles, *supra* note 1, Principle 15.2.

However, a good deal of caution and sensitivity to local context is important in implementing this recommendation. Although systematic titling of land held in informal tenure was often recommended by development experts in earlier decades, such programs proved unmanageably complicated and expensive in many cases. At the same time, the sudden introduction of statutory private property rights concepts into traditional communities that had previously held their land in collective tenure often led to opportunism, conflict, and further marginalization of vulnerable groups such as female-headed households.

In this context, the World Bank has shifted its policy on land titling to recognize the importance of recognizing and supporting customary tenure regimes under appropriate circumstances.¹¹² Other observers have noted the need for limiting state interventions in support of customary tenure regimes to those that are demonstrably necessary to protect indigenous groups from specific development threats.¹¹³ Thus, although it is clear that customary tenure forms should be accorded retrospective recognition, the level and nature of accompanying prospective legal protection that should be accorded to such systems should be decided on a case-by-case basis.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

In the Context of Durable Solutions

Adjudication Bodies

In practice, provisional remedial mechanisms for addressing mass-claims typically take the form of an independent commission, with an adjudication panel supported by a secretariat that takes and processes claims and drafts decisions for discussion and approval. Such commissions are typically mandated under peace agreements or domestic legislation to remove the caseload of property claims relating to specific past displacement events from

¹¹² See Deininger, *supra* note 41.

¹¹³ See Daniel Fitzpatrick, *Best Practice Options for the Legal Recognition of Customary Tenure*, 36(3) DEV. & CHANGE (2005).

the jurisdiction of ordinary adjudicatory bodies and decide them on the basis of facilitated administrative procedures.

A key question in the development of such commissions is whether they should operate primarily at the central or local level. In Bosnia, decentralized first instance processing allowed benefits from local knowledge and access to local information (records, witnesses, field investigations) and dispersed a very large caseload (over 200,000 claims) broadly, speeding the overall process.¹¹⁴ However, heavy international monitoring was crucial to keep the process on track. By contrast, in Guatemala, *de facto* and *de jure* responsibility for property remedies was often delegated to local authorities with most to lose from the implementation of such remedies. In the absence of either dedicated international monitoring of this process or systematic government oversight, local authorities often worked openly against the provision of remedies to displaced persons.¹¹⁵

In cases where there is no capacity or resources for setting up an adjudicatory body in the wake of armed conflict and displacement, the competent authorities should recognize both the utility and the limitations of initial reliance on existing local dispute resolution processes in seeking to ensure some type of a remedy for claimants.¹¹⁶ Such bodies are often informal and more likely to apply customary rules than statutory ones. In some cases, these rules may lead to discriminatory or arbitrary outcomes and such bodies often rely on a negotiated approach to property claims, in which occupiers of abandoned property are allowed to retain possession of some land in exchange for ceding the rest back to displaced owners or lawful users. While such outcomes do not necessarily constitute legal remedies, they may provide the only feasible basis for durable, locally accepted solutions in situations where the state itself temporarily lacks the capacity to provide better terms to IDPs.

¹¹⁴ Philpott, *supra* note 76, at 42.

¹¹⁵ See Painter, *supra* note 54.

¹¹⁶ See Aursnes & Foley, *supra* note 62, at 10-14 (discussing legal aid to property claimants in Afghanistan).

Enforcement Bodies

Existing enforcement bodies with experience and established legal capacity to provide administrative enforcement are typically more reliable than *ad hoc* enforcement bodies. However, the responsibility of existing institutions to enforce the orders of provisional remedial adjudication mechanisms should be clearly and explicitly set out in law.

INTERNATIONAL ROLE

The role of the international community—UN agencies, development actors, regional organizations, bilateral donors, and NGOs—is likely to be crucial in many settings involving remedies for property violations. Remedies for property violations are necessary but expensive in terms of both political capital and state finances. As a result, barring international support, there may often be inadequate domestic political support and capacity to implement restitution and inadequate domestic funding to implement compensation, leaving IDPs and other dispossessed groups at risk of being denied a remedy. With the exception of the post-1989 “re-privatizations” in Eastern Europe and post-Apartheid restitution in South Africa—both of which took place in the context of peaceful political transitions from authoritarianism to democracy—there are few examples of countries that have provided adequate remedies for property violations without international support.

Unfortunately, the international community’s performance in identifying property violations and supporting efforts to address them is mixed. For instance, while the UN Mission in Kosovo (UNMiK) assumed exclusive jurisdiction over the restitution of local housing, the contemporaneous UN Transitional Administration in East Timor (UNTAET) was unable to promote an active approach to property issues despite destabilizing post-conflict land disputes in the context of mass repatriation.¹¹⁷ In response to calls for a more systematic approach, UNHCR and UN Habitat have sponsored recent efforts

¹¹⁷ Daniel Fitzpatrick, *Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor* (UNHCR Evaluation and Policy Analysis Unit, Working Paper No. 58, 2002).

to ensure that attention to property issues is programmatically included from the planning of UN peace missions through their implementation.¹¹⁸ Such proposals have ensured the inclusion of “housing, land and property issues” as a focal point issue for the Protection Cluster Working Group (PCWG) in the context of the current UN Humanitarian Reform process.¹¹⁹

Nevertheless, attempts to connect property issues more systematically with the UN’s broader rule of law agenda in post-conflict settings could go a long way to countering concerns that the priority accorded to remedial programs in any given setting may be set according to inconsistent and essentially arbitrary factors such as the repatriation policies of refugee-receiving donor countries. For example, although Bosnia and Croatia both began as Yugoslav Republics and both became mired in conflict and ethnic cleansing after declaring independence in the early 1990s, the international community’s approach to return issues in the two countries has been notably inconsistent. While international monitors intervened forcefully to ensure the restoration of 100,000 abandoned socially owned apartments in Bosnia to their pre-war residents, their counterparts in Croatia have effectively condoned the permanent confiscation of up to 30,000 such apartments, leaving as many minority Serb families without any prospect of a genuine legal remedy for the loss of their homes.¹²⁰ Although many factors may explain this disparate approach, it is telling that over 600,000 Bosnian refugees found shelter in Western European countries which frequently supported restitution as a means of facilitating their repatriation, while the bulk of Croatian Serb refugees were

¹¹⁸ Scott Leckie, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a new UN Institutional and Policy Framework*, UNHCR Department of International Protection, Legal and Protection Policy Series, PPLA/20005/1 (Mar. 2005); *See also*, Agnès Hurwitz, Kaysie Studdard & Rhodri C. Williams, *Housing, Property and Conflict Management: Identifying Policy Options for Rule of Law Programming*, *International Peace Academy Policy Report 4* (2005).

¹¹⁹ *See* Protection Cluster Working Group Home Page, <http://www.humanitarianreform.org/humanitarianreform/Default.aspx?tabid=79>.

¹²⁰ Human Rights Watch, *A Decade of Disappointment: Continuing Obstacles to the Reintegration of Serb Returnees* (Sept. 2006).

displaced to relatively un-influential countries in the region.¹²¹ The extent to which the concerns of third countries hosting large refugee populations can shape restitution and return policies has been seen in many other scenarios, such as Guatemala and Afghanistan.¹²²

Despite the international community's lack of a coherent general approach to property issues in displacement settings, many specific international efforts to support domestic remedies have been highly successful. These have ranged from internationally run restitution programs (as in Kosovo), to monitoring, capacity-building, funding reconstruction and resettlement programs, advocacy, reporting, and standard setting, most notably in the form of the *Pinheiro Principles*. In addition to funding and technical knowledge, international actors can often provide a degree of impartiality that can be of great utility in shifting the focus from politicized debates over responsibility for displacement to the technical discussions on addressing its consequences.

In the course of its protection work, the Office of the United Nations High Commissioner for Refugees (UNHCR) has become involved in the practicalities of implementing property restitution programs on behalf of displaced persons in numerous settings from Tajikistan and Bosnia in the early 1990s to contemporary Iraq. In 2001, UNHCR developed standardized guidelines to its field presence on identifying and addressing property issues.¹²³

¹²¹ Joanna Harvey, *Return Dynamics in Bosnia and Croatia: A Comparative Analysis*, 44(3) INT'L MIGRATION 103 (2006).

¹²² The role of Mexico in facilitating durable solutions for Guatemalan refugees is explored in Christine Cheng and Johannes Chudoba, *Moving Beyond Long-term Refugee Situations: the Case of Guatemala* (UNHCR New Issues in Refugee Research, Working Paper No. 86, 2003). For a discussion of repatriation to Afghanistan from camps in Pakistan, see David Turton & Peter Marsden, *Taking Refugees for a Ride? The Politics of Refugee Return to Afghanistan* (Afghanistan Research and Evaluation Unit, 2002).

¹²³ Office of the United Nations High Commissioner for Refugees, *Checklist on the Restitution of Housing and Property* (Nov. 2001).

The United Nations Human Settlements Program (UN-Habitat) played an early role in the development of the HPD/HPCC in Kosovo and its Disaster, Post-Conflict and Safety Branch continues to advocate a more systematic approach to remedies for violations of housing rights within the UN system. UN-Habitat is the focal point agency for “housing, land and property issues” in the Protection Cluster Working Group (PCWG).¹²⁴

The International Organization for Migration (IOM) has developed significant expertise in mass-claims reparations procedures in the last decade although it traditionally has focused on the repatriation of refugees. IOM’s experience with mass-claims reparations began with work on Nazi forced labor and Swiss bank compensation programs dating from the World War II era but has more recently expanded to include technical advice to the bodies competent for restitution in Iraq and Colombia.¹²⁵

The Centre on Housing Rights and Evictions (COHRE), an international NGO, has expanded from its initial focus on housing rights to become a leading advocate of post-displacement restitution of housing, land, and property.¹²⁶ COHRE has published numerous studies and legal resource guides on the right to restitution and supported the mandate of Sergio Paulo Pinheiro, the Special Rapporteur on Housing and Property Restitution, whose *Pinheiro Principles* on this topic were adopted by the UN Sub-Commission on Human Rights in June 2005.

Displacement Solutions, a relatively new international NGO, undertakes research on issues related to durable solutions to displacement and property restitution. It maintains a roster of experts who can be called in to provide technical assistance in specific local settings.¹²⁷

¹²⁴ See Protection Cluster Working Group, *Land, Housing and Property Issues*, available at <http://www.humanitarianreform.org/Default.aspx?tabid=434>.

¹²⁵ See International Organisation for Migration, *Reparation Programmes*, available at <http://www.iom.int/jahia/page74.html>.

¹²⁶ See Centre on Housing Rights and Evictions Home Page, <http://cohre.org>.

¹²⁷ See Displacement Solutions Home Page, <http://www.displacementsolutions.org>.

The Norwegian Refugee Council (NRC) is a humanitarian NGO that began providing legal advice and representation to beneficiaries in the context of its work supporting repatriation and return in the Balkans during the mid-1990s. NRC's legal counseling programs have expanded considerably with programs set up to assist displaced persons in locations ranging from Afghanistan and Uganda to Georgia and Colombia. Infringements of housing, land, and property rights have been one of the most frequent complaints encountered by virtually every one of these programs, giving the NRC considerable insights into how to seek domestic remedies for such violations.

The Internal Displacement Monitoring Center (IDMC) is an international body originally set up by the NRC in 1998 that monitors conflict-induced internal displacement in about fifty countries worldwide. In its regular updates on internal displacement in these countries, the IDMC focuses on land, housing, and property issues as one of its main thematic issues.¹²⁸

SUMMARY OF RECOMMENDATIONS

1. In cases where conflict-induced displacement is imminent and local populations are likely to be coerced into giving up rights to their homes and lands, states should consider passing legislation allowing the temporary suspension of legal property transactions in such areas.
2. During displacement situations, states should prevent the destruction of property abandoned by displaced owners, rights-holders, users, or residents in accordance with international humanitarian law and ensure that it is not destroyed, appropriated, or altered by other persons.
3. Humanitarian allocation of abandoned property to temporarily house other displaced populations should be based on written regulations setting out specific provisions for the reinstatement of the pre-displacement occupants as soon as circumstances allow and sanctioning the damaging or alteration of temporarily allocated properties.

¹²⁸ See International Displacement Monitoring Centre Home Page, <http://www.internal-displacement.org>.

4. During displacement situations, records establishing legal rights in property should be safeguarded in order to allow accurate reconstruction of the situation prior to displacement.

5. In the wake of displacement, all competent authorities should commit themselves to providing remedies for violations of housing, land, and property rights and to upholding all such rights recognized not only under domestic law, but also in accordance with international human rights law, without adverse distinction.

6. In the wake of conflicts, discriminatory or arbitrary reallocations of displaced persons' property should be revoked, along with coerced private sales or exchanges. In addition, temporary humanitarian allocations of abandoned housing should be phased out and the pre-conflict owners, residents, and users allowed to resume the exercise of their rights.

7. Where displacement and dispossession have taken place on an (at least locally) large scale and under similar or uniform circumstances, provisional remedial programs should be set up as a temporary measure to ensure rapid processing of claims in a manner that complements the ordinary domestic judicial and/or legal framework.

8. Provisional remedial programs for property violations should be limited to violations alleged to have occurred within set geographic and temporal parameters; however, these parameters should be based strictly on when and where systematic displacement is known to have occurred, regardless of formal criteria such as the date states of emergency or war were declared, in order to avoid arbitrary exclusion of displaced individuals.

9. In their substantive scope, remedial programs for property violations should aim to restore rights to homes and lands that IDPs depended on for their shelter or livelihoods even in cases where they did not formally own them.

10. In choosing remedies for property violations, states should provide full restitution except under limited circumstances where financial or in-kind compensation may be more appropriate. In cases where property was destroyed or its pre-displacement owners or users were denied access to it for

an unjustifiable time period, both restitution and compensation should be provided.

11. Eligibility to claim for remedies should not be limited to the nominal pre-displacement rights holders of properties but also to subsidiary claimants such as their spouses or heirs; where groups that held property in common allege violations of their rights, collective claims should, in principle, be admissible.

12. Claimants should be exempted from administrative fees and onerous bureaucratic requirements. While claims deadlines may be imposed, they should be accompanied by outreach and information campaigns designed to reach all potential claimants and accessible procedures for laying claims.

13. States should provide clear public information and outreach on property remedies to all affected parties, and should, in principle, support the provision of legal aid to claimants. Additional measures should be considered, as necessary, to ensure participation on an equal basis by disadvantaged individuals or groups.

Chapter 11

Employment, Economic Activities, and Livelihoods

David Tajgman*

INTRODUCTION

This chapter looks at legislative, regulatory, and policy approaches to ensure that internally displaced persons (IDPs) have access to livelihoods. This includes non-discriminatory access to waged employment as well as the means to establish and maintain self-employment; access to, and recognition of, professional and technical qualifications; access to labor markets during and after displacement; and measures to facilitate the transition from dependency on external assistance to economic self-reliance. It is written with a view to suggesting approaches to national legislators, policy makers, and implementers looking to give effect to the *Guiding Principles on Internal Displacement* (the *Guiding Principles*).

IDPs' employment and income-generating situations vary tremendously from place to place, both before and during displacement. Before displacement, they range from waged employment in the civil service or formal private sector to subsistence agricultural activities. During displacement, they range from situations where displacement was development-induced and thus the subject of detailed planning,¹ to situations where a natural disaster has damaged or destroyed the infrastructure needed to support employment and livelihoods. Also, during displacement, employment and income-generating situations range from where the state has acted deliberately to erase the employment and livelihood opportunities of the displaced to situations where generalized violence or armed conflict has caused displacement and the housing of IDPs in temporary camps.

Like their fellow citizens, all IDPs need, and have a right, to work. This chapter surveys steps taken to give effect to this right and meet this need in

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¹ See Chapter 15 of this volume on development-induced displacement.

ways that are appropriate to the wide range of circumstances noted above. It looks at how these efforts are established in law and policy, and on this basis, given effect in practice, seeking thereby to identify potential best practices.²

LEGAL FRAMEWORK

A rights-based approach can be taken to explain what the *Guiding Principles* advocate that states do to help IDPs maintain and re-establish employment and livelihoods. Such an approach sees the integration of the norms, standards, and principles of the international human rights system—as reflected in the *Guiding Principles*—into legislation and policies as the justification for that action.

Relevant Guiding Principles

The right to employment during displacement is stipulated in Principle 22, which states that “internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the...right to seek freely opportunities for employment and to participate in economic activities.”

Several other Principles serve to improve IDP access to employment opportunities, economic activities, and livelihoods. They may also seek to prevent the loss of these opportunities as a consequence of displacement. Principle 1.1 states that IDPs should enjoy “in full equality, the same rights and freedoms under international and domestic law as do other persons in their country,” and that they should “not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.” This means that the entire range of state action aimed at promoting employment, economic activity and livelihoods—major direct or indirect targets of state policies everywhere—should be applied with equal force to IDPs. Non-discriminatory application of such policies would improve IDPs’

² The research presented in this chapter is based on a review of documents, including country profiles developed by the Internal Displacement Monitoring Center (IDMC), the mission reports of the Special Representatives of the Secretary General, and other documents referenced in the text.

situation; affirmative action benefiting IDPs could help them more. This is discussed in further detail later in this chapter.

Principle 4.2 stipulates that particularly vulnerable IDP groups “shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs,” while Principle 5 reinforces existing international obligations “under international law, including human rights and humanitarian law” meant to prevent and avoid conditions that might lead to displacement. Such conditions have historically been caused by violations in contravention of international labor standards, in particular those related to discrimination and the protection of indigenous peoples.³

Where feasible alternatives to displacement are not possible, Principle 7 provides that “all measures shall be taken to minimize displacement and its adverse effects.” This would include measures to minimize adverse effects on employment, economic activities, and livelihood. Principle 11.2(b) states that during displacement, IDPs, whether or not their liberty has been restricted, shall be protected in particular against “slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labor of children,” and that threats and incitement to commit such acts shall be prohibited. Principle 13.1 goes on to state that “in no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities,” while Principle 13.2 calls for IDPs to be “protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement.” Observance of these provisions is relevant as involvement in armed forces or groups could be considered a form of employment.

The *Guiding Principles* explicitly refer to employment in discussing protections during displacement. Evidence strongly suggests, however, that livelihood assistance to, and protection of, IDPs is critically important after

³ Discrimination (Employment and Occupation) Convention, 1958, ILO No. 111, 362 U.N.T.S. 31; Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989, ILO No. 169, 72 I.L.O. Off. Bull. 59, 29 I.L.M. 1382 (1989).

return or after the cause of displacement has subsided.⁴ Several Principles implicitly pertain to employment and livelihood supports during the period of return, resettlement, and reintegration.

Notably, Principle 28 calls on authorities “to facilitate the reintegration of returned or resettled internally displaced persons,” an obligation that encompasses assistance to enable the displaced to re-establish previous livelihoods (e.g., rehabilitating damaged agricultural land, business assets, fishing boats, etc.) or provide them with training and assistance for developing new sources of income.⁵ The ban on discrimination during reintegration in Principle 29.1 implies that all livelihood supports available to the citizenry at large—as great or as small as they might be—should also be granted to (former) IDPs.

Principle 29.2 calls upon the authorities to assist returned and/or resettled IDPs to recover property and possessions abandoned or disposed of upon displacement, fulfilling a critical need in reestablishing livelihoods. Finally, the obligation to allow humanitarian access to reintegrating IDPs under Principle 30 has important implications for facilitating livelihood support programs provided by external agents.

Relevant International Law and Standards

The right to work and to pursue economic activities, employment, and livelihood broadly understood is found in several international human rights instruments.⁶ The International Labour Organization (ILO) has adopted relevant instruments; however, none explicitly address IDPs.

⁴ John Borton, Margie Buchanan-Smith & Ralf Otto, *Support to Internally Displaced Persons, Learning from Evaluations: Synthesis Report of a Joint Evaluation Programme*, at 141 (2005).

⁵ Protection Of Internally Displaced Persons In Situations Of Natural Disaster—A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, February 27-March 5, 2005, 22, available at <http://www.ohchr.org/english/issues/idp/Tsunami.pdf>.

⁶ See United Nations Action in the Field of Human Rights, at 131 (1994).

Key protections in the Universal Declaration of Human Rights (UDHR) include the right to own property alone as well as in association with others (Article 17); the right to work, to free choice of employment, and to protection from unemployment (Article 23); and the right to an education (Article 26). The International Covenant on Civil and Political Rights (ICCPR) elaborates on the right to work, noting that it includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. States parties to the ICCPR are obliged to take appropriate steps to safeguard this right, including by providing technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development, and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual. Article 7 of the ICCPR sets out the just and favorable conditions of work that should be ensured by states parties.

Similar obligations are set out in the International Labour Organization (ILO) Employment Policy Convention, 1964 (No. 122), which requires ratifying member states to adopt a national policy promoting freely chosen and productive employment. States are required to take protective measures against the forms of forced labor and exploitation identified in Guiding Principle 11.2(b) under several UN, ILO, and regional treaties and human rights instruments.⁷ Child recruitment is also banned under the Optional Protocol to the Convention on the Rights of the Child.⁸

The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (hereinafter the ILO Discrimination Convention) obliges ratifying states to eliminate discrimination on the basis of race, color, sex, religion, political opinion, national extraction, or social origin in relation to a broad definition of employment and occupations. The ILO Discrimination

⁷ The Forced Labor Convention, 1930, ILO No. 29, 39 U.N.T.S. 55; Abolition of Forced Labor Convention, 1957, ILO No. 105, 320 U.N.T.S. 291; Universal Declaration of Human Rights, art. 4; the International Covenant on Civil and Political Rights, art. 8; American Convention on Human Rights, art. 6; the European Convention for the Protection of Human Rights, art. 4; African Charter on Human and Peoples' Rights, art. 5.

⁸ Optional Protocol to the Convention on the Rights of the Child, arts. 1, 2.

Convention also obliges the state to promote equality in employment by private actors. Although race, national origin, and religion may be the cause for displacement, the status of displacement is not an explicitly prohibited basis named in the ILO Discrimination Convention. The ILO Discrimination Convention does, however, provide and promote the idea that states add to the prohibited bases enumerated in it;⁹ IDP status could well be a basis that might be appropriately added.

Under Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), states parties undertake to prohibit and eliminate racial discrimination in the enjoyment of certain economic, social, and cultural rights, including the right to work and free choice of employment. States are also required under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) to take numerous specific steps to eliminate discrimination against women in the areas of education and employment.¹⁰ The UN Convention on the Rights of the Child (CRC), and ILO conventions on women, children, maternity, and disabled persons' protection and equality, in varying ways, call for law, policy, and action targeting the particular needs of these vulnerable groups.

The rights of indigenous peoples are the subject of special protection in international law. These rights were first set out in the ILO's Indigenous and Tribal Populations Convention, 1957 (No. 107) and were later expanded and revised in the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Specific provisions are made in these instruments to guarantee rights in case of displacement or relocation.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

Seven obstacles to implementing the *Guiding Principles* are summarized below. They can be used to guide remedial actions, policy, and legislation.

⁹ ILO Discrimination (Employment and Occupation) Convention, art. 1(1)(b).

¹⁰ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), arts. 10, 11.

First, displacement threatens opportunities for employment, economic activities, and livelihoods by dislocating persons in relation to the capacities and means they have to engage in these activities at their place of habitual residence. In the case of waged employment, displacement removes a worker from his or her place of work and from the labor market in which he or she usually seeks jobs. Persons occupied on their own account are removed from the various productive resources used in pursuing their livelihood, including land, equipment, access to capital resources, and labor used to supplement their own. IDPs are removed from their customer and client bases, their usual social support and protection networks and mechanisms, and usual means of improving and recognizing skills, building and reinforcing product markets. In the context of development-induced displacement, the World Bank has identified an “impoverishment risk” that is clearly relevant to other causes of displacement.

Production systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost.¹¹

Second, IDPs face challenges in establishing the capacities and means needed to engage in employment, economic activities, and livelihoods during displacement. This is so whether they are living in or outside temporary housing facilities. It is also true after displacement, whether they have returned to their homes or settled in new homes. Cataloguing generally the dislocating effects of displacement on employment, economic activities, and livelihoods tends to underemphasize their dramatic consequences for the human beings involved. While law and policy can be put in place to address these consequences and to implement the *Guiding Principles*, the displaced humans suffer social and psychological consequences that these means cannot remedy.

¹¹ The World Bank Operational Manual, OP 4.12, ¶ 1.

Third, IDPs face discrimination in pursuing employment, economic activities, and livelihoods. Discrimination occurs because of the fact of their displacement or because of characteristics correlated with their displacement—for example, religion, ethnic or geographic origin, or race. Employers may decline to hire IDPs whom they expect will leave the job when it is possible to return home. Access to loans,¹² land, and other productive inputs may be specifically denied to IDPs. Access may also be limited in practice because preference is given to persons who are not IDPs. Access to internal work permits, where they are used, may be denied. IDPs may face discrimination from the non-IDP population who perceive them to be a privileged group, unjustifiably benefiting from special programs set up for their assistance.¹³

Fourth, institutional arrangements to assist IDPs in finding, developing, or taking employment opportunities, or accessing economic activities or livelihoods, may be inadequate or completely absent. Existing governmental and non-governmental organizations and institutions may have uncoordinated responses to IDPs' needs in this area. Institutional reach and capacity may be limited or unbalanced; services may be on offer, but not in geographic areas where they are needed. Opportunities to quickly shift resources may be similarly limited.

Fifth, many practical obstacles can be cited. The general fear of IDPs to declare themselves and restrictive registration processes may limit the availability of special services to them.¹⁴ IDPs may move to areas where employment opportunities are already scarce. Employment opportunities may

¹² Report of the Representative of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1995/57, Addendum, Profiles in displacement: Peru, ¶ 91, U.N. Doc. E/CN.4/1996/52/Add.1 (1996).

¹³ Deng Report 2000/53, Addendum, Profiles in Displacement: Georgia, ¶ 119, U.N. Doc. E/CN.4/2001/5/Add.4 (2001) [hereinafter Deng Report 2000/53: Georgia].

¹⁴ Press Release, *Internally Displaced in Nepal Overlooked and Neglected*, UN Expert Says, Apr. 22, 2005, available at http://www.brookings.edu/articles/2005/0422_nepal_kalin.aspx.

be of a character different from that with which they were occupied at home.¹⁵ The location of available housing or camps may be distant from existing employment opportunities.¹⁶ The taking of employment and pursuit of livelihoods may be hampered by the loss of documentary proof of employment qualifications, employment history, and productive property ownership.¹⁷ IDPs often find jobs in the informal economy where they are easily exploited.¹⁸

Sixth, exceptionally vulnerable groups face particular obstacles. Women IDPs face obstacles that are not faced by men. These include being denied access to land¹⁹ and credit.²⁰ Female IDPs may also suffer from exceptionally high gender-specific illiteracy rates.²¹ IDP children are another particularly vulnerable group. They may need to find work to supplement household

¹⁵ Deng Report 2002/56, Addendum, Profiles in Displacement: Turkey, ¶ 10, U.N. Doc. E/CN.4/2003/86/Add.2, (2002) [hereinafter Deng Report 2002/56: Turkey].

¹⁶ Deng Report 2001/54, Addendum, Report on the Mission to the Sudan, ¶ 19, U.N. Doc. E/CN.4/2002/95/Add.1 (2002) [hereinafter Deng Report 2001/54: Sudan].

¹⁷ Deng Report 2000/53: Georgia, *supra* note 13; Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World Specific Groups and Individuals: Mass Exoduses and Displaced Persons, Profiles in Displacement: East Timor, ¶ 51, U.N. Doc. E/CN.4/2000/83/Add.3 (Apr. 6, 2000); see also chapter nine on the recovery of personal documentation and chapter ten on property in this volume.

¹⁸ Deng Report 1995/57, Addendum, Profiles in Displacement: Peru, ¶ 91, U.N. Doc. E/CN.4/1996/52/Add.1 (1996) [hereinafter Deng Report 1999/57: Peru].

¹⁹ Deng Report 1996/52, Addendum, Profiles in Displacement: Mozambique, ¶ 74, U.N. Doc. E/CN.4/1997/43/Add.1 (1997).

²⁰ Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives on Internally Displaced Persons, Note by the Secretary-General, Addendum, Profiles in Displacement: Tajikistan, ¶ 91, U.N. Doc. A/51/483/Add.1 (Oct. 24, 1996).

²¹ Deng Report 1995/57: Peru, *supra* note 18, ¶ 68.

income; they may be unable to attend school for lack of facilities or prerequisites, including language and documentation needed to register.²²

Finally, the causes of displacement have a dramatic influence on what states are willing and able to do in the way of policy, law, and regulation favoring IDPs' employment and economic activity. Where the causes are grounded in a states' intent to destroy employment and livelihood through displacement, as in the case of ethnic cleansing, civil war, or unrest, they pose an obstacle to implementing the *Guiding Principles*. On the other hand, much preparatory policy, law- and regulation-making can be done in advance of displacement caused by natural and man-made disasters.

REGULATORY FRAMEWORK

National constitutions and law should establish the fundamental framework for equality, the rights to work, to education, and to the essential elements—enabling rights related to such things as land tenure, right to and enforceability of contracts, protection of water, fishing and land use rights, and rights to water and other common resources—that give opportunity to peoples' livelihood. Problems in the form and content of legislation can work against effective law and policy. Speaking of legislation specifically targeting IDPs, commentators in Georgia in 1999 noted that:

Many legislative acts aiming [at] improvement of IDPs' situation have been issued. But all of them have a big defect: they are too abstract and unrealistic. The most frequently used words in these acts: "assist", "maximally support", "ensure", "find sources"—may be acceptable at law level but when the same is repeated in those acts which should transform these words into concrete steps, we get into a blind-alley. There are no terms, no concrete measures, no

²² *Id.* ¶ 93.

accountable officials and not a single fact of holding someone accountable for misconduct.²³

A look at sample legislation and policy suggests that this comment could equally apply elsewhere. Omnibus IDP legislation including provisions dealing with employment and promotion of self-reliance has been adopted in several countries;²⁴ questions of implementation arise nevertheless.²⁵

Enactments that give IDPs preferential treatment can have adverse effects. This has been observed particularly where there is a combination of development-induced displacement, habitually difficult employment and livelihood circumstances, and donors concerned that the employment and livelihoods of those affected by development-induced displacement be replaced. In such circumstances, preferential employment and livelihood opportunities given to IDPs can be perceived to be large and unjustified by other citizens who face a similarly difficult day-to-day existence. The problem is worsened where the IDPs are of a particular religious or ethnic origin. This is a common situation considering that members of ethnic or racial groups tend to live—and are displaced—together. The possibility of this situation may call for special efforts to insulate the favored IDPs from retaliation.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

States everywhere place employment and livelihood promotion along with economic development high on the policy agenda. Three preliminary points need to be made about this as it concerns IDPs as citizens displaced within

²³ Georgian Young Lawyers' Association, *Monitoring of Legal and Actual Status of Internally Displaced Persons in Georgia*, at 28 (1999).

²⁴ Georgia, Colombia, Tajikistan (giving assistance to find work or alternatively to be granted unemployment allowances during displacement; when resettling, work equivalent to their previous experience or training courses where required, pension or limited salary according to their period of absence). Profiles in Displacement: Tajikistan, *supra* note 20, ¶ 42.

²⁵ *Id.* ¶¶ 64, 90

their own country. First, many states have laws that are applicable without discrimination to national populations as a whole, including IDPs. Many national constitutions assure the right to seek employment and occupation freely;²⁶ most prohibit forced or compulsory labor; most prohibit discrimination in employment and occupation on numerous internationally recognized bases; most secure rights of tenure in land and other productive resources; and most provide for education. Second, IDPs, just as other citizens, benefit from the extremely broad range of related legal, policy, and program initiatives.²⁷ Third, IDPs benefit or suffer from the level of economic development within the country, the extent of employment and livelihood opportunities, and the level of law enforcement.²⁸ These three operational premises must be taken into account as background in assessing possible efforts taken specifically on behalf of IDPs.

The focus of this chapter is on laws and policies that on the one hand specifically name IDPs as a protected group and establish the basis for efforts to be made for their particular benefit,²⁹ and on the other hand, situations that unintentionally or intentionally disadvantage IDPs despite provisions in law and policy that should benefit them just as other citizens. Unintentional disadvantage flows from neutral provisions or practices that disproportionately disadvantage IDPs as compared with their compatriots. Intentional disadvantage occurs where IDPs are discriminated against because they are displaced or because they are members of groups commonly discriminated against, plainly contrary to the *Guiding Principles*.

²⁶ Right to free choice of employment, Armenian Constitution, article 29; Anti-Discrimination, Bosnia and Herzegovina, Labor Law of the Federation, article 5; cited along with other similar instances in Ludwig Boltzmann, *Implementing the Guiding Principles on Internal Displacement on the Domestic Level: An Analysis of Domestic Legislation and Policies and Recommendations on Areas For Further Research* (2005), at 33 [hereinafter BoSty].

²⁷ Deng Report 2002/56: Turkey, *supra* note 15, ¶ 16.

²⁸ *Id.*; see also Deng Report 2000/53: Georgia, *supra* note 13, ¶ 35.

²⁹ *Privileging IDPs: Georgia*, fn 89 of BoSty; *Azerbaijan*, fn 91 of BoSty; *Indonesia*, fn 93 of BoSty.

These protections and disadvantages ultimately affect the stock in the assets IDPs use to support their employment and economic activities.³⁰ The human assets of skills and abilities grounded in the basic physical and psychological health of the individual and his or her ability to function productively are affected. Social assets such as the ability of the local social network, including informal and formal social institutions, the existence of common normative values, trust and an orientation toward cooperation, to support, in this case, the ability of individuals to engage in economic activities and employment are affected. The natural resources available to individuals in pursuing employment and livelihood objectives, including food, water, and wildlife are affected. The physical assets of roads, energy, housing, buildings, land, transport and other infrastructure that can contribute to employment and economic activity are affected. The financial assets of access to credit, banking, social security funds, savings and remittances that make it possible for individuals to secure through financial exchange other necessary inputs are affected.

A final consideration is the fact that the different kinds of assistance given to the displaced to strengthen these stocks depends on the phase of displacement. These phase-based interventions operate against the backdrop of rights that should be set out in laws prior to displacement.³¹

Prior to Displacement

When displacement occurs, IDPs should benefit from all the elements of a functioning system of labor administration in place prior to displacement.

³⁰ The framework suggested here is a narrow application of the sustainable livelihood approach coined in Robert Chambers & Gordon Conway, *Sustainable Rural Livelihoods: Practical Concepts for the 21st Century*, Institute of Development Studies Discussion Paper, No. 296 (1991). These authors first used the term ‘sustainable livelihood’ and defined a livelihood as comprising people, their capabilities and their means of living, including food, income and assets. In its true form, the approach would look at all issues related to productive capacity, including fundamental health, shelter and food security issues.

³¹ Profiles in Displacement: Tajikistan, *supra* note 20, ¶ 60.

They also benefit from the wide range of law, policy, and activities that support economic self-sufficiency, employment, and enterprise development in most countries. These include access to education, training institutions, and certification of skills; access to employment services, credit institutions, banks, and land; and the existence of systems of social security and pensions.

An essential three-point foundation can be suggested. The first point is to have these systems, their underpinning laws and policies, and resulting activities in place prior to displacement. An essential element of this foundation is establishing the right to equal treatment in employment or occupation, either as an IDP or as a member of other protected groups that are potentially relevant in a context of displacement, for example, ethnic or racial minorities, or indigenous peoples. The second point of the foundation is to appropriately fix and record individuals' rights since displacement will remove access to them and related asset-strengthening institutions and programs at the home place. Such fixation of individual rights applies to the gamut of rights relevant to economic self-sufficiency, running from land titles to the right to follow particular educational and training programs or to practice a particular profession, to the right to receive pension benefits.³² This important second point reinforces the practical aspects of the first. It is critical that rights are recorded in a way that is impervious to displacement. The third point of the foundation is to assure the right of access to institutions that support employment and economic activities in places in the country other than that of citizens' residence.

All these foundational elements should be put in place legislatively prior to displacement. They are relevant in all types of displacement situations. They can be particularly important where displacement is caused by armed conflict or generalized violence where the ability to foresee displacement and protect the persons affected is limited. Similarly, where human rights persecution is the cause of displacement, governing regimes are unlikely to adopt special protections for IDPs as such, or for groups destined to become displaced. Non-discriminating pre-displacement systems for fixing acquired rights are critical.

³² Leopold Jose Bartolome et. al., *Displacement, Resettlement, Rehabilitation, Reparation, and Development*, Thematic Review I.3, 13 (2000) (prepared as an input to the World Commission on Dams).

The most evolved examples of legislation, policy, and operational initiatives specifically benefiting IDPs prior to displacement can be seen in connection with development-induced displacement. This includes, for example, the “non-action alternative.” Under this policy, there is a recognized option to avoid development projects that cause displacement even though there is potential for planning for displacement. This option is specifically called for in the *Organization of Economic Cooperation and Development (OECD) Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects* (the *OECD Guidelines*)³³ and could be placed in national economic planning policy and related legislation.

Where displacement does occur, a simple but useful distinction has been made between land-based and non-land-based resettlement programs. In advance of displacement, law and policy is put in place in land-based resettlement programs to provide resettlers with enough land to regain and build farms and small rural businesses. Non-land-based resettlement strategies include activities such as occupational training, employment, directed credit, and small business and enterprise development for job creation.³⁴

Resettlement programs that include elements of both types aim to bolster stock in the broader range of livelihood assets. For example, special training initiatives benefiting soon to be displaced persons can be taken in advance of displacement to boost the stock in human capital. Much emphasis has been placed on maintaining and boosting social capital in the context of development induced displacement. This includes consultation with prospective IDPs about methods to be used and initiatives to be taken to maintain livelihoods, efforts to ensure that community groups are relocated as a single entity, etc. Physical and financial assets are targeted by community planning, construction of infrastructure, and special programs of credits, loans, grants, and purchases to the benefit of IDPs.

³³ Organisation of Economic Co-operation and Development [OECD], *Guidelines on Aid and Environment No. 3, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects*, at 6 (1992).

³⁴ Asian Development Bank, *Handbook on Resettlement: A Guide to Good Practice*, 62 (1998).

Steps need to be taken in both land-based and non land-based resettlement programs to meet a range of problems. These can include the fact that non-titled IDPs are legally ineligible for compensation; compensation for productive assets is not based on replacement costs; and that available land is of poor quality and inadequate. Other problems include the lack of skills needed for income-generating programs; an inadequate budget for income restoration programs; the lack of institutional and technical capacity to plan and implement micro-projects for income generation; and neglect of vulnerable groups in income restoration programs.³⁵

Pre-displacement steps specifically benefiting IDPs can also be taken where the displacement is caused by human-made disasters such as industrial or nuclear accidents. Although the 1993 Prevention of Major Industrial Accidents Convention calls for planning in the event of industrial accidents, actions to address the employment and livelihood results of displacement are not explicitly mentioned.³⁶ The instrument is nevertheless flexible enough for policy makers and advocates to use as a framework within which to design legislation and employment policy to benefit persons displaced by human-made disasters.

In the case of natural disaster, advance planning is possible and can yield substantial returns. The geographic zones that are susceptible to earthquake, typhoon, hurricane, flooding, fire, tsunami, and similar natural disasters tend to be known. Emergency plans can be made in advance, before populations are displaced. There are scores of examples of such emergency plans. Most emphasize restoration of infrastructure; few emphasize longer-term restoration of livelihood and economic self-sufficiency as such.

Finally, where displacement is induced by the desperate economic situation of a country, broad policy targets for economic development naturally imply

³⁵ *Id.*

³⁶ The Prevention of Major Industrial Accidents Convention, 1993 (No. 174). This instrument does not cover nuclear installations. It has been ratified by twelve countries as of May 30, 2008.

employment and self-reliance benefits for IDPs.³⁷ For example, in Colombia, it is reported that “income-generating activities in which internally displaced persons engage tend to be low-paying, temporary jobs with few or little social benefits such as construction work for men and domestic work for women.”³⁸ These types of jobs are common for many groups in many countries; law and policies designed to improve the situation for all who work in these jobs can have important benefits for IDPs as a group.

During Displacement

Discussion of IDP employment and livelihoods tends to focus on durable solutions after displacement. Action is also needed during displacement, especially as displacement can last for long periods of time.³⁹ Such action is well justified by the observed problems of IDP unemployment and inactivity. For example, without access to employment opportunities during displacement, IDPs can become particularly vulnerable to recruitment by both government and rebel forces.⁴⁰ Displaced children are particularly vulnerable to forced recruitment—as soldiers, domestic servants, or sex slaves.⁴¹ Where the cause of displacement is a natural disaster and IDPs are only temporarily displaced, the lack of income during displacement can lead to the loss of livelihood assets, which in turn undermines future employment and economic activities.

³⁷ Profiles in Displacement: East Timor, *supra* note 17, ¶ 56.

³⁸ Deng Report 1999/47, Addendum, Profiles in Displacement: Follow-up mission to Colombia, ¶ 94, U.N. Doc. E/CN.4/2000/83/Add.1 (2000).

³⁹ Deng Report 2002/56: Turkey, *supra* note 15, ¶ 15.

⁴⁰ Interview with UN official, Abidjan, Sept. 20, 2005, cited in Global IDP Project, *Internal Displacement in Côte d'Ivoire: a Protection Crisis*, at 13 (Nov. 7, 2005).

⁴¹ Global IDP Database, *Profile of Internal Displacement: Democratic Republic of the Congo, Compilation of the Information Available in the Global IDP Database of the Norwegian Refugee Council* (Aug. 8, 2002).

Relief assistance targeting economic activities and livelihood during displacement can be given whether persons are displaced among the general population or in camps. Although encampment is useful in an initial reception phase of displacement, long-term encampment can lead to hopelessness, inactivity, and dependency.⁴² Encampment is not good for economic self-reliance. It has thus been argued that encampment should be avoided in favor of integrative solutions, including local integration, self-settlement, or other forms of assistance that allow IDPs access to gainful employment, land, and social services.⁴³ This type of approach gives IDPs' economic self-reliance and livelihood a high priority in driving arrangements for IDP relief. Yet, care needs to be taken—initially, in equality-strengthening laws—to avoid exploitation where such approaches are taken.⁴⁴

Where encampment is inevitable, launching initiatives that tap the realities of the camp economy is the usual strategy for establishing employment and livelihood opportunities. The challenge is building upon, or injecting necessary elements, to develop or strengthen the marketplace. For example, women in Darfur, Sudan and Huamba Province, Angola add the value of their labor to firewood by collecting and distributing it.⁴⁵ Access to the firewood is

⁴² Stephen Castles & Nicholas Van Hear, *Developing DFID's Policy Approach to Refugees and Internally Displaced Persons*, I REFUGEES STUDY CENTER 2005, citing Richard Black, *Putting Refugees in Camps*, 2 FORCED MIGRATION REVIEW 1-4 (1998); LYNELLYN LONG, BAN VINAI (1993); Liisa Malkki, *Refugees and Exile: From "Refugee Studies" to the National Order of Things*, 24 ANNUAL REV. OF ANTHROPOLOGY 495-523 (1995).

⁴³ Castles and Van Hear, *supra* note 42.

⁴⁴ Internal Displacement Monitoring Center, Democratic Republic of Congo: Some 40,000 Flee Ongoing Fighting every Month—A Profile of the Internal Displacement Situation, at 105 (Mar. 1, 2006).

⁴⁵ Internal Displacement Monitoring Centre [IDMC] Sudan, *Global Overview of Trends and Developments in 2005*, at 47 (Mar. 2006); Global IDP Database Angola, *Profile of Internal Displacement: Angola*, Compilation of the Information Available in the Global IDP Database of the Norwegian Refugee Council, at 68 (Aug. 9, 2002) [hereinafter Global IDP Database: Angola].

a necessary prerequisite as well as a means to exchange value in the form of barter—of food rations or other services—or cash money. Steps can be taken to promote such initiatives. In Meira Camp, Pakistan, Save the Children paid women to make blankets and children’s clothing sets, and hired watchmen and cleaners to work at the camp.⁴⁶ Personal grooming services, clothes-making and repair, food preparation, small-scale construction, and similar activities, are all services in demand within camps,⁴⁷ and programs can be devised to provide training in these sorts of activities.⁴⁸ Legislation and policy should at least not hinder such activities, and at best actively encourage them.

A typical response to IDP unemployment is employment-generating infrastructure development, rehabilitation, or maintenance programs. These programs can improve physical assets that, in turn, improve livelihood opportunities after displacement. Substantial employment was created for IDPs in reconstructing infrastructure in India, Sri Lanka, Indonesia, and Thailand after the 2004 tsunami. Such programs can boost human assets (through skills training), social assets (through consultation and community-focus implementation modalities), and physical assets depending on the arrangements made for their implementation.⁴⁹ Considering natural assets, an example can be seen in the Georgian Law on Internally Displaced Persons,

⁴⁶ Save the Children, Response Situation Report #25 (Mar. 7, 2006), *available at* <http://www.reliefweb.int/rw/rwb.nsf/db900SID/KHII-6MM5TS?OpenDocument>.

⁴⁷ Informal trading also takes place inside the IDP camps and transit centers. Cigarettes, soap, matches, cooking oil, and firewood are sold there in small quantities. Women dominate as sellers of low-priced goods. High-priced merchandise is generally sold by men, but few displaced men have the financial resources to enter that sector of the market. Global IDP Database: Angola, *supra* note 45.

⁴⁸ Norwegian Refugee Council, *Camp Management Toolkit*, §20 (2004).

⁴⁹ ILO Tsunami Work—Background Information, ILO Regional Office for Asia and the Pacific, *available at* http://www.ilo.org/public/english/region/asro/bangkok/download/yr2005/tsunami_background.pdf.

which obliged local authorities to provide IDPs with plots of land for temporary use.⁵⁰

In the Context of Durable Solutions

Although the ideal situation for IDPs is returning to their habitual place of residence, this is often an unattainable solution. This is clearly the case in development-induced displacement, where resettlement, the next best option, is the process of starting a new life in any place other than the place of original residence. The process of reintegration means the re-entry of IDPs into the social, economic, cultural, and political fabric of their original (where return has been possible) or new communities. A durable re-entry has occurred when the former IDP becomes a part of the community and is not distinguished from that community for any reason related to the person's former status as a displaced person.⁵¹ Reintegration ultimately means that any livelihood supports given only to IDPs will have fallen away.

A wide range of livelihood supporting policies and programs can be justified before this ideal situation can be achieved.⁵² But two general observations are worth making first, concerning the relationship between return and livelihood opportunities relative to law and policy-making. First, IDPs hesitate to return if there are no, or limited, livelihood opportunities compared to livelihood

⁵⁰ Although government has confirmed that plots have been given, there are some reports from IDPs that they had to pay “extra expenses” in order to actually benefit from the scheme. Without payment for extra expenses no land, bad land, or badly situated land might be given. Deng Report 2000/53: Georgia, *supra* note 13, ¶ 37.

⁵¹ Internal Displacement Monitoring Center [IDMC], *Training Materials on Durable Solutions* (2004).

⁵² An example of an ambitious relocation and reintegration scheme has been sketched out for pastoralists in Afghanistan, involving consultation, skills training, asset transfers, access to micro-financing, approaches to developing acceptance by local populations, etc. IDMC Afghanistan, *Commitment to Development Key to Return of Remaining Displaced People—A Profile of Internal Displacement Situation*, at 135 (Dec. 2, 2005).

chances in the residence where they are temporarily dislocated.⁵³ This can be associated with the availability or access to returned lands and other productive inputs, the scarcity of waged jobs, the availability of mechanisms for kick-starting livelihoods at the home place after return, or concerns for physical security. Return in certain cases may be seen as being both dependent on, and part of, the general economic development of the region concerned.⁵⁴

This livelihood-based hesitancy to return can hinder economic self-sufficiency efforts made in law and policy. The problem is most acute where return seems to be imminent. IDPs thus wait before setting down the roots of economic self-sufficiency, and policy-makers hesitate to give effect to supportive policy and programs, waiting or moving instead to design responses for reintegration at the place of original residence.⁵⁵

Law and policy can confront the hesitancy. To counter the phenomenon in Georgia, for example, the “New Approach” program was designed to reaffirm “the right of all displaced persons to return to their home in conditions of safety and dignity, while recognizing the need, in the absence of those conditions, to enable internally displaced persons to realize their full rights as citizens and to resume productive lives.”⁵⁶ After a long period of displacement in this case, efforts were shifted from humanitarian assistance to enabling the internally displaced to become self-reliant and socially and economically integrated. Failure to make this shift left the internally displaced “in a precarious position, in effect locking them out of the benefits that could accrue to them from participation in longer-term development activities.”⁵⁷

⁵³ Case of Croatian Serbs, noted by the Internal Displacement Monitoring Center, IDP’s in Croatia.

⁵⁴ Deng Report 2000/53: Georgia, *supra* note 13, ¶ 103.

⁵⁵ Deng Report 1998/50, Addendum, Profiles in Displacement: Azerbaijan, ¶ 95, U.N. Doc. E/CN.4/1999/79/Add.1 (1999) [hereinafter Deng Report 1998/50: Azerbaijan].

⁵⁶ Deng Report 2000/53: Georgia, *supra* note 13, ¶¶ 112, 108-128.

⁵⁷ *Id.* ¶ 111, citing Report of the Secretary-General concerning the situation in Abkhazia, Georgia, ¶ 24, S/2000/345, Apr. 24, 2000.

The second observation is that IDPs' resistance to economic inactivity can be seen in cases where displacement was short-termed, livelihood stocks were relatively strong prior to displacement, and return, although tentative, is possible.⁵⁸ In this last case, despite catastrophic affects of displacement on livelihoods, nominally returned IDPs can, under still unstable circumstances, undertake coping strategies in the direction of economic self-reliance. In these circumstances, re-establishing livelihood opportunities should be viewed as a process rather than an all or nothing proposition and securing a durable return is probably the best authorities can do to reestablish livelihoods.

Human Assets

Vocational training programs provide skills, which are transportable assets. Examples can be given of training in languages, computer skills, and trades such as carpentry.⁵⁹ Skills training centers for demobilized combatants in Angola provided basic training in brick-making, agriculture, electric wiring, and carpentry.⁶⁰ IDPs can benefit from training in their new environments, be it an urban labor market or a labor market undergoing transition to a market economy,⁶¹ or in skills they need to fill available jobs.⁶²

Institutional mechanisms can be put in place to help put IDPs in contact with employers at the end of a program of training.⁶³ Skills can be recognized

⁵⁸ Internal Displacement Monitoring Center [IDMC], Democratic Republic of Congo, *supra* note 44, at 108.

⁵⁹ Program run by the International Rescue Committee (IRC) in Zugdidi, Georgia. Deng Report 2000/53: Georgia, *supra* note 13, ¶ 45.

⁶⁰ Global IDP Database: Angola, *supra* note 45, at 90.

⁶¹ Deng Report 2000/53: Georgia, *supra* note 13, ¶ 45.

⁶² Deng Report 1998/50: Azerbaijan, *supra* note 55, ¶ 93.

⁶³ Deng Report 2001/54: Sudan, *supra* note 16.

through certifications given as part of the program. The state itself, private actors, and international actors can operate certification programs. In each case, policies and laws need to make it possible for such institutions to operate. Documentation of previously acquired qualifications has to be made easy, or provision made for persons who simply lack documentation.⁶⁴ This can include skills-testing, or methods of recertification based on testimonial evidence.

Human assets can also be boosted through policies and programs specifically aimed to entice refugees home. These can bring employment benefits to IDPs. Return of Qualified Nationals programs in Afghanistan,⁶⁵ East Timor,⁶⁶ and Bosnia⁶⁷ were undertaken specifically with a view to rejuvenating the local economy and strengthening local capacity.

Social Assets

Stock in social assets may be the most difficult to rebuild. The social liabilities of ostracism and discrimination hamper IDPs' economic activity by affecting other livelihood assets. Challenges are lessened where social networks are transplanted with entire communities. This sometimes happens in cases of development-induced displacement. But this is not the usual case, and efforts are needed on the one hand to breakdown behavior that keeps IDPs out of social networks, and on the other hand to build and rebuild social networks that contribute to economic activity and self-sufficiency. These would include anti-discrimination laws and laws or policies that respect the social networking practices of communities of IDPs, such as those respecting customs and

⁶⁴ Deng Report 1995/57: Peru, *supra* note 18, ¶ 98.

⁶⁵ International Organization for Migration, EU-RQA Programme Micro and Small Scale Business Support Grants, *available at* <http://www.iom-rqa.org/self-employment%20schemes%20explanatory%20note%20revised.htm>.

⁶⁶ Profiles in Displacement: East Timor, *supra* note 17, ¶ 57.

⁶⁷ International Organization for Migration Home Page, <http://www.iom.ba/Programs/Completed/rqn.htm>.

practices of indigenous peoples. Probably equally significant are the softer interventions that can be undertaken by national policy promotion institutions such as those charged with promoting human rights, spiritual wellness (i.e., organized faith-based organizations), education (i.e., universities and other educational institutions), and similar civil society institutions.

IDPs can face employment and livelihood difficulties if they return prematurely to their homes. This can be related to issues of social integration as well as security. Local workers and employers need to be prepared for an influx of returning IDPs into the local labor market and measures to recover occupied lands need to be taken prior to any actual return of IDPs.⁶⁸

A comprehensive assessment of the conditions and difficulties of IDPs may be needed to ensure that projects are developed that target their needs. Laws and policies need to authorize or mandate this. This type of assessment might be one of the best ways for determining how social assets can be strengthened, and social networks and trust recreated and supported. Implementation of the New Approach program in Georgia included a series of studies to assess and address the issues of employment and income generation, and the law as it related to IDPs and issues of community development.⁶⁹

Physical Assets

A livelihood assessment of the physical assets needed by IDP groups is a good strategy considering the possibly broad range of these assets. In Georgia, for example, the Office of the United Nations High Commissioner for Refugees (UNHCR) observed that more sustainable return occurred after it began providing returnees with agricultural inputs.⁷⁰ In other situations, livestock

⁶⁸ Global Internal Displacement Database, *Profile of Internal Displacement: Cote D'Ivoire*, *supra* note 41, at 7.

⁶⁹ Deng Report 2000/53: Georgia, *supra* note 13, ¶¶ 102, 118.

⁷⁰ *Id.*

could be the necessary physical asset,⁷¹ and if so, the quantity of livestock should be sufficient to generate surplus income.⁷² Law and policy need to make these types of support possible, including mechanisms for transferring ownership or title to IDPs.

Basic infrastructure security will also be a priority in many cases. This includes, for example, the removal of mines, the availability of roads to bring goods to market, and the functioning of basic machinery for productive activities such as the processing of raw agricultural products.⁷³ Creating or restoring these assets can provide short-term employment for IDPs.

Finally, productive land ownership can also be a critical factor enabling IDPs to lift themselves out of poverty. The *Guiding Principles* ask for observance of the principle on non-discrimination in this regard.

Financial Assets

Special financing arrangements for IDPs can be very important for self-sufficiency, particularly if it is on a micro-scale. In the Democratic Republic of Congo, for example, micro-financing of livelihood projects for ex-combatants was conditioned on the decommissioning of arms, although donor financing was withdrawn when the broader disarmament agreement collapsed.⁷⁴

⁷¹ World Bank, Georgia—Poverty and Income Distribution, vol. I, ¶ 14, Report No. 19348-GE (1999).

⁷² Deng Report 2000/53: Georgia, *supra* note 13, ¶ 40.

⁷³ Deng Report 2000/53, Addendum, Profiles in Displacement: Armenia, ¶ 26, U.N. Doc. E/CN.4/2001/5/Add.3 (2000) [hereinafter Deng Report 2000/53: Armenia].

⁷⁴ Internal Displacement Monitoring Centre [IDMC], Profile of Internal Displacement: Republic of Congo (Brazzaville) Compilation of the Information Available in the Global IDP Database of the Norwegian Refugee Council, 65 (Apr. 8, 2005).

Taxation on newly reoccupied but as yet unproductive property may have undesired effects on IDPs who have just returned.⁷⁵ It is advisable to adopt tax law to accommodate this situation.

Institutional mechanisms to increase or improve the stock of financial asset supports can vary. In Eritrea, a central informal group met to brainstorm on issues relating to micro-finance/credit for IDPs.⁷⁶ Where international donors fund micro-finance schemes, their failure to meet appeals or fulfill pledges undermines recovery efforts.⁷⁷ Private agencies can also be contracted to implement micro-financing schemes.⁷⁸

Subsidies can boost stock in financial assets. Subsidized public transportation for the displaced may be a practical way to facilitate their engagement in income-generating activities.⁷⁹ To support income-generating activities for women, support can be given to child-care facilities.⁸⁰ Special unemployment benefits can also be put in place for persons affected by a natural disaster

⁷⁵ Deng Report 2000/53: Armenia, *supra* note 73.

⁷⁶ Global IDP Project, Profile of Internal Displacement: Eritrea Compilation of the Information Available in the Global IDP Database of the Norwegian Refugee Council 107 (June 17, 2005).

⁷⁷ *Id.* at 137.

⁷⁸ Internal Displacement Monitoring Centre [IDMC], Afghanistan: Commitment to Development Key to Return of Remaining Displaced People—A Profile of the Internal Displacement Situation, at 103 (Dec. 2, 2005).

⁷⁹ Deng Report 1999/47, Addendum, Profiles in Displacement: Follow-up Mission to Colombia, ¶ 96, U.N. Doc. E/CN.4/2000/83/Add.1 (2000) [hereinafter Deng Report 1999/47: Columbia].

⁸⁰ One example of a state-run program in this regard is the “Madres Comunitares” in the Nelson Mandela barrio which involves paying a number of internally displaced women to provide day care for children whose mothers work. RRSIDP, submitted in accordance with Commission resolution 1999/47. Deng Report 1999/47: Columbia, *supra* note 79, ¶ 96.

where, for example, employment or self-employment is no longer possible because of destruction of the place of employment.⁸¹

Job Creation

The typical economic activity plan for IDPs involves job creation. Such plans employ IDPs in the reconstruction of homes, public infrastructure, public buildings, irrigation works, well-making and repair, mine clearing, and so on. Different programmatic approaches can be taken to job creation initiatives, each with related legal and policy implications. IDPs can be employed directly by government. Private contractors who are in turn employed by government to undertake construction projects can also employ them. Provisions should ideally be made in national law and regulations in the first case for such extraordinary employment programs, setting, among other things, detailed requirements for employment terms and conditions. In the case of private contractors, national law and regulations should ideally require labor clauses in public contracts or otherwise assure that the employment and income-generating objectives of government are achieved via the private sector. Prior to displacement, policies promoting labor-based technologies in public contracting can help mainstream this approach, which in turn can be used to benefit IDPs if displacement occurs.⁸² IDPs can also be given grants specifically for the purchase of materials needed to reconstruct housing or productive premises themselves, or to contract construction work. Building materials can also be made available directly. Here, too, appropriate laws and regulations should be in place to facilitate such extraordinary transfers.

⁸¹ United States' Disaster Unemployment Assistance does not grant benefits where the worker is displaced per se; in recent cases, however, destruction of the place of work could well be coincident with destruction of the worker's home, *available at* <http://workforcesecurity.doleta.gov/unemploy/disaster.asp>.

⁸² David Stiedl & David Tajzman, *Labor Clauses in the Public Contracts in Ghana: Recent Experience in the Roads Sector*, Ghana Country Procurement Assessment Report, Annex 9, Vol. 5, June 2003, *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/05/21/000160016_20040521151743/Original/290551GH1CPAR0Annex0901v5.doc.

Incentives can be given to businesses to hire IDPs.⁸³ Businesses themselves may be owned by IDPs who in turn may make special efforts to employ IDPs.⁸⁴ IDPs in Azerbaijan established themselves as private construction contractors to respond to demand set in motion by public contracts and international assistance, providing employment and creating skills for other IDPs.⁸⁵ This cascading effect makes it good policy to promote IDPs as enterprise owners and employers.⁸⁶ NGOs also often operate business development programs specifically targeting women, with an objective of keeping women IDPs out of prostitution.⁸⁷

Policies of affirmative action have been used to favor IDPs. To be effective, however, such policies need also to take labor market demands into account; and positive action obligations need to apply to economic sectors that are actually creating jobs.⁸⁸

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Responsibility for assisting IDPs lies first with national authorities. Issues of public administration may be more important than effectiveness when it comes to assigning responsibility specifically for IDP employment and livelihood opportunities. Where displacement is caused by a natural disaster, for example, authorities responsible for disaster relief and emergencies will respond, probably with little immediate thought to employment and livelihood issues as such. In the view of such authorities, the immediate effects of the disaster, life and property, need to be protected. Only after chaos is averted or

⁸³ Deng Report 1999/47: Columbia, *supra* note 79, ¶ 95.

⁸⁴ Deng Report 2000/53: Georgia, *supra* note 13, ¶ 46.

⁸⁵ Deng Report 1998/50: Azerbaijan, *supra* note 55, ¶¶ 69-70.

⁸⁶ Deng Report 2000/53: Georgia, *supra* note 13, ¶ 47.

⁸⁷ *Id.* ¶ 48.

⁸⁸ Georgian Young Lawyers' Association, *Monitoring of Legal and Actual Status of Internally Displaced Persons in Georgia*, a paper supported by UNHCR, at 19 (1999).

abated will thought turn to restoring livelihoods. Depending on the scale of displacement, authorities other than those usually dealing with employment and economic activities may be involved, taking up the task of establishing emergency employment opportunities. Only in the context of finding durable solutions will the authorities usually responsible for employment matters, and institutions under their control, take up their responsibilities. Similarly, authorities responsible for a development initiative that induces displacement may have lead responsibilities for it, with little hand-off to, and liaison or coordination with, line authorities responsible for human rights, community planning, or labor and employment matters. Where war and civil unrest are the cause, the military and police may be the leaders, again with limited inter-authority coordination.

It has been noted that “in the absence of policy and legal instruments and an effective mechanism to monitor compliance, even well-structured institutions with trained staff have failed in consistent implementation of effective resettlement.”⁸⁹ This suggests that special policies and legal instruments should be considered. Special institutional frameworks to broadly oversee reintegration and specifically to oversee efforts aimed at employment and economic self-sufficiency may also be considered. Responsibility for promoting IDPs’ employment and livelihoods opportunities cannot be vested in military or police authorities where displacement is caused by armed conflict, generalized violence, or persecution. International agencies, NGOs, and other governmental authorities are better placed in such circumstances, and particularly so during displacement. International financial institutions are often involved in development-induced displacement. Their policies should be used to develop national institutions appropriate to the situation.

Where displacement is permanent, a number of different types of institutions will be involved in helping IDPs reintegrate within labor markets and find employment opportunities in new places of residence. NGOs can play an important role in helping facilitate implementation of Guiding Principle 28.2 to ensure full participation of IDPs in the planning and management of their reintegration, in seeking the views of IDP communities, monitoring projects,

⁸⁹ Leopold Jose Bartolome et al., *supra* note 32, at 6 (2000).

and explaining efforts, rights, and so on.⁹⁰ Educational and labor market institutions should play their normal roles and ideally be sensitized to the needs of the former IDPs in the community.

There is at least one example of the judicial branch of government playing an important role in promoting a response to IDPs' needs. It has been reported that:

the Colombian Constitutional Court issued a ruling in 2004, declaring the lack of adequate protection and assistance to IDPs unconstitutional and urging the government to design a strategy guaranteeing an effective response to the maximum of available resources. The Colombian government has seemingly taken the ruling seriously by establishing and reinforcing institutions meant to respond to the IDPs' needs for health care, education, livelihood and property. It also allocated more than \$2 billion at the end of 2005 for long-term IDP programs in response to the Constitutional Court's ruling.⁹¹

ROLE OF INTERNATIONAL ACTORS

State structures weakened by years of war and destruction rarely have the capacity to ensure a successful return and reintegration of IDPs in post-conflict situations. External help is needed.⁹² The effects of natural and man-made disasters similarly strain state structures. International actors can, and do, play an important role in financing and orienting policy and programs that generate employment in these circumstances. This can be done both during

⁹⁰ Deng Report 2000/53: Georgia, *supra* note 13, ¶¶ 126-127.

⁹¹ Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2005*, 2006 INTERNAL DISPLACEMENT MONITORING CTR. 60 [IDMC Global Overview].

⁹² *Id.* at 47.

displacement and as part of durable solutions after the causes of displacement abate.

Governments are known to deny the existence of IDPs in certain circumstances. Where this is the case, they are unlikely to seek international help in improving IDP employment or livelihood situations. Since employment and livelihood promotion is a general policy concern, international players may be able to provide IDP-friendly assistance without specifically targeting the group.⁹³ International actors need also to be concerned about the legality of their activities under national laws.⁹⁴ States interested in maintaining the rule of their own laws as well as making use of international resources will want to consider the user-friendliness of relevant law and regulation in the context of situations that cause internal displacement and the involvement of international actors in helping in the aftermath.

Examples of international actors' support for projects that create employment include: public works and training, employment as social workers to counsel IDPs,⁹⁵ and employing doctors who are IDPs.⁹⁶ In Azerbaijan, various types of support to micro-enterprise development by international agencies and NGOs were reported including "vocational and business training; small business grants or loans to individuals for the purchase of needed equipment...loans to groups of internally displaced persons organizing small business cooperatives...and the establishment and support of women's cooperatives."⁹⁷ In Georgia, efforts to rally financial resources from the donor community benefited from a reorientation of IDP policy.⁹⁸

⁹³ Deng Report 2002/56: Turkey, *supra* note 15.

⁹⁴ This can mean compliance with many different types of national laws and regulations dealing with matters as different as rules for importation productive machinery used for vocational training to labor regulations applicable to persons employed in development projects.

⁹⁵ Deng Report 1998/50: Azerbaijan, *supra* note 55, ¶ 78.

⁹⁶ *Id.* ¶ 80.

⁹⁷ *Id.* ¶ 95.

International Labour Organization

The ILO is the UN specialized agency mandated with promoting employment and favorable conditions for work. It has been involved for fifty years in providing assistance associated with employment promotion as well as national labor administration supporting livelihood opportunities. It works closely with the World Bank in implementing the types of employment-creating infrastructure projects associated with IDPs. In recent years, the ILO has developed policy recommendations and approaches and programs within its mandate for helping countries in crisis, including dealing with displaced persons.⁹⁹

World Bank

International financial institutions have policies that mandate their activities and involvement in development-induced displacement. These can be used as a basis for requesting assistance. In 1980, the World Bank formulated the first policy on development-induced resettlement of any development agency engaged in funding or constructing projects that caused displacement.¹⁰⁰ The Bank's policy explained the basic criteria which every Bank financed project needed to meet, defined its fundamental objective as restoring the income and livelihood of affected people, and improving living standards further whenever possible. The Asian Development Bank¹⁰¹ and the Inter-American

⁹⁸ For example, the New Approach policy in Georgia. See Deng Report 2000/53: Georgia, *supra* note 13, ¶¶ 116-117.

⁹⁹ International Labour Organization, *Crisis Response Publications*, http://www.ilo.org/public/english/employment/crisis/info/g_publ.htm.

¹⁰⁰ Michael Cernea, *The Urban Environment and Population Relocation*, World Bank Discussion Paper No. 152 (1993).

¹⁰¹ See Involuntary Resettlement Policy, Aug. 1995, available at http://www.adb.org/Documents/Policies/Involuntary_Resettlement/default.asp?p=rsttlmnt; see also Resettlement: A Guide to Good Practice, 1998, available at

Development Bank¹⁰² followed suit, making policy in 1995 and 1998, respectively. The World Bank also has a policy on indigenous peoples that is relevant to situations of displacement.¹⁰³

In the context of its operations, the World Bank can offer important experience for orienting and implementing policies that support IDP self-reliance in the case of resettlement in development-induced displacement. Its experience may also be useful in situations of man-made and natural disasters leading to displacement, and in post-conflict situations. Community empowerment programs typically include employment generation facilities, and micro-credit and micro-enterprise development programs are common to the Bank's portfolio of activities that can benefit IDPs.¹⁰⁴

OECD

In December 1991, the OECD Ministers of Environment and Development Cooperation endorsed *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development*.¹⁰⁵ The *OECD Guidelines* call for integration of the possibility of involuntary displacement into development planning, and with respect to access to training and employment, the planning should take into account the idea that general economic growth cannot be relied upon to protect the welfare of the project-affected population. Assistance might be sought from the OECD within this context.

<http://www.adb.org/Documents/Handbooks/Resettlement/default.asp> and Summary of the Handbook.

¹⁰² See Operational Policy on Involuntary Resettlement (10/98, IND-103, E, S), Oct. 1998, available at http://www.iadb.org/sds/ind/publication/publication_138_102_e.htm; Involuntary Resettlement in IDB Projects. Principles and Guidelines, Nov. 1999, available at http://www.iadb.org/sds/ind/publication/publication_138_105_e.htm.

¹⁰³ Operational Policy (OP) 4.10, July 2005.

¹⁰⁴ Profiles in Displacement: East Timor, *supra* note 17, ¶ 57.

¹⁰⁵ OECD Guidelines, *supra* note 33.

UN Agencies

There is no single organization within the UN responsible for IDPs. With respect to economic self-reliance, the role of UN agencies is seen mostly in the context of transition to development.¹⁰⁶ Food-for-work programs operated by the UN World Food Programme provide a means both for meeting food needs until a return to former livelihoods is possible, and re-engaging displaced persons in productive employment.¹⁰⁷

SUMMARY OF RECOMMENDATIONS

1. Laws should establish and fix the rights of persons to the assets they need to engage in employment and economic activities through the following:
 - a. with respect to human assets, securing the equal right to education and arranging for educational and skill certification that is transportable and can be restored;
 - b. with respect to social assets, securing such things as the right to employment and occupation without discrimination and to associate;
 - c. with respect to natural assets, securing such things as the right to land, water, fish and timber;
 - d. with respect to physical assets, securing such things as the right to productive goods and chattel; and
 - e. with respect to financial assets, securing such things as the right to borrow money, receive grants and benefits, and to contract.

2. Sustained and deliberate efforts should be made to implement relevant international standards, including the *Guiding Principles*, in the area of equality, the rights of indigenous peoples, employment policy, labor administration, social security, and vocational training.

¹⁰⁶ Inter-Agency Standing Committee, *Implementing the Collaborative Response to Situations of Internal Displacement, Guidance for United Nations Humanitarian and/or Resident Coordinators and Country Teams*, at 35 (June 2005).

¹⁰⁷ *Id.* Annex 2, Activities List, WFP—World Food Programme. See also Deng Report 2000/53: Georgia, *supra* note 13, ¶ 45.

3. Labor administration and employment policies, laws, and programs that are in place and operational before displacement ought to be appropriate to needs in the local context.
4. A policy for emergency labor administration services should be designated in advance of displacement circumstances.
5. An emergency public employment service should be seen as essential, and arrangements should be made to establish contingencies for it.¹⁰⁸
6. Laws and policies that enable the quick implementation of appropriate emergency employment programs should be put in place that take into account a range of issues, including sources of funding, methods of identifying infrastructure susceptible to natural disasters, policies for identifying beneficiaries, policies supporting labor intensive construction and maintenance methods.
7. Policy should be made to guide labor market institutions in their handling of IDPs and where appropriate, special institutional arrangements should be considered with a view to specifically benefiting IDPs. Action should be taken to implement the right of IDPs to treatment in all ways equal to their fellow citizens in connection with employment and occupation.
8. The safeguards that guide the lending of international financial institutions should, at a minimum, inspire national legislative and policy activity with respect to development-induced displacement and displacement with other causes where appropriate to conform to the Guiding Principle of avoiding displacement where possible.
9. Laws and policies need to be consistent with, and supportive of, practical programmatic measures taken when displacement occurs, and when return becomes possible.

¹⁰⁸ The ILO has established a manual entitled *Guidelines for Establishing Emergency Public Employment Services* (2003).

Chapter 12

The Right to Social Security Including Pensions

Anne Charbord*

INTRODUCTION

In the course of displacement, internally displaced persons (IDPs) often leave everything behind, including their property, their belongings, and their employment. National governments, which have primary responsibility for the protection, security, and welfare of IDPs, must ensure that, both during displacement and in finding durable solutions to displacement, IDPs are able to enjoy the same rights as the rest of the population, without discrimination. This often implies taking measures to address their specific needs, as a particularly vulnerable category of the population. The protection of IDPs includes ensuring that their economic, social, and cultural rights are fully respected, which is a crucial aspect of ensuring that durable solutions are sustainable. And this includes examining the issue of their right to social security.

The issue of social security has for a long time been addressed outside the human rights framework. It has been seen as a needs-based charity, or as an element of a state's social policy, on which international law had little or no bearing. Since the adoption of the Universal Declaration of Human Rights (UDHR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to social security has clearly been a part of international human rights law. Additionally, a number of other international human rights conventions, at the universal and at the regional level, expressly refer to it.

There is no doubt that the “right to social security” represents an important legal guarantee aimed at ensuring the right of everyone to live a life in human dignity in difficult situations, including ill-health, disability, unemployment, injury, death, maternity, and other unforeseen situations which may cause

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distress. It is fundamental to social justice and crucial to ensuring that individuals do not fall below a defined minimum subsistence level or poverty line.

While the right to social security can be broadly described as protecting the material conditions necessary for an adequate standard of living and from the life-threatening and degrading conditions of poverty and material insecurity, its content and scope of application remain somewhat unclear. It is often linked to a number of other human rights, such as the right to an adequate standard of living, the right to health, the right to food, and even, in specific cases, to the right to property. Some link it to civil and political rights, such as the right to life and the prohibition of cruel, inhuman, degrading treatment or punishment.

There are a number of approaches to the concept of social security. These range from a narrow approach, limited to support in case of loss of income, to a more classical approach which identifies nine social risks—as reflected in International Labour Organization (ILO) conventions on the topic—to even broader approaches, which take poverty as a starting point. Pensions, or old-age benefits, may be considered as a specific aspect of the protection afforded by social security.

At the outset, it is important to highlight that the distinction between social security and social assistance is highly controversial and may appear blurred and arbitrary. While both are designed to ensure that the basic needs of the beneficiaries are covered, it is generally accepted, however, that social assistance refers to benefits which are based solely on an individual's needs, without any requirement of affiliation to a social security scheme, requirement of professional activity, or payment of contributions. Social security, on the contrary, is based on affiliation to social security schemes and, as such, is based on entitlements. The benefits are granted in the event of a risk arising, but are not intended to compensate for a state of need as such.

This chapter will focus on the right to social security, as protected in a number of international instruments, including pensions as a specific aspect of social security protection. This chapter will not focus on social assistance nor will it examine the issue of the provision of services that are basic for survival,

including essential food and drinking water, basic shelter and housing, and essential medical services and sanitation. They may either fall under the examination of the provision of humanitarian assistance, or be considered part of the substantive right itself, such as the right to health or the right to food.

A pre-condition for a right to social security of IDPs, and for a right to access social security, is that social security schemes have been set up by the state.¹ Where this is the case, it is particularly important that IDPs do not lose their acquired rights because they are, or have been, displaced. IDPs are generally at greater risk of impoverishment than the rest of the population. Social security aims at ensuring that particularly vulnerable categories of the population, such as the elderly, the disabled, and the sick are able to cope with their situation, without falling below a defined poverty level. As such, ensuring that particularly vulnerable IDPs—the elderly, the disabled²—are able to maintain their right to social security benefits, which are often their only means of survival, is especially important. It contributes to providing them with the possibility of re-establishing themselves and reintegrating back into society.

LEGAL FRAMEWORK

This section will first examine a number of rights which provide the international background to IDPs' right to social security, and right of access to social security. These include the rights to social security, to equality and non-discrimination as well as property under international and regional human rights law. The chapter will then focus on the relevant provisions of the *Guiding Principles on Internal Displacement* (the *Guiding Principles*), which do not expressly mention such a right. The last sub-section will focus on the applicability of the right to social security in this context.

¹ This study therefore concentrates on states which have adopted such regulatory frameworks before the onset of internal displacement, as discussed in Part II below.

² The Conference on Internal Displacement in the IGAD Region recognized that the 'elderly and disabled IDPs were also particularly vulnerable groups within internally displaced populations, who merited special attention and support,' *see* Report of the Expert Meeting, Brookings SAIS Project on Internal Displacement, August 20-September 2, 2003.

Relevant Guiding Principles

The *Guiding Principles* do not expressly address the right to social security or the more specific aspect of pensions. However, a number of the Principles are relevant to the subject matter of this chapter.

Principle 1(1) states that “[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international law and domestic law enjoyed by other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.” Principle 4 provides for non-discrimination in the application of the *Guiding Principles*.

In addition, Principle 19 states that:

(1) All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.

(2) Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual or other abuses.

(3) Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Principle 28(1) affirms IDPs’ right to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country, and places the responsibility on competent authorities to establish conditions as well as to provide the means to allow such return. Also, Principle 29(1) affirms that IDPs who have returned to their homes or places of habitual residence or who have resettled in another part of

the country shall not be discriminated against as a result of their having been displaced and sets forth their right to participate fully and equally in public affairs at all levels and have equal access to public services.

The rights to property and possessions are also protected during displacement and in the context of durable solutions (Principles 21 and 29(2)). Finally, Principle 20 relates to the right of recognition as a person before the law as well as the right to necessary documentation to enable enjoyment and exercise of IDPs' legal rights.

Legal Basis

Universal Human Rights Law

Article 22 of the Universal Declaration of Human Rights (UDHR)³ states that “[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Article 25 of the UDHR states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴, affirms “the right of everyone to social security, including social insurance.” In addition, Article 10(2) recognizes the right of working mothers “to adequate social security benefits” and Article 10(3) requires states parties to undertake special measures of protection and assistance for children and young persons. Although the ICESCR does not contain a definition of

³ Universal Declaration of Human Rights, U.N. Doc A/810, at 71 (1948).

⁴ International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316 (1966).

“social security,”⁵ the Committee on Economic, Social and Cultural Rights’ General Comment to Article 6 on the economic, social and cultural rights of older persons states:

[t]he right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.⁶

The right to social security is also enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁷ the Convention on the Rights of the Child (CRC),⁸ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁹ the International Convention on the Protection of the Rights of All Migrant Workers and

⁵ After this manuscript was finalized, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 19, The Right to Social Security, UN Doc E/C.12/GC/19, art. 9 (2008).

⁶ *Id.* ¶ 2.

⁷ Convention on the Elimination of All Forms of Discrimination against Women (1979), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, arts. 11(1), 14(2), U.N. Doc. A/34/46, Sept. 3, 1981.

⁸ Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, art. 26(1), U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

⁹ G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, art. 5(e)(iv), U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, Jan. 4, 1969.

Members of Their Families,¹⁰ and the 1951 Convention relating to the Status of Refugees (the Refugee Convention). Article 24(1)(b) of the Refugee Convention¹¹ accords refugees the same treatment as nationals with respect to “social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme).”

ILO Convention 102 on Social Security (minimum standards)

The ILO Social Security (Minimum Standards) Convention (the ILO Social Security Convention)¹² establishes nine branches of social security. They are medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivor’s benefit.¹³ It is the only international instrument, based on basic social security principles, that establishes universal minimum standards for all nine branches of social security.¹⁴

¹⁰ G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, art. 27(1), U.N. Doc. A/45/49 (1990), July 1, 2003.

¹¹ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force Apr. 22, 1954.

¹² C102 Social Security (Minimum Standards) Convention, 1952.

¹³ Other relevant ILO Conventions include: Maternity Protection Convention (Revised), 1952 (No. 103); Equality of Treatment (Social Security) Convention, 1962 (No. 118); Employment Injury Benefits Convention, 1964 (No. 121); Invalidity, Old Age and Survivors’ Benefits Convention, 1967 (No. 128); Medical Care and Sickness Benefits Convention, 1969 (No. 130); Maintenance of Social Security Rights Convention, 1982 (No. 157); Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168).

¹⁴ Other ILO documents which refer to social security include the Declaration of Philadelphia, Annex to the Constitution of the ILO, adopted by the ILO, May 10, 1944 and the Conclusions concerning social security adopted by the ILO, 89th session, 2001 which re-affirmed that social security was a basic human right, ¶ 2.

Regional Human Rights Law

Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador)¹⁵ states that “[e]veryone shall have the right to social security protecting him from the consequences of old age and disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence.” The African Charter on Human and Peoples’ Rights (AfCHPR)¹⁶ does not expressly recognize a right to social security. However, Article 13(3) affirms that “[e]very citizen shall have the right of access to public property and services in strict equality of all persons before the law” and Article 18(4) states that the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 12 of the European Social Charter¹⁷ reaffirms the right of all workers and their dependents to social security and places a number of positive obligations on state parties to achieve this right.¹⁸ Article 30 of the same

¹⁵ O.A.S. Treaty Series No. 69 (1988), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 67 (1992).

¹⁶ African [Banjul] Charter on Human and Peoples' Right, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁷ European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89.

¹⁸ For the purpose of this article, social security covers a number of schemes, which must have three characteristics: (1) the social security system should cover the traditional risks: health care, sickness, unemployment, old age, employment injury, family, and maternity; (2) it must be collectively financed, which means funded by contributions of employers and employees and/or by the state’s budget. (3) Article 12§1 recognizes the right to social security to workers and their dependents, including those who are self-employed. This means it must cover a significant percentage of the population as regards sickness insurance and family benefits, and of the active population as regards sickness and maternity benefits, unemployment benefits, pensions, and work accidents or occupational diseases benefits. When the system is financed by taxation (or budgetary resources), its coverage in terms of persons

Charter requires states parties “to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance,” thereby clearly distinguishing between social security and social assistance.

Right to Equality and Non-discrimination in the Application of the Right

Although its exact contours may be unclear, the right to social security, including pensions and other benefits, is protected under international human rights law. In order to ensure that the analysis is complete, the right to non-discrimination in the application of the right to social security and the principle of equality need to be included.

Article 2(2) of the ICESCR, which states that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” is a general non-discrimination clause—an accessory clause—in that it is a right to not be discriminated against in the application of the rights protected by the Covenant. This type of clause is found in virtually all other human rights instruments. Although IDPs are not specifically mentioned, “other status” certainly includes discrimination based on the fact of having been internally displaced.

The right to equality—or of equal protection of the law—is enshrined in Article 26 of the ICCPR, which provides that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any

protected should rest on the principle of non-discrimination, without prejudice to the conditions for entitlement.

ground, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Reference to such a “right to equality” can be found in a number of other human rights instruments,¹⁹ with the notable exception of the ICESCR and the ECHR.²⁰ It prohibits discrimination in law or practice in any field regulated and protected by a state’s public authorities when not based on objective and reasonable criteria. In contradistinction to the principle of non-discrimination in the application of the rights contained in the ICESCR, this right applies regardless of whether the subject matter falls under the ambit of the right protected by the ICCPR.

What became known as the “social security cases against the Netherlands” were the first communications in which a violation of the prohibition of discrimination was alleged independently of any right protected by the ICCPR.²¹ In these cases, the United Nations Human Rights Committee (the Human Rights Committee) determined that Article 26 of the ICCPR also applies to social and economic rights and that the non-discrimination clause in Article 26 of the ICCPR covers all spheres of state activity, not only those that fall within the scope of another right recognized in it. The Human Rights Committee emphasized that Article 26 did not “require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with Article 26 of the Covenant.” As such, the right to equality protects against discrimination in social security systems on prohibited grounds and discrimination may arise from the exclusion of certain groups

¹⁹ See UDHR, art. 7; ACHR, art. 24; AfCHPR, arts. 3(1), 3(2).

²⁰ See, however, Protocol No. 12 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms of September 4, 2000 providing in Article 1(1) that “[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. “

²¹ See Broeks and Zwann-de Vries cases, communications No. 172, 182/84.

from eligibility for benefits, or from compliance with conditions in order to qualify for benefits.

The Dutch cases referred to discrimination based on sex—which is one of the grounds specifically mentioned in Article 26, but in other cases, the Human Rights Committee has found violations of Article 26 when social security schemes discriminated on the ground of nationality,²² which is not a ground explicitly included in Article 26. As such, there is no doubt that a social security system which would exclude solely on the basis of internal displacement would be contrary to this Article.

*The Right to Property*²³

An analysis of the legal framework applicable to social security and pensions would not be complete without noting that certain social security benefits, including pensions, have been considered as protected under the right to property in regional human rights law.

In *Gaygusuz v. Austria*,²⁴ the European Court of Human Rights (the ECtHR) examined emergency assistance granted by the Austrian Government to individuals who had exhausted their entitlement to unemployment benefits. The ECtHR noted that entitlement to this social benefit was linked to the payment of contributions to the unemployment insurance fund, which was also precondition for the payment of unemployment benefits. It follows that there is no entitlement to emergency assistance where such contributions have not been made. The ECtHR concludes that “the right to emergency assistance [...] is a pecuniary right for the purposes of Article 1 of Protocol No. 1.”²⁵ [This]

²² See, e.g., *Gueye et al v. France*, communication 196/1983.

²³ See chapter ten on the right to property in this volume.

²⁴ ECtHR, *Gaygusuz v. Austria*, Aug. 31, 1996, case No. 39/1995/545/631.

²⁵ ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the

provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay taxes or other contributions.” The Court went on to find a violation of the right to non-discrimination linked to Article 1 of Protocol 1, in that the authorities’ refusal to grant the applicant emergency assistance was based solely on his nationality, which was not considered by the Court as based on any reasonable and objective justification.

In the case of *Azinas v. Cyprus*,²⁶ the ECtHR considered that where an employer has given a more general undertaking to pay a pension on conditions which can be considered to be part of the employment contract, the individual acquired a right which constituted a “possession” within the meaning of Article 1 of Protocol No. 1 and the ECtHR subsequently found a violation of the applicant’s right to property. The case was subsequently reviewed by the Grand Chamber, which considered it inadmissible.

Within the Inter-American system, social security benefits have also been considered as protected under the right to property.²⁷ In the case of “*Five pensioners*” v. *Peru*, the Inter-American Court of Human Rights stated that from the time that the applicants ceased to work and opted for the retirement set forth in the law, they acquired the right to their pensions being regulated by the terms and conditions established in the law. In other words, the pensioners acquired a right to property related to the patrimonial effects of the rights to a pension.²⁸

right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.

²⁶ ECtHR, *Azinas v. Cyprus*, June 20, 2002, No. 56679/00.

²⁷ Article 21 of the IACHR, which states: ‘1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law’.

²⁸ IACtHR, (Ser. C), No.98/2003.

Analysis of the Legal Framework and Applicability to IDPs

The *Guiding Principles* do not expressly refer to a right to social security or access to pensions and other benefits of a similar nature. However, it is clear from an analysis of the different provisions, both under international and regional human rights law, as well as from the *Guiding Principles* that—if such mechanisms exist in the country where displacement occurs—IDPs have the right to take part in social security schemes as well as a right to access social security benefits, without which IDPs' right to social security becomes ineffective. This is the case both during displacement and in the context of return or resettlement, once durable solutions become possible.

It is clear that IDPs are entitled to benefit from the right to social security as provided under international human rights law, even though this right is not specifically mentioned in the *Guiding Principles*. IDPs normally retain citizenship and do not lose, as a consequence of being displaced, the rights granted to the population at large. In the context of ensuring IDPs' dignity and their economic, social and cultural reintegration, the *Guiding Principles* highlight that IDPs must enjoy equal access to public services, which may include pensions and other entitlements. It is clear that the principle of non-discrimination and equality are crucial in this subject matter. IDPs are entitled to non-discriminatory application of the rights protected under international law, but they are also entitled to equality in the application of laws relating to rights that are not protected under international human rights law or the *Guiding Principles*. Finally, the right to property, which is expressly addressed by the *Guiding Principles*, may also be relevant. Insofar as the benefits derived from a social security scheme are considered as possessions, IDPs should be protected against unjustified interference by the state and should be repaired in case of violation.

As such, even if not expressly referred to in the *Guiding Principles*, IDPs are entitled to equally contribute to schemes set up by the state, both during and after displacement. The state must ensure equal, non-discriminatory access to benefits, both during and after displacement, and in case of a violation, the state must ensure compensation and reparation.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

This section will focus on highlighting the main issues in ensuring that IDPs are able to benefit from the right to social security as well as access to pensions and other benefits, both during displacement and after displacement. The section refers to a number of country-specific situations taken from the states of the former Yugoslavia. The primary reason this region was chosen is because of the high level of social protection that existed before the conflicts that led to internal displacement. As such, it provides a valuable example of the challenges encountered by IDPs in ensuring their right to equal access to social security. Before examining the country-specific examples, this section focuses on trends in the regulatory framework.

Regulatory Framework

While the international standards exist, both under international human rights and under international labor law, there is no single model of social security. This may be explained by the fact that the models adopted depend on a number of varying factors, including a country's history, political system, and levels of economic development. By way of example, systems may be private or public, run at the state or sub-state level, by private enterprises, or within a planned economy. There may also be private schemes. The level and types of coverage also varies between states. It is clear, however, that no matter what type of system is chosen, a number of principles must be respected, including that social security schemes must not be discriminatory; be secure; and be run according to principles of transparency and good governance.²⁹

As part of their obligations under the ICESCR, states undertake to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the

²⁹ See International Labour Organization [ILO], *Social Security: A New Consensus*, ¶ 4 (2001).

adoption of legislative measures” (Article 2.1). In further defining states’ obligations, the UN Committee on Economic, Social and Cultural Rights (the Committee) stated that this placed at least two obligations of immediate effect on states, the “undertaking to guarantee” and the obligation to prevent discrimination in the application of the right.³⁰ The Committee notes that in some cases, including the right to social security, “legislation may [...] be an indispensable element for many purposes. States may also need to adopt administrative, financial, educational and social measures as well as provide an effective remedy.”³¹

Turning to the states that will be examined below, the manner in which social security is regulated reflects the fact that the models vary greatly. A common trend throughout these states is that the varying social security schemes are regulated by laws and by-laws. In Croatia, Serbia and Montenegro, the financing, administration and regulatory framework for the social security schemes is to be found at the state level, whereas in Bosnia and Herzegovina, these are to be found at the sub-state—Entity or Cantonal—level. The organization, number, and administration of the schemes also differ from one state to the other.

Country-specific Examples: Overview of States from the Former Yugoslavia

Under the Socialist Federal Republic of Yugoslavia (SFRY), the citizens’ basic right to social security was established by Article 281 of the 1974 Constitution. Based on this provision, the SFRY enacted the Law on Basic Rights of Pension and Disability Insurance,³² which granted a set of equal minimum rights to be enjoyed by all the citizens of the Yugoslav Federation and regulated the rights of citizens who moved from one Republic to another. In addition, as the six Republics each had their own pension fund, they had

³⁰ See Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations (art. 2, ¶ 1, of the Covenant), ¶¶ 1-2.

³¹ *Id.* ¶ 3.

³² SFRY Official Gazette Nos. 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 54/90, 84/90.

competency to develop their own laws and each pension fund was permitted to have its own statutes.

In principle, after having contributed to the national pension fund through employment in state or private enterprises, individuals were entitled to “old age pensions” following the attainment of a certain age, fulfillment of a certain number of working years, or a combination of the two. The pension base was calculated on the average of the individual’s ten best working years. Other types of pensions existed, such as family pensions,³³ “anticipated” old age pensions, and special service pensions.³⁴ It should also be recalled that the Yugoslav Army (JNA) had a special fund, which was separate from any one of the Yugoslav Republics and controlled from Belgrade.

Bosnia and Herzegovina (BiH)

The ethnic nature of the conflict seriously disrupted the pension system in BiH and resulted in the creation of three separate funds.³⁵ This mainly, if not only,

³³ For example, a widower who was not receiving a pension was entitled to claim the pension of the dead spouse and children under the age of 27 and enrolled full time in school were entitled to claim a family pension.

³⁴ Large pensions granted to individuals who were considered as having made special contributions to the life of the state (artists, politicians, etc.). The granting of these special service pensions was a political decision, and, sometimes, contributions to the fund did not need to be made. Also included in this category were the pensions granted by Article 42 of the R.S. Law on Pension and Disability Insurance to individuals who participated in the R.S. army between 1992 and 1995, who were entitled to pension and disability insurance calculated as doubled in duration.

³⁵ For a full review of the BiH pension system, see the Office of the UN Commissioner for Refugees [UNHCR], *Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons*, Oct. 2001; see also Organization for Security and Co-operation in Europe [OSCE], Human Rights Department, *Falling Through the Cracks: the Bosnian Pension System and its Current Problems* (1999).

affected the displaced population. Without being exhaustive, this section will highlight the main problems faced by IDPs since the end of the conflict.

Division of Funds and Devolvement of Competences

In 2006, the UN Committee on Economic, Social and Cultural Rights observed that:

the constitutional framework for Bosnia and Herzegovina, imposed by the Dayton Peace Agreement, which divides the state party into two Entities (the decentralized Federation of Bosnia and Herzegovina consisting of 10 Cantons and the centralized Republika Srpska) as well as one district (the District of Brcko), confers limited responsibility and authority to the Government at the State level, in particular in the field of economic, social and cultural rights, and creates a complex administrative structure, which often results in the lack of harmonization of laws and policies relating to the equal enjoyment of economic, social and cultural rights by the populations of the two Entities, the Cantons of the Federation and the municipalities of the same or different entities.³⁶

This is certainly true of social security, including pensions, which was a case in point.

During the conflict, the fund of the Republic of BiH was split into three separate funds, the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina (the Sarajevo Fund), the Bureau of Pension and Disability Insurance of Mostar (the Mostar Fund),³⁷ and the Public Fund of Pension and

³⁶ Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations—Bosnia and Herzegovina*, Jan. 24, 2006, ¶ 8, E/C.12/BIH/CO/1.

³⁷ Decree of the War Presidency of Herceg-Bosna, Jan. 1, 1994.

Disability Insurance of Republika Srpska (the RS Fund).³⁸ Each Fund became exclusively responsible for the pensioners living in its administrative area.³⁹

After the conflict, despite efforts on the part of the international community to instigate and encourage co-operation between the Funds, any contact—including exchange of basic information—was discouraged or prevented by the local authorities in power. This situation continued well after the end of the conflict, when legislation on pension and disability insurance was adopted at the Entity level, where the constitutional competencies lie.⁴⁰

Following a High Representative decision, the Sarajevo and Mostar Funds were *de lege* merged in 2000⁴¹ though the *de facto* merger only occurred in

³⁸ This Fund started functioning in 1992, when pension officials living in the R.S. asked pensioners to re-register with their local branch office.

³⁹ Within the Federation, the Mostar Fund became responsible for Cantons 2, 8, and 10; the Sarajevo Fund was responsible for Cantons 1, 3, 4, 5, and 9; Cantons 6 and 7 were split between the two Funds depending on the majority ethnic group in each municipality.

⁴⁰ In respect of the Federation, under Part II, Article 2(e) of the Federation Constitution, responsibilities for social welfare policy lie with the Federation and Cantonal authorities. For Entity-level legislation in the Federation, see the Law on Pension and Disability Insurance adopted in 1998 (FBiH Official Gazette 29/98, July 23, 1998) and amended by the High Representative's Decision of Nov. 12, 2000, Decision of the High Representative Amending the Federation Law on Pension and Disability Insurance. For the R.S., its Constitution is much less clear: the R.S. Constitution only refers to 'social policy' and 'increase[ing] of the social welfare of citizens' in Article 51. However, since the BiH Constitution does not assume functions and powers in relation to social welfare or pensions, under its Article III 3. (a), these functions and powers are assigned to the institutions of the Entities. For Entity-level legislation in the R.S., see the Law on Pension and Disability Insurance (R.S. Official Gazette No. 32/00, Sept. 22, 2000), amended by the High Representative's Decision amending the R.S. Law on Pension and Disability Insurance of Nov. 12, 2000.

⁴¹ See High Representative, Decision of the High Representative Imposing the Federation Law on Pension and Disability Insurance Organization, Nov. 12, 2000.

2002. In the intervening period, the three Funds entered into an agreement⁴² whereby they regulated a certain level of co-operation and interaction. The agreement provided that the Fund that had made payments to pensioners before it came into force would continue to pay the pensions to the same pensioners, regardless of the pensioner's place of temporary or permanent residence. This meant that those who received a pension from their area of displacement would continue to receive their pension in their place of return, even if this area was located in the other Entity.⁴³ The RS Government unilaterally withdrew the RS Fund from the agreement in March 2002.⁴⁴ Although both the RS Fund and the Sarajevo Fund continued to pay those pensioners already recognized as beneficiaries, the absence of legal obligations added to the precarious situation of IDPs.

In 2003, the state level Ministry for Refugees and Displaced Persons issued the Strategy of BiH for the Implementation of Annex VII of the Dayton Agreement (the Strategy).⁴⁵ The stated aim was to have the Strategy implemented by 2006. One aspect of the Strategy was to secure the conditions for sustainable return, which included pension-disability insurance, health care, and education. The Strategy recognized that one of the impediments to a state-level effort in these fields was the fact that the competencies were at the level of the Entities.

To date, there is still no state level agreement nor is there a uniform system between both Entities, as was highlighted by a number of human rights treaty

⁴² Agreement on the Mutual Rights and Obligations in the Implementation of the Pension and Disability Insurance dated Mar. 27, 2000 and entered into force May 18, 2000, RS Official Gazette No. 15/00 and Federation BiH Official Gazette No. 24/00.

⁴³ 'One of the difficulties is that coverage cannot be transferred from one entity to another. This poses an obstacle to persons considering return and has turned into a problem for returnees.' RSG on human rights of IDPs, Report following his visit to BiH, E/CN.4/2006/71/Add.4, ¶ 49.

⁴⁴ Official Gazette of the R.S., No. 10/02, Mar. 4, 2002.

⁴⁵ Annex 7 of the Dayton Peace Agreement dealt with the issue of returns.

bodies.⁴⁶ By way of example, the Committee on Economic Social and Cultural Rights expressed concern that the absence of an inter-Entity agreement on pensions prevented many returnees moving from one Entity to the other from enjoying access to pension benefits and health care and recommended that the state party promote the adoption of an inter-Entity agreement on pension rights.⁴⁷ The Representative of the Secretary General (RSG) on the Human Rights of IDPs said that “[a]ccess of IDPs and returnees to health care and social security is adversely affected by the lack of harmonization between the relevant legislation and welfare systems of the two entities.”⁴⁸ More recently, the Laws on IDPs which were adopted at the state and Entity levels in 2005 and 2006 do not refer to pensions or to social security,⁴⁹ either during displacement or upon return.

⁴⁶ There is, however continued reference to the idea of a united pension fund under the authority of the state-level Ministry of Civil Affairs. *See, e.g.*, ILO SRI Newsletter, 2006/1.

⁴⁷ ¶¶ 20, 42, E/C.12/BiH/CO/1, Jan. 22, 2006.

⁴⁸ *See* report of the RSG on human rights of IDPs following his visit to BiH, E/CN.4/2006/71/Add.4, ¶ 49.

⁴⁹ They do however all refer to other basic rights, such as food, clothing, health care, education. The RS and BiH Laws specifically refer to welfare in the case of unemployment, which is more linked to social assistance as defined in the introduction than to social security. *See also* Law on displaced persons and returnees in the Federation of BiH and refugees from BiH, March 16, 2005, Law on displaced persons, returnees and refugees in the Republika Srpska, April 26, 2005, Law on refugees from BiH and displaced persons in BiH, 2003. As highlighted by the RSG on human rights of IDPs, “[a]ccording to both laws, IDP status including its entitlements ceases upon return to a person’s pre-war place of residence, ‘when a safe and dignified return to her/his former place of residence is possible, but a displaced person has not returned there, or when this person voluntarily decided to permanently settle in another place.’ Finally, it should be mentioned that the 2007 Programme on solving the problems of displaced persons, returnees, and refugees refers to health care and allocates funds for “sustainable return,” without specifying to what, in practice, the funds should be allocated.

Access to Documentation, Payment of Fees and Transfer of Pensions⁵⁰

IDPs faced serious administrative difficulties in registering with a new pension fund. Because the Sarajevo Fund kept all of the documents relating to employees throughout BiH, it was often extremely difficult for pensioners to obtain the necessary evidence of their employment and their contributions needed for new registration. In addition, the Funds themselves contributed to making the task cumbersome. By way of example, in 1998, the Sarajevo Fund stated that it would make documents available to the Mostar and the RS Funds, but at prohibitive administrative fees.

Further, it was difficult for IDPs or returnees to access their pension when they received it from a different area than the one where they lived, since the Funds had no mechanism for paying pensions to an address on one of the territories administered by another Fund. If an IDP wanted to collect his/her pension, s/he was obliged to make the journey and collect it in person. Even though in many cases the overriding issue was that of security, where this was not the case, it was a disproportionate monthly burden on the pensioner. Indeed, in some cases, the pension amount did not warrant the expense of travel. It was only in 2001 that payment could be done directly by post or through a bank. However, it was reportedly inconsistently applied, and the requirement imposed by the Mostar Fund for testimonial documentation to be obtained from the municipality and the police was particularly burdensome and represented another obstacle to IDP return.

Health Insurance⁵¹

The problem of medical insurance is also closely linked to that of pensions, since the pension funds contribute directly to the public health sector. As such, pensioners living in one Entity but receiving payments from another were unable to realize secondary social benefits related to their pension, such as health care. Health insurance for pensioners was geographically fixed to the

⁵⁰ See Chapter 9 of this volume on the recovery of personal documentation.

⁵¹ See Chapter 6 of this volume on the right to health and basic services.

Entity of their pension registration. If a pensioner moved from one Entity to the other, their health insurance did not follow, and treatment incurred their personal liability.⁵²

On 5 June 2001, health care officials of the Federation, Brcko District, and of the Republika Srpska entered into an agreement⁵³ which stipulates that pensioners who have returned from one Entity to the other were entitled, upon certification from the pension fund in their area of displacement, to insured health care services pursuant to the legislation in their place of return.⁵⁴ It was however reported that the RS Fund failed to provide the needed certification for returnees to the Federation.⁵⁵

⁵² On March 31, 2000, the agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance was concluded between the Institute of pension and disability insurance of Mostar, the Social Fund for pension and disability insurance of Bosnia and Herzegovina, and the Public fund for pension and disability insurance of the RS.

⁵³ Agreement on the Manner and Procedure of Using Health Care Services of Insurees in the Territory of Bosnia and Herzegovina Outside the Territory of the Entity, Including Brcko District, in Which they are not Insured, OG BiH No. 30/2001.

⁵⁴ See The Office of the UN High Commissioner [UNHCR], *Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons*, at 7 (Oct. 2001).

⁵⁵ See International Crisis Group, *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina*, at 21-22 (Dec. 13, 2002). See also the RSG on IDP's Report following his visit to BiH: 'As the first major inter-entity agreement prepared and negotiated without the intervention of the international community, the directors of the entities and the Brčko District health insurance funds signed an agreement in 2001 securing for all those insured in one entity, health coverage in another. The implementation of the agreement, however, is reportedly unsatisfactory,' ¶ 49.

Differences in Amounts

When the Funds were divided, the records and other documentation relating to workers and pensioners remained under the control of the Sarajevo Fund. Consequently, neither the Mostar Fund nor the RS Fund had even the most basic information about the entitlements of new or existing pensioners. As such, they had to create their own systems where entitlements were calculated according to very different criteria. Since it had possession of the pre-conflict records, the Sarajevo Fund was able to install a multi-level ranking system, very similar to the pre-war system. The RS Fund resorted to calculating based on an individual's level of education⁵⁶ and in Mostar, it was decided that instead of developing new criteria, the same amount of money would be granted to all pensioners every month, depending on the amount of money available.

In addition to the fact that pension levels were low throughout the state and that pensioners often did not receive the full amount owed to them as a result of the absence of harmonized legislation between the two Entities and of state-level legislation regulating pensions and other benefits, the difference in levels between the three Funds (at first) and the two Funds (as of 2000/2002) were particularly problematic for IDPs and returnees. Because the Funds had different pension calculation schemes as well as different scales, the amounts of benefits varied and pensions were much lower in the RS than in the Federation.⁵⁷

This issue was examined by the Human Rights Chamber for Bosnia and Herzegovina (the Human Rights Chamber)⁵⁸ in the case of *Klickovic, Pasic*

⁵⁶ The Law entered into force on Jan. 1, 1994.

⁵⁷ It should be highlighted that in the FBiH, there are just 1.15 contributors for each pensioner (344,000 contributing workers and 299,000 pensioners), while in RS the number of pensioners actually exceeds scheme contributors by about one third (144,000 contributing workers to 189,000 pensioners). See the ILO SRO newsletter, 2006/01.

⁵⁸ The Human Rights Chamber was a body established by Annex 6 of the 1995 Dayton Peace Agreement, and was entrusted to resolve or decide on applications

*and Karanovic.*⁵⁹ The applicants had retired in Sarajevo in 1981 and 1982, respectively. In May 1992, they both stopped receiving their pension from the SRBiH upon displacement to the Republika Srpska, and only started receiving a pension from the RS Fund in 1996. Both applicants returned to Sarajevo in 2001. When they applied to the Sarajevo Fund to receive their pension, they were informed that according to the agreement signed between the Funds in 2000, they were not entitled to a pension from a Sarajevo Fund, but would continue to receive it from the RS Fund. For the applicant, this meant a loss of half of their pensions.

The Human Rights Chamber did not find a violation of the right to property on the basis that “the applicants do not have a right to receive a particular amount of pension payment.” The Chamber also examined the situation from the point of view of Article 9 of the ICESCR, which provides a right to social security. It found that there was a disparity between the situation of the applicants and those other SRBiH pensioners whose pension rights matured before the conflict broke out in 1992 and who remained in the Federation throughout the conflict.

This disparity leaves no doubt that persons who were internally displaced during the armed conflict are, upon their return, treated differently. Each of the present applicants left Sarajevo in 1992 at the outset of the armed conflict. These applicants now receive smaller pensions simply because they left the Federation for a period of time, not on their own free will, to live in the Republika Srpska. Those who remained enjoy greater pension rights than those who left, although they may have been identically situated before the armed conflict.

[...]

concerning alleged or apparent violations of human rights. 250 KM in the R.S. versus 500 KM in the Federation for one and 190 KM versus 350 KM for the other.

⁵⁹ See Human Rights Chamber, *Klickovic, Pasic and Karanovic v. FBiH, R.S. and BiH*, Case No. CH/02/8923, CH/02/8924 and CH/02/9364, Jan. 10, 2003.

Indeed, it appears that the present applicants (and others who were internally displaced and have returned to the Federation) are in a worse situation than Federation pensioners who moved to other countries during the armed conflict. Many Federation pensioners who moved to other countries during the armed conflict continue to enjoy full pension rights from the Federation Fund.⁶⁰

The Chamber concluded that in view of the fact that the cost of living in the Federation was higher than that in the RS, this differential treatment was a significant obstacle to the return of displaced persons. The fact that the only reason put forward for the differential treatment of these individuals was the displaced persons status, which cannot serve as a basis for the differential treatment, it is thus discriminatory. They have thus been discriminated against in their enjoyment of their right to social security, as provided for by Article 9 of the ICESCR.⁶¹

This issue was also examined by the RSG on the Human Rights of IDPs and the UN Committee on the Elimination of Racial Discrimination. The RSG found that “individual return decisions and sustainability are influenced by the difference in pension amounts between entities in conjunction with differences in the cost of living”⁶² and the Committee on the Elimination of Racial Discrimination requested that the state parties ensure that pension benefits are provided on a non-discriminatory basis.⁶³

In conclusion, the separation of the SRBiH Pension Fund into three and then two funds has disproportionately affected IDPs, who had to re-register in their Entity of displacement and, upon return, were unable to re-register in their

⁶⁰ *Id.* ¶¶ 87-88.

⁶¹ *Id.* ¶¶ 89-91.

⁶² See Report of the RSG on human rights of IDPs following his visit to BiH, E/CN.4/2006/71/Add.4, ¶ 59.

⁶³ Comm. on the Elimination of Racial Discrimination [CERD], *Concluding Observations on BiH*, Apr. 2006, CERD/C/BIH/CO/6.

Entities of return. However, this issue was never addressed as an issue for which IDPs needed specific assistance. The splintering of the pension system and the continuing absence of competency at the state level for social security issues and pensions in particular, has clearly had a discriminatory effect on IDPs both during displacement and after return and has certainly been an impediment for those IDPs who considered return, but were not able to envisage it without access to social and economic rights on a non-discriminatory basis.

Croatia

Access to full pensions and to other social benefits for a number of IDPs has been, and still is, extremely problematic. While the Government of Croatia has accepted in principle that one's working years between 1991 and 1995 should be recognized, even for those mainly ethnic-Serb IDPs who found themselves in areas not controlled by Croatian authorities during the conflict, the government has also set down a number of restrictive conditions rendering the recognition of these years very difficult for IDPs.

The main issue is that of obtaining recognition of employment carried out during the conflict in areas which were not under the control of Croatian authorities (i.e., including Eastern Slavonia and Krajina). In 1997, Croatia adopted the Law on Convalidation,⁶⁴ whose objective was to allow individuals to file claims for validation of documents issued in these areas, in particular those which proved employment. This was a precondition for the recognition and realization of pension rights and other social benefits.

The Decree on Implementation of the Law on Convalidation for administrative areas of labor, employment, pension and disability insurance⁶⁵ stipulated that a requirement to obtain the validation of working years for pension benefits was the possession of a status of a contributor registered in the records of the administrative bodies in charge of pension and disability insurance. Additionally, the Decree provided for (1) a very restrictive deadline for

⁶⁴ See Official Journal No. 104/97.

⁶⁵ See Official Journal No. 51/98.

applying (before 10 April 1999) as well as (2) limitative residency requirements for applying.

These requirements have meant that a number of IDPs were unable to obtain validation of the documents which were necessary for them to have access to their pensions and other benefits, including disability insurance.⁶⁶ In addition, there are reports that even those who did apply within the strict deadline faced difficulty obtaining the recognition of their working years.⁶⁷ In particular, there is no standardized practice regarding whether witnesses may be heard in cases where documents have been destroyed. Finally, the time spent in paramilitary units is not subject to validation as part of one's working years and in practice, this has often meant that those who had spent some time in those units were also denied recognition of the working years that were not spent in paramilitary units.⁶⁸

Both the Law on Convalidation and its Decree have primarily negatively affected those mainly ethnic-Serb IDPs who lived in Serb-controlled areas between 1991 and 1995. The non-realization of pension rights as well as of disability insurance has deterred a number of elderly and disabled IDPs from returning to their pre-war place of residence. Return in the absence of the validation of their documents meant either obtaining lower benefits than those to which they were entitled or losing the benefits altogether.

In a number of cases, those IDPs who did decide to return, suffer from living on a much lower income than what they need. After his visit to the Balkans in 2005, the RSG on the Human Rights of IDPs said that:

⁶⁶ The re-opening of the deadline is one of the topics discussed as part of the Sarajevo Process and has also been highlighted as one of the short-term priorities within the EU Accession Partnership process—see Decision of the European Council dated Feb. 20, 2006.

⁶⁷ See ECRI Report, June 14, 2005, ¶¶ 41, 42.

⁶⁸ See OSCE Regional Legal Assistance Programme, *A Study on Access to Pertaining Rights and (Re)integration of Displaced Persons in Croatia, BiH and Serbia in 2006* (Mar. 2007).

[m]any IDPs are marginally aware of the rights to which they are entitled, both under domestic and international law. Others are unable for practical reasons to access entitlements and remedies provided in Government offices. These disadvantages are coupled with local administrative systems which too often have cumbersome and complex requirements, particularly in the area of documentation and registration. This frequently results in aggravated helplessness, disorientation and disempowerment suffered by IDPs, who become even more firmly locked into their existing situations. Obstacles to access to health care, education, social security benefits and other State services or to the labor market can easily become insurmountable. Since there seems to be no social safety net for those who fall outside the system, those who have not managed to get into the system, owing to the burdensome administrative practices, are further marginalized and pushed into the informal economy.⁶⁹

While Croatia did address the issue of right to social security and access to benefits through the Law on Convalidation, this law had and continues to have an indirect discriminatory effect on the mainly ethnic-Serb IDP population.

Serbia

As highlighted by the RSG on the Human Rights of IDPs, Serbia and its people have undertaken very considerable efforts to welcome, assist, and protect persons displaced from Kosovo. In particular, Serbia has recognized, in accordance with the *Guiding Principles*, that as citizens remaining within their own country, IDPs have, in principle, the same rights as anyone else. Despite this positive approach, the overall situation of many IDPs in Serbia remains difficult, in particular as regards the enjoyment of their economic, social and cultural rights. Some of these difficulties are caused by the overall difficult economic situation in Serbia. Thus, to a certain extent, IDPs are suffering from the same economic and administrative difficulties being

⁶⁹ See Report to the General Assembly, ¶ 28, U.N. Doc. A/60/338 (Sept. 7, 2005).

experienced by the rest of the resident population. However, IDPs face additional problems and hurdles, some of which are due to the fact that special needs stemming from their being displaced are not sufficiently acknowledged, while others are caused by a lack of adequate policies and structures to address their plight.⁷⁰

In Serbia proper, a Law on Refugees (the Refugee Law) and a National Strategy for Resolving the Problems of Refugees and IDPs (the Refugee and IDP Strategy) were adopted in May 2002. The Refugee and IDP Strategy focuses mainly on return of IDPs to Kosovo as the preferred solution. Both the Refugee Law and the Strategy fail to address the rights of IDPs during displacement, including access to pensions and health insurance for those displaced. From a practical perspective, this remains extremely problematic in light of the continuing difficult situation in Kosovo and leaves IDPs from Kosovo living in an unstable situation, with no real prospect of finding durable solutions to their displacement anytime soon. In particular, their equal access to economic, social, and cultural rights needs to be addressed during displacement in that access to social benefits is a crucial part of IDP protection due to IDPs' specific vulnerability, economic and otherwise.

Although IDPs in Serbia are legally entitled to the same rights and services as other citizens, in practice, many displaced people are not able to access this social protection. "IDPs who applied for their pensions prior to 1999 are reportedly receiving them, but those who became eligible and/or applied after that time are eligible only for 'provisional pensions' pending collection of all required documents. The amounts of the provisional pensions are much lower than the amounts beneficiaries of pensions would normally expect."⁷¹

The fact that IDPs have problems accessing their pensions has two main root causes. First, a lack of access to personal documentation proving their entitlements and second, the failure by employers to make the necessary

⁷⁰ See Report of the RSG on human rights of IDPs following his visit to Serbia and Montenegro, ¶¶ 30-31, E/CN.4/2006/71/Add.5.

⁷¹ See Report of the RSG on human rights of IDPs following his visit to Serbia and Montenegro, ¶ 39.

contributions. A last issue is the fact that IDPs often are not legally employed and therefore their periods of work are not counted in any future social benefits to which they may be entitled. As such, IDPs often face direct and indirect discrimination.

Access to documents

IDPs may face difficulty in obtaining a number of documents that may be needed for a number of purposes, from ID cards, to proof of residence, including birth, marriage, and death certificates. For example, most of these documents were left in Kosovo during IDPs' flight and may have been destroyed or lost. Additionally, it is often dangerous for IDPs to return to their former place of residence.⁷² An additional burden is that there is no agreement on recognition of documents between the United Nations Mission in Kosovo (UNMIK) and Serbia.

⁷² See Report of the RSG on human rights of IDPs following his visit to Serbia and Montenegro: Problems in obtaining documents (Guiding Principle 20, ¶ 2) are a major issue for IDPs and the key to many other problems, in particular access to health care and to other state services to which they are entitled. The documentation and registration requirements for all Serbians are complicated and cumbersome. For people who are already at a disadvantage due to their displacement, these hurdles can become insurmountable. Seven 'dislocated registry offices' or 'registry offices in exile' have been set up in central and southern Serbia to facilitate replacement or issuing of documentation for IDPs from Kosovo. Nevertheless, many still have to travel far distances (e.g., from Belgrade to registry offices in southern Serbia), office staff are overburdened, and many of the documents issued are temporary. As a result, many IDPs lack critical documents for services such as social welfare,' ¶ 32. See also CESCR: 'The Committee expresses its deep concern about the uncertain residence status of and the limited access by refugees, returnees from third countries and internally displaced persons, including internally displaced Roma, to personal identification documents, which are a requirement for numerous entitlements such as eligibility to work, to apply for unemployment and other social security benefits, or to register for school.' The Committee 'calls on the State party to assist refugees, returnees and internally displaced persons by facilitating the procedures necessary to obtain personal documents, including birth certificates, identity cards and work booklets, to enable them to enjoy their economic, social and cultural rights,' ¶¶ 14, 42, E/C.12/1/Add.108 (2005).

As such, up to seventeen different documents may be necessary to prove eligibility for social protection.⁷³ Two documents are particularly important for obtaining access to work-related entitlements. The first of these is a work booklet. A work booklet is a personal employment record document of education and employment, kept by the company of current employment until the termination thereof. This document is important for claiming pensions, obtaining new employment, and receiving unemployment benefits.

As highlighted by the RSG on the Human Rights of IDPs,⁷⁴ these documents may be difficult for IDPs to access because the files kept by the companies for which the individual worked prior to displacement may have been lost or destroyed.⁷⁵ According to the Office of the United Nations High Commissioner for Refugees (UNHCR), there is an obvious lack of diligence and good faith by employee records staff to process requests for such documents.⁷⁶ Additionally, even when work booklets are available, there is a tendency among certain institutions to introduce additional conditions regarding data that must be provided to acquire work booklets. Such conditions often amount to being manifestly unreasonable.⁷⁷

⁷³ International Committee of the Red Cross [ICRC], *The Situation of IDPs in Serbia and Montenegro*, Issues Paper (May 2005).

⁷⁴ See Report of the RSG on Human Rights of IDPs following his visit to Serbia and Montenegro, 'IDPs have had particular trouble obtaining 'working booklets' which are necessary to obtain regular jobs or unemployment benefits and pensions if their former employer is no longer in business or has moved, or if they have lost these documents,' E/CN.4/2006/71/Add.5, ¶ 34.

⁷⁵ IDPs who used to work for state owned companies in Kosovo are reportedly the ones facing the least hurdles in obtaining copies of their work documents.

⁷⁶ UNHCR/Praxis, *Analysis of the Situation of Displaced Persons from Kosovo in Serbia, Law and Practice*, at 19 (Mar. 2007).

⁷⁷ By way of example, 'prior to 2004, persons wishing to obtain an original work booklet from the Kosovo Pension Administration could do so in person or through a proxy, upon submission of the organization's and applicant's name. In 2006, persons wishing to obtain the original of a work booklet must do so personally, while a proxy can obtain only a copy of it. The interested party must provide his/her 10-digit

Another form that is necessary is the M-4 form, which provides a record of an employee's years of insurance, personal income, and remuneration. It contains the evidence of the monthly contributions to the pension fund made by the employer for the employee, and is necessary for the calculation of pension benefits. Again, these forms were often left in Kosovo and are difficult for IDPs to obtain. Additionally, the conditions set forth by the Serbian authorities may be considered to be wholly unreasonable under the circumstances.⁷⁸

Even though the Government of Serbia chose return of IDPs as the preferred durable solution, it must be recognized that some effort has been put into alleviating the plight of those displaced and encouraging local integration. A special unit was created within the Serbian Pension Fund which deals with IDPs and the Ministry for Labor, Employment and Social Policy, which is responsible, *inter alia*, for providing the social benefits of pensions and disability in the field has issued a recommendation to the Serbian Pension Fund asking for a more flexible approach in regard to the required documentation. The unit has proposed acceptance of alternative documents such as receipts or statements as valid proof of employment.⁷⁹

registration number (written on the work booklet) and a copy of his/her pension check (if the pension was paid before Jan. 1, 1999). If he/she does not know the exact registration number or had not retired before 1999, he/she must contact the former employer in Kosovo to obtain the relevant number. The institutions or companies are often not able to provide such details. Even if the requested registration number can be obtained most IDPs cannot or fear travel to Kosovo, and are thus unable to obtain their original work booklets. Copies of work booklets are worthless as evidence in Serbia.⁷ *Id. See also* PRAXIS, *Access to Documents for IDPs in Serbia*, at 15 (Feb. 2007).

⁷⁸ The Serbian Pension Fund recognizes only the original M4 Forms issued by the Fund itself. In a majority of cases, this documentation was left in Kosovo. In the meantime, UNMIK started issuing M4 Forms based on the Kosovo Pension Fund's documentation, but the Serbian Pension Fund does not recognize such documents. *See* UNHCR/Praxis, *Analysis of the Situation of Displaced Persons from Kosovo in Serbia, Law and Practice*, at 32 (Mar. 2007). *See also* PRAXIS, *Access to Documents for IDPs in Serbia*, at 19 (Feb. 2007).

⁷⁹ UNHCR/Praxis, *Analysis of the Situation of Displaced Persons from Kosovo in Serbia, Law and Practice*, at 33 (Mar. 2007).

Absence of Payment of Contributions to the Pension Fund from Employers

IDPs may not be receiving their pensions also because, although legally employed, their employers have not contributed to the pension fund. Through the Law on Linkage of the Years of Employment,⁸⁰ the Republic of Serbia accepted to compensate the Pension Fund for all employers who did not pay their contributions in the period from 1991-2003. More than 300,000 claims have been submitted in the period October 2005-January 2006. However, the number of IDPs who benefited from this law remains unknown.⁸¹

Another important issue is the presence of a large number of IDPs in Serbia who work in the informal or “grey economy” sector.⁸² This leaves them in a particularly vulnerable situation, as their employers do not pay any pension, social, or health insurance. This leaves them outside the scope of social security protection and, in addition, their employers do not contribute to the income tax, which also means that they are not contributing to funding government programs to help the most vulnerable.

As such, in Serbia, the main problem appears to be the fact that the chosen preferred solution for IDPs has been return. As such, measures to encourage integration have been scarce, although recently a few measures have been taken to alleviate the burden placed on IDPs by taking into account their specific situation. In practice, however, much still needs to be done to ensure that IDPs are not being discriminated against in their access to pensions specifically, and economic, social, and cultural rights more generally.

⁸⁰ Official Gazette Republic of Serbia, No. 85/05.

⁸¹ *Id.*

⁸² See Report of the RSG on human rights of IDPs, ‘Unemployment is generally high in Serbia but particularly high among the displaced. Among those IDPs who do work, more than half are employed in the ‘grey market’ (e.g., unregulated jobs with no benefits),’ ¶ 32. See also Conclusions of the CESCR, ‘[t]he Committee is equally concerned that many persons, especially Roma, internally displaced persons and refugees, work in the informal economy or in the low-income sector without adequate working conditions and social security coverage.’

Montenegro

In Montenegro, IDPs, who are mainly from Kosovo, are not recognized as citizens. As such, IDPs are not granted permanent residence unless they were born in Montenegro or owned property in Montenegro prior to being displaced to Montenegro. They receive temporary residence cards through the Montenegro Commissariat for Displaced People.⁸³

Additionally, in May 2003, the Montenegro Government issued a decree amending the Decree on Employment of Non-Resident Physical Persons. Article 1 of the Decree defines a non-resident physical person as a person who “does not have habitual residence or centre of business and livelihood interests on the territory of the Republic of Montenegro.” Since IDPs are not entitled to permanent residence permits in Montenegro, the Decree applies to them. The Decree imposes a tax of 2.50 Euro per day on employers hiring non-permanent residents. Employers who violate the provision are subject to high fines. Consequently, the legal framework—which includes citizenship, residency, and employment—acts as a strong disincentive to Montenegrin employers in the hiring of IDPs. The RSG has qualified this practice as discriminatory against IDPs.⁸⁴

⁸³ Before separation, Montenegro gave priority to Republican citizenship over state citizenship, and IDPs, mainly from Kosovo, were considered as citizens of Serbia.

⁸⁴ ‘While certain measures to protect the local population on the labor market may be justifiable, the combination of these measures put IDPs at an enormous disadvantage in terms of work. It is a form of discrimination that is incompatible with Guiding Principle 22, ¶ 2(b). Furthermore, as many IDPs left their work booklets behind in Kosovo, employment is extremely difficult even for those who qualify as Montenegrin citizens. [A]s temporary residents IDPs are subjected to higher tax obligations and do not have access to services other than basic health and basic education. They are not assisted in receiving care in Serbia for conditions that cannot be treated in Montenegro, whereas Montenegrin citizens do. They are not eligible for social welfare and cannot acquire real estate. All non-residents and non-Montenegrins are subject to these laws and not IDPs in particular. However, the Representative would like to point out that, unlike migrant workers, IDPs often have not had the choice of where they flee to. Furthermore the relevant laws seem to have changed after the IDPs had reached their current places of residence, without taking into account their particular situation, difficulties they were facing and the consequences these legislative changes

Being unable to legally have access to employment,⁸⁵ IDPs often have no other option than to work in the so-called grey economy, leaving them in a very vulnerable position. They remain outside any form of legal protection and do not contribute to social security schemes, including pensions, unemployment benefits, and disability insurance. Finally, their employers are not subject to taxation on their employment, which limits the government's ability to provide basic services for the most vulnerable. Additionally, regarding those IDPs who are already entitled to access their pensions accrued during their working life, as in Serbia, the issue of obtaining the work booklets is an important obstacle. This leads to poverty, consisting of both low income⁸⁶ and lack of access to services and equal treatment under the law.⁸⁷

would have for them. Thus, the combined effect of these measures on IDPs is discriminatory' RSG Report, visit to Serbia and Montenegro, E/CN.4/2006/71/Add.5, ¶¶ 50-52.

⁸⁵ In 2004, the Government of Montenegro adopted a new law on employment, which allows for employment of IDPs, under very restrictive conditions: Law on Employment and Work of Foreigners: 'A foreigner can be hired, in other words can conclude a labor contract, if he/she has permission for temporary residence, that is temporary stay in Republic and if he/she gets a work permit (art. 2).' A work permit is the document in which an employer can offer a work contract or a special contract to a foreigner. A work permit for a foreigner is issued by the Employment Fund of Montenegro. The Government of Montenegro decides, based on its emigration policy, the conditions and movement of the labor market, including the annual number of foreign work permits (quota) it issues. *See* Strategy on Refugees and IDPs, 2005.

⁸⁶ See the figures given by the Strategy for resolving the issues of refugees and IDPs issued by the Government of Montenegro in 2005: 'among the total number of displaced persons from Kosovo, 44.3% are supported persons, while 39.4% are unemployed, making 83.7% of the entire internally displaced population that are without any work engagement. Among this population, 7.6% are temporarily occupied, primarily in the sphere of the grey economy. Only 1.3% of displaced persons work in state-owned companies, while only 0.8% of them work regularly in the private sector. Pensions are received by 6.7% of displaced persons. According to the heads of households surveyed, the primary source of income for almost half of displaced non-Roma households (47.7%) is the temporary or permanent employment of some household member. For a smaller portion of households (16.7%), pensions represent the primary income. Generally, incomes of displaced persons are irregular,

The Strategy that was adopted in April 2005 sets forth returns as the preferred durable solution for displacement. As such, it addresses the issue of pensions mainly as an element of the sustainable returns of IDPs to their places of origin (mainly Kosovo). While acknowledging that the conditions of return depend mainly on the situation in the area of origin, the government views its role as one of support in achieving the program goals and of providing information to potential returnees regarding the possibilities of return. One of the elements includes the realization of their basic rights, which includes pensions.⁸⁸ Regarding pensions for those IDPs that chose to remain in Montenegro, the Strategy states that those legally employed have access to the same rights as Montenegrin citizens.⁸⁹

INTERNATIONAL ROLE

Just as most states examined have failed to deal with the issue of social security, including pensions, in a comprehensive way, so have most international organizations and NGOs. UNHCR stands out as an agency which has tackled the issue of social security of pensions in the region as an issue which is crucial to IDPs both during displacement and as an important element of creating the conditions conducive to sustainable returns,⁹⁰ in addition to

differing from period to period. Two-thirds (68.6%) of displaced non-Roma households reported that they did not have enough money to pay for food during the month that preceded the survey; 65.9% did not have enough funds to provide for three meals per day.’ According to the ICRC, although these figures were an estimate, in 2003, 60% of Roma IDPs and 48% of non-Roma IDPs were living below the Montenegro Poverty Level. This meant that 54% (8,945 people) of the displaced population was living in poverty. See Household Economy Assessment, Apr. 2005.

⁸⁷ See ICRC, *The Situation of IDPs in Serbia and Montenegro*, Issues Paper, at 11 (May 2005).

⁸⁸ See point 6.1 of the Strategy.

⁸⁹ See §6.2.1 of the Strategy.

⁹⁰ The Office of the UN High Commissioner for Refugees [UNHCR], *Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of*

tackling issues which are a pre-condition to ensuring that social security rights are respected, such as accessing necessary documentation. At a more regional level, the Organization for Security and Cooperation in Europe (the OSCE) has also made attempts at addressing the issue of pensions as part of its work on economic, social, and cultural rights.⁹¹

SUMMARY OF RECOMMENDATIONS

1. National authorities must protect the right to social security and must ensure equal, non-discriminatory access to benefits, both during displacement and once durable solutions to displacement have been found in national laws and policies pertaining to IDPs.
2. National laws and policies should take into account the particular vulnerabilities of certain categories of IDPs such as the elderly, sick, and disabled.
3. A national focal point must be identified to ensure that there is responsibility for the protection of the right of equal access to social security.
4. In their efforts to ensure that durable solutions to displacement are found, national authorities must take into account economic, social, and cultural rights as part of ensuring the sustainability of return. This includes ensuring that IDPs will have equal, non-discriminatory access to social security benefits, whether they choose to resettle in another part of the country, to integrate locally, or to return to their places of habitual residence.
5. National authorities must issue replacement documentation, free of charge, to IDPs as soon as possible without imposing unreasonable conditions such as having to return to the place of origin. Where replacement documentation is

Croatia and the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons (October 2001).

⁹¹ Organization for Security and Co-operation in Europe [OSCE], *Falling Through the Cracks: the Bosnian Pension System and its Current Problems* (1999).

issued, national authorities must ensure general recognition of the replacement documentation.

6. A permanent national mechanism for the recognition of the years of service prior to displacement, during displacement, and post displacement must be set up, which would allow for all of the years of service of an individual to be taken into account without punishing individuals for displacement or return.

7. National authorities must ensure that IDPs can access their social security benefits in the area of their residence, both during and post displacement without unreasonable conditions for accessing benefits, such as having to return to the place of origin or to the place of displacement.

8. National authorities must ensure that during displacement, IDPs have equal access to legal employment opportunities and that they contribute to social security schemes that are in place and ensure that when permanent solutions are found, IDPs do not lose their benefits.

9. National authorities should provide that IDPs who have been discriminated against in their access to social security have access to reparations or compensation, ensuring that IDPs who have been delayed in receiving their social security benefits obtain them retroactively and are able to present their grievances in court or before other appropriate decision-making bodies.

10. The International Labour Organisation (ILO) should be encouraged to be more directly engaged on the issue of IDPs and social security with individual states and internationally.

11. UNHCR and other international organizations and NGOs should continue to engage on the issue of social security with national authorities.

12. National authorities should ensure the cessation, non-recurrence, and prevention of violations of the right to social security of IDPs.

Chapter 13

Political Participation Rights in Particular the Right to Vote

Jeremy Grace and Erin Mooney*¹

INTRODUCTION

Internally displaced persons (IDPs) remain entitled to the full range of rights enjoyed by other persons in the country, including the right to participate in governmental and public affairs. The principle of universal and equal suffrage, guaranteeing that every person who has the right to vote (typically ascribed to citizens who have attained the age of majority) is able to exercise this right without distinction of any kind, extends to those citizens who are internally displaced. In practice, however, IDPs often face obstacles that impede their exercise and enjoyment of this right and may even lead to their disenfranchisement and exclusion from the political process and public affairs. Overcoming these obstacles is critically important, both for the respect of IDPs' rights and for the legitimacy of a country's electoral process and governance structures. Above all, it is essential to enable IDPs, who so often are already marginalized, to take part in the public affairs of their community and country and thereby to have a say in the political, economic, and social decisions that affect their lives.

Governments have the primary role and responsibility to ensure that IDPs are able fully and freely to exercise their rights to political participation. This responsibility remains in force during a situation of displacement as well as upon IDPs' return or resettlement. Indeed, the ability of IDPs to exercise their rights to political participation on an equal basis with others in the community

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is an essential element of a durable solution. National legislation and practice therefore must safeguard IDPs' rights to political participation.

LEGAL FRAMEWORK

The right to political participation, including the right to vote and to be elected as well as to participate in governmental and public affairs is expressly affirmed in the *Guiding Principles on Internal Displacement* (the *Guiding Principles*),² the internationally-recognized framework setting forth the rights and guarantees of IDPs, and it is rooted in well-established standards of international human rights law.

Relevant Guiding Principles

The principles of equality and non-discrimination are the cornerstones of the normative framework for protection of the rights of the internally displaced. As an overarching principle, Principle 1(1) provides that IDPs “shall enjoy in full equality, the same rights and freedoms under international and domestic law as do other persons in their country” and “shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”

Principle 22(1)(d) expressly affirms that these tenets apply to the right to political participation. It specifies that “[i]nternally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of...[t]he right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right.”

To give effect to this right, Principle 22(1)(a) affirms the “rights to freedom of thought, conscience, religion or belief, opinion and expression” and Principle 22(1)(c) provides for the “right to associate freely and to participate equally in community affairs.” Principle 29(1) reaffirms the right of internally displaced

² *Guiding Principles on Internal Displacement*, presented by the UN Secretary-General Francis M. Deng to the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2.

persons “to participate fully and equally in public affairs at all levels” also upon their return or their resettlement.

Internally displaced persons therefore have the right to political participation, including a specific right to vote, to participate in public affairs, and to freedom of assembly. These rights apply equally to IDPs living in camps and non-camp situations. They also apply regardless of whether IDPs choose to return to their area of origin, integrate locally, or resettle elsewhere in the country. Indeed, the ability to participate on an equal basis in public affairs is an essential element of IDPs’ reintegration and among the benchmarks of a durable solution to displacement. The *Guiding Principles*’ reaffirmation of the right of IDPs to political participation is grounded in a rich body of international human rights law.

Legal Basis

Universal and Equal Suffrage

Underpinning the right to political participation, in particular the right to vote and to be elected, is the principle of universal and equal suffrage. The first international statement of this principle appears in Article 21 of the 1948 Universal Declaration of Human Rights (UDHR) and is codified as a right in Article 25 of the International Covenant on Civil and Political Rights (ICCPR),³ which affirms that:

[e]very citizen shall have the right and the opportunity ... without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the

³ Universal Declaration of Human Rights, G.A. res 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), entered into force Mar. 23, 1976.

free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

It is important to highlight that unlike other rights and freedoms recognized by the ICCPR, Article 25 protects the rights of “every citizen,” as opposed to every human being generally. In other words, there is an eligibility requirement of citizenship, among other criteria, in order for individuals, including IDPs, to be able to claim this right.

However, Article 25 prohibits “unreasonable restrictions” on the right to political participation. Typically, the right to vote is contingent upon citizenship, age, residence in a particular electoral or administrative district, and other criteria. For IDPs, residency requirements are inherently problematic as IDPs have been forced to flee their habitual residence. While residency requirements for voter eligibility are legitimate, the U.N. Human Rights Committee has specified that “if residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.”⁴ Indeed, the Committee has stressed that states “must take effective measures to ensure that all persons entitled to vote are able to exercise this right.”⁵ The Organization for Security and Cooperation in Europe (OSCE) similarly has specified that “the absence of a permanent residence should not prevent an otherwise qualified person from being registered as a voter.”⁶

Aside from Article 25 of the ICCPR, also essential to a meaningful election process are what have been termed the “political and campaign rights,”

⁴ Human Rights Comm., General Comment No. 25, *The Rights to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶ 11, U.N. Doc. A/51/540 (1996).

⁵ *Id.* ¶ 3.

⁶ Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights [OSCE/ODIHR], *Existing Commitments for Democratic Elections in OSCE Participating States*, at 16 (Oct. 2003).

elaborated elsewhere in the ICCPR.⁷ Of particular relevance are Article 19, guaranteeing freedom of opinion and expression; Article 21, guaranteeing the right to peaceful assembly; and Article 22, guaranteeing the right to freedom of association. As with residency requirements, any restrictions that serve to impede the full and free participation of citizens in genuine elections should be subject to scrutiny.

Regional human rights instruments reaffirm and reflect rights to political participation articulated in the ICCPR, including the African Charter on Human and Peoples' Rights⁸ (Article 13); the American Convention on Human Rights⁹ (Article 23); and the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰ (Article 3). Mention also should be made of the "human dimension" commitments undertaken by participating states in the OSCE. Of particular importance is the Copenhagen Document of 1990 (Articles 3, 6, 7, and 8).¹¹

Finally, central to the concept of universal and equal suffrage is the principle of non-discrimination. Article 25 of the ICCPR specifies that the political participation rights articulated therein are to be guaranteed without any of the

⁷ GUY GOODWIN-GILL, *FREE AND FAIR ELECTIONS* 102 (New expanded ed., 2006), citing Larry Garber and Clark Gibson, *Review of United Nations Electoral Assistance 1992-1993*, at 58 (Aug. 1993); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 61 (1992).

⁸ African Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁹ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

¹⁰ Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 9), 213 U.N.T.S. 262.

¹¹ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe, June 29, 1990.

distinctions mentioned in Article 2, that is, without “distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹² Regional human rights instruments restate a general principle of non-discrimination on similar grounds.¹³ Potentially of significance to IDPs, the American Convention adds “any other social condition” to the standard list of grounds on which discrimination in the enjoyment of rights is prohibited.¹⁴

Special Protection for Particular Groups

Additional human rights instruments have sharpened the principle of non-discrimination in the enjoyment of rights to political participation for particular groups of persons who historically have been marginalized. The specific provisions guaranteeing these rights for women, racial and ethnic groups, minorities, and indigenous persons, all of whom typically comprise disproportionately high numbers of the internally displaced, are particularly relevant.

Supplementing general provisions of non-discrimination based on sex are a number of international and regional instruments specifically articulating the political participation rights of women. These instruments include the Convention on the Political Rights of Women,¹⁵ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and

¹² ICCPR, arts. 25, 2.

¹³ African Charter, art. 2; American Convention, art. 1; European Convention, [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on Sept. 21, 1970, Dec. 20, 1971 and Jan. 1, 1990 respectively, art 14.

¹⁴ American Convention, art. 1.

¹⁵ Convention on the Political Rights of Women, 193 U.N.T.S. 135.

the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹⁶

Ethnic and minority groups often are disproportionately affected by displacement. Thus, the political participation rights articulated in the Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁷ the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities,¹⁸ and International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries are also relevant.¹⁹

Situation-specific Issues

In times of public emergency, including war, restrictions on rights to political participation are permissible under the ICCPR and most of the regional instruments. However, under the American Convention on Human Rights, no derogation is permitted.²⁰

¹⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000), art. 9, entered into force Nov. 25, 2005.

¹⁷ Convention on the Elimination of All Forms of Racial Discrimination against Women, G.A. res. 34/180, 34 U.N. Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, art. 7.

¹⁸ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. No. 49 at 210, U.N. Doc. A/47/49 (1993). art. 2.

¹⁹ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991. art. 6.1 (a)-(b).

²⁰ American Convention on Human Rights, art. 27.

Situations of internal displacement often arise in the context of armed conflict. Unlike human rights law, international humanitarian law does not address the issue of political participation. Nonetheless, in the event that elections were to be conducted in a situation of armed conflict (whether internal or international conflict), the continued application of the principle of non-discrimination under international human rights law would ensure that IDPs in any case could not be denied the right of political participation. In situations of natural disaster, persons affected by natural disasters “have the right to vote in elections and to be elected even if they cannot exercise these rights at their places of habitual residence.”²¹

Indeed, in situations of internal displacement, whatever their cause, the importance of ensuring rights to political participation has been expressly affirmed in normative statements by inter-governmental organizations. The OSCE has underscored that “it should be a matter of special scrutiny whether IDPs can freely exercise their right to vote.”²² The Council of Europe has affirmed that “member states should take appropriate legal and practical measures to enable internally displaced persons to exercise their right to vote in national, regional or local elections and to ensure that this right is not infringed by obstacles of a practical nature.”²³ The African Union, in its draft Convention on Internal Displacement and Protecting and Assisting Internally Displaced Persons affirms that internal displacement does not infringe on IDPs’ right to vote.

In summary, the principle of universal and equal suffrage clearly extends to all internally displaced citizens who meet the voter eligibility criteria specified in

²¹ United Nations, Inter-Agency Standing Committee (IASC), *Operational Guidelines on Human Rights Protection in Situations of Natural Disasters, with Particular Reference to the Persons who are Internally Displaced (Guidelines on Human Rights and Natural Disasters)*, Guideline D.5.1, 32 (2006).

²² Organization for Security and Co-operation in Europe [OSCE], *Final Report, Supplementary Human Dimension Meeting on Migration and Internal Displacement*, Vienna, Austria, at 5 (Sept. 25, 2000).

²³ Council of Europe, Recommendation (2006), adopted by the Committee of Ministers on Apr. 5, 2006, ¶ 9.

national electoral legislation. Special protections exist to ensure this right is enjoyed by historically disadvantaged groups, including women, ethnic groups, minorities, and indigenous persons, who typically comprise disproportionate numbers of internally displaced populations. Further, whereas residency requirements often apply, it is well-established that these cannot exclude the internally displaced from being able to exercise their rights to political participation.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

Whereas IDPs' right to political participation is clear, in practice, IDPs often face obstacles in exercising this right. These obstacles in many cases result in a denial of IDPs' rights, their disenfranchisement, and their exclusion from the political life and public affairs of their community.

Residency Requirements

Generally, the right to vote is closely tied to an elector's place of residence. National electoral legislation and electoral codes typically condition the right to participate in elections on residency requirements, specifying that electors can only participate in the constituency in which they permanently reside. In situations of internal displacement, which by definition entails at least a temporary loss of residence, the general rule that one votes in the electoral district of one's habitual place of residence is inherently problematic. This is especially true for the vast majority of IDPs who are displaced outside of their normal electoral district.

In direct presidential elections, single-constituency parliamentary elections, or national referendums, a change of residence generally poses no problem. However, in local and governorate as well as multiple-constituency parliamentary elections, residency requirements can be particularly problematic for displaced persons. Several questions arise concerning the electoral district in which IDPs are eligible to vote. These include the

following:

- Must IDPs *only* vote in their home areas? Is it possible and safe to do so? What if elections cannot be held there due to insecurity or lack of effective control over the territory? Suppose these conditions persist for years or even decades?
- Suppose IDPs do not intend to return to their area of origin, even when conditions would enable them to do so, but rather have opted to rebuild their lives in another part of the country?
- Should IDPs be eligible to cast votes for elections taking place in the electoral district of their habitual place of residence or where they are currently residing while displaced? And should they have the choice between these two options?
- What, if any, might be the consequence for IDPs if they choose to register as a voter in the electoral district in which they are residing while displaced, in particular if they plan to eventually return to their area of origin?

In Georgia, national legislation for many years expressly denied IDPs the ability to elect municipal or parliamentary representatives for the districts in which they were residing while displaced. Although IDPs were permitted to re-register as an elector in this area, according to national legislation, doing so would come at a cost of relinquishing their IDP “status” and all the benefits this entailed under the Law on IDPs. In part, these regulations reflected the lingering influence of the *propiska* system in place during the Soviet Union, which restricted freedom of movement by tying rights to an individual’s approved place of residence.²⁴

In Sri Lanka, while IDPs are not prevented by any legal restriction to change registration of official residence from one administration region to another, administrative, practical, and political barriers have been an issue. To change the place of registration, an IDP must return to the area where they were

²⁴ Erin Mooney & Balkees Jarrah, *The Voting Rights of Internally Displaced Persons: The OSCE Region*, at 32-41 (2004), available at http://www.brookings.edu/~media/Files/rc/papers/2004/1105humanrights_mooney/20041105_osce.pdf.

registered prior to displacement to collect a letter of confirmation—a requirement that is neither practical nor safe. As in Georgia, by registering to vote in their place of residence while displaced, IDPs risked losing their status as IDPs and the associated relief aid as well as potential assistance to return and rebuild their homes should this possibility ever arise. Moreover, for Muslims expelled from the north, the government policy in Puttalam district has long been that they are living temporarily in the area as IDPs until they can return to their places of origin. Reflecting this, their right to vote is tied strictly to the area where they were registered as voters prior to displacement, i.e., the North, through absentee voting. However, unless IDPs are able to safely visit these areas, they cannot verify that their names are included on the annually updated voters' lists, which are posted only in the area of electoral administration. IDPs who reached the legal voting age (18 years) after displacement therefore have been unable to register in the voting lists either in their area of origin or their present location.²⁵

In many countries, re-registering one's place of residence and therefore the constituency in which a voter is registered also often entails cumbersome administrative and procedural requirements, which can be particularly unreasonable in situations of internal displacement. Often, as in the case of Sri Lanka noted above as well as Chechnya, Armenia, and Zimbabwe, registering to vote requires IDPs to return to their place of origin to obtain a transfer form. In Armenia, IDPs faced exacting evidentiary requirements.²⁶ In Zimbabwe, transfer forms are provided for under the Electoral Act but entail stiff documentation requirements, which have impeded large numbers of IDPs (many of whom were believed to be opposition supporters) from participating in the elections.²⁷

In Liberia, the nearly 150,000 IDPs remaining in camps during the period of voter registration in advance of elections in October 2005 had the option to

²⁵ Catherine Brun, *Local Citizens of Internally Displaced Persons? Dilemmas of Long Term Displacement in Sri Lanka*, 16 J. OF REFUGEE STUDIES 386-390 (2003).

²⁶ Mooney & Jarrah, *supra* note 24.

²⁷ *Zimbabwe: Thousands of Clean-Up Victims May Fail to Vote in Senate Election*, ZIMONLINE, Oct. 20, 2005.

register to vote either in the camps or in their home areas. However, they were required to decide several months before the election, and at a time when the return process was just beginning and was encountering obstacles, whether their residence on polling day would still be in the camps or would already be back in their home communities. The situation epitomized how election scenarios can drive repatriation and return programs, and potentially without due regard to core humanitarian principles of voluntary, safe, and dignified return.²⁸ Over-ambitious statements about timelines for return encouraged the majority of IDPs who registered to opt to vote back home. However, delays in the actual return process (which in fact was completed only in spring 2006), meant that IDPs who had registered to vote at home but who, in fact, were still in the camps on polling day would be disenfranchised.²⁹

Lack of Documentation³⁰

Registering to vote, as well as actual access to voting through obtaining a ballot generally, will require proof of identity, with an elector having to show personal identity documentation attesting to citizenship and civil registration or residency. These requirements can be difficult for IDPs, as personal documentation often is lost, destroyed, or confiscated in the course of displacement. Moreover, voter registries compiled prior to the events causing displacement may be destroyed in situations of displacement, whether conflict or natural disaster. Without documentation, it will be difficult for IDPs to register to vote as well as to certify their eligibility at polling stations.

Obtaining replacement documentation often is very difficult; in some countries, as noted above, it may even require that IDPs return to their areas of origin although these remain unsafe. Moreover, even prior to displacement, it may be that requirements for documentation can discriminate against women

²⁸ Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2005, 2006* INTERNAL DISPLACEMENT MONITORING CTR., at 37.

²⁹ *Liberia and Cote d'Ivoire: Upcoming Elections May Exclude Displaced Persons, Refugees* Int'l 2005.

³⁰ See chapter nine in this volume on the recovery of personal documentation.

and minorities. In a number of countries, women lack government-issued identity documentation in their own names and instead must rely on their husbands or other male family members, with whom they are registered as “dependents.” In the event of the deaths of their male relatives or the family separation that often occurs in situations of displacement, these women lose all legal identity and also face tremendous obstacles obtaining replacement documentation in their own names.³¹ As regards minorities, the lack of documentation among Roma IDPs in the Balkans, for instance, has been a major obstacle to their participation in elections.³²

Discrimination

In addition to general discrimination, IDPs may suffer on account of being displaced. IDPs often are members of ethnic or religious minority groups who continue to suffer discrimination during displacement. Discrimination can mar all aspects of the electoral process, including voter registration, access to information on electoral procedures in a language IDPs understand, discrepancies in the number of polling stations open and hours of operation, and harassment at polling stations.

In Croatia, for example, legislation in place in the mid to late 1990s made a legal distinction between displaced ethnic Serbs and displaced ethnic Croats, which resulted in systematic discrimination against displaced Serbs. Displaced Serb voters faced more cumbersome registration procedures, had access to

³¹ U.N. Office of the Special Adviser on Gender Issues and Advancement of Women, *Enhancing Women’s Participation in Electoral Processes in Post-Conflict Countries*, Expert Group Meeting Report, Feb. 20, 2004, U.N. Doc.EGN/ELEC/2004.

³² Organization for Security and Co-operation/Office for Democratic Institutions and Human Rights [OSCE/ODIHR], *Republic of Serbia, Serbia and Montenegro, Presidential Election 13 and 27 June 2004, OSCE/ODIHR Election Observation Mission Report*, at 2 (Sept. 22, 2004).

fewer polling stations than displaced Croats, and in some cases, were even directly turned away by the staff of polling stations.³³

Discriminatory language policies can also have significant repercussions on IDPs' political participation. In Turkey, the prohibition of languages other than Turkish in political campaigning, coupled with low levels of literacy among the Kurdish population in the south-east of the country, where the internal displacement has been concentrated, was a significant obstacle to Kurdish IDPs participating in elections and making an informed choice.³⁴

Insecurity and Acts of Intimidation

In situations of displacement caused by conflict or communal tensions, exercising the right to vote and to stand for election can result in intimidation and entail risks to physical security. These risks can occur at the various different stages of the electoral process, from voter registration, to obtaining the necessary identity documentation, through to the casting of ballots and even the arrival of elected officials to assume their duties of office. For instance, IDPs from Chechnya were required to travel back to their home areas, even though these remained unsafe, to collect a voting certificate.³⁵ In a number of countries, displaced voters have been harassed and attacked while traveling to, or once at, polling stations. In Moldova, IDP returnees crossing from the secessionist Transdniestrian region to cast their vote in Moldovan elections regularly have faced obstruction, intimidation, and harassment from the *de facto* Transdniestrian authorities.³⁶ In post-conflict elections held in Sierra Leone, acts of intimidation marred the electoral participation of IDP

³³ Simon Bagshaw, *Internally Displaced Persons and Political Participation: The OSCE Region*, Occasional Paper, The Brookings Institution Project on Internal Displacement, 13 (2000).

³⁴ Mooney & Jarrah, *supra* note 24.

³⁵ See, e.g., *id.* at 49-54.

³⁶ *Id.* at 47 (citing OSCE/ODIHR election observation reports).

women voters.³⁷ In Zimbabwe, displaced voters who opted to return to rural areas to vote in the October 2005 elections required letters from the village leaders whom allegedly had been mobilized to intimidate electors to vote for the ruling party.³⁸ Elections can only be free, fair, and legitimate if voters can cast their ballots and participate in the overall electoral process without fear or risk of harm.

Physical Access to Polling Stations

Problems of physical access to polling stations due, for instance, to insecurity, disaster conditions, or distance, can also impede IDPs' political participation. In the post-conflict elections held in Sierra Leone in 2002, despite positive steps taken by the government to enable the participation of internally displaced women, the need to travel long distances to reach voting stations and the cost of transportation impeded many IDP women from casting their vote.³⁹ Absentee voting arrangements may be the only means by which displaced persons are able to exercise their right to vote, although it is not provided for in all cases. Even when absentee voting procedures are in place, these sometimes can be so complicated as to frustrate IDPs' ability to make use of them. In the United States, a federal lawsuit was filed on behalf of electors from the state of Louisiana displaced by Hurricane Katrina to protest cumbersome mail-in voting procedures in the New Orleans municipal elections.⁴⁰

³⁷ Binta Mansaray & Courtney Mireille O'Connor, *Voting for Peace, Survival and Self-Reliance: Internally Displaced Women Go to the Polls in Sierra Leone*, Sept. 2002, available at <http://www.womenscommission.org/pdf/sl.pdf> [hereinafter *Voting for Peace*].

³⁸ *Zimbabwe: Thousands of Clean-Up Victims May Fail to Vote in Senate Election*, ZIMONLINE, Oct. 20, 2005.

³⁹ See *Voting for Peace*, *supra* note 37.

⁴⁰ *Group Sues Over New Orleans Election Plans*, ASSOCIATED PRESS, Feb. 10, 2006.

Lack of Information and Issues of Transparency

A lack of adequate and timely information is often a further impediment to IDP voting. Ensuring that the electorate has access to information, in particular regarding the voting procedures but also concerning campaign information, and in a language voters understand, is a critical ingredient for a free and fair electoral process.

Electoral officials themselves often lack clear guidance on the particular legislative provisions as well as procedural arrangements and safeguards in place to enable IDPs' participation in the political process. Epitomizing this problem was the 2003 presidential election held in Chechnya, when dramatically conflicting information about the voting arrangements for IDPs located in Ingushetia created such confusion as to lead to IDPs' *de facto* disenfranchisement.⁴¹ In Georgia, when electoral reforms were introduced in national legislation to enable IDPs to vote in all types of elections (see below), these important changes to the electoral law and procedures were not adequately known or understood by local electoral officials, who in some cases continued to turn IDP voters away.⁴² In the 2005 presidential elections in Liberia, IDP organizations underscored the urgent need for voter education in IDP camps, with a particular appeal for information on political parties' platforms on return, resettlement, and reintegration of displaced and other war-affected Liberians.⁴³

Language barriers can also be an issue. In Serbia, the OSCE has pinpointed the lack of voter information provided in the Roma language as one of the main reasons for low electoral participation by Roma IDPs.⁴⁴ In Azerbaijan,

⁴¹ See Mooney and Jarrah, *supra* note 24.

⁴² *Id.* at 37.

⁴³ 'Visit Us Now' IDPs Leadership Urges UP, DAILY OBSERVER, Nov. 1, 2005.

⁴⁴ Organization for Security and Co-operation/Office for Democratic Institutions and Human Rights [OSCR/ODIHR], Republic of Serbia (Federal Republic of Yugoslavia), Presidential Elections, Sept. 29 and Oct. 13, 2002, and Repeat Presidential Election, Dec. 8, 2002, Final Report, Feb. 18, 2000.

the government's change for official use to the Latin alphabet as opposed to the Cyrillic script, in which IDPs were schooled prior to their displacement, has resulted in IDPs' experiencing difficulties in comprehending public information from the government and media about elections.⁴⁵

Overall, IDPs frequently face a range of obstacles to enjoying and exercising their rights to political participation, in particular affecting *whether* they can vote, *where* their vote counts, *how* they can register and vote, and even *who* they can vote for. Left unaddressed, these barriers deny IDPs their rights, disenfranchise displaced voters, and deprive the displaced of a say in the decisions affecting their lives.

REGULATORY FRAMEWORK

IDPs' political and voting rights must be protected through the national electoral framework, defined as "a group of constitutional, legislative, regulatory, jurisprudential and management rules"⁴⁶ that govern the electoral process. In general, an electoral framework should address the following issues: the type of electoral system; district delimitation and seat apportionment; voter registration and management of the voter lists; the legal status and codes of conduct for candidates and political parties; balloting procedures; counting and results reporting; and resolution and adjudication of disputes.⁴⁷

The centerpiece of this framework typically is a national electoral code or elections act. Complementing this are the administrative decisions of election management bodies (EMBs) and rulings of electoral tribunals and adjudication

⁴⁵ International Organization for Migration, *Electoral Displacement in the Caucasus: Georgia and Azerbaijan, Action Plan II* (2003).

⁴⁶ Jesus .Orozco Hernandez & Y. Zuckermann, *Legal Framework Overview, ACE Electoral Knowledge Network*, available at <http://www.aceproject.org/ace-en/topics/vo/voa/voa02/voa02f>.

⁴⁷ See Organization for Security and Co-operation in Europe [OSCE], *Guidelines for Reviewing a Legal Framework for Election*, Jan. 2001, available at http://www.osce.org/documents/odihr/2001/01/1566_en.pdf.

mechanisms, which clarify and make operational elements of election administration. In addition, any relevant decisions or rulings by the national human rights commission or constitutional court must be taken into account. In conflict or post-conflict environments, legislators often also need to ensure compliance with a variety of additional legal obligations, including transitional law and provisions embedded in peace agreements and treaties. In addition, domestic legislation and policy specifically related to internal displacement must also be taken into account.

Ensuring that IDPs are able to exercise their voting rights therefore requires a detailed analysis of the domestic electoral administration framework and how this relates to the particular situation of IDPs. In general, the following two broad categories of concern can be identified: (1) ensuring that IDPs are guaranteed full and equal rights to political participation, and (2) that this participation does not compromise the integrity of the electoral process or threaten the security of IDPs. Particular attention must be made to issues of residency requirements, documentation requirements, and of voter registration. To ensure that IDPs are able to exercise their voting rights, the regulatory framework will likely need to address the following critical issues: absentee balloting; residency requirements; lack of documentation; non-discrimination, and election security.

More broadly, the national electoral framework must be consistent with the state's constitutional protections and obligations under international law. Where it is not, the electoral framework will need to be modified to be brought in line with international standards. Building on the provisions embedded in the international and regional human rights instruments, international and regional inter-governmental organizations as well as non-governmental organizations have developed detailed criteria for free and fair elections, which provide specific guidance and examples of best practices in relation to different elements of the election cycle. Key sources of guidance include:

- United Nations Human Rights Committee, General Comment 25;
- European Commission for Democracy through Law (Venice Commission), Guidelines on Elections;

- Inter-Parliamentary Union (IPU), Declaration on Criteria for Free and Fair Elections;
- Commonwealth Secretariat, Good Commonwealth Electoral Practices;
- Southern African Development Community (SADC) Parliamentary Forum, Norms and Standards for Elections in the SADC Region;
- Association of Central and Eastern European Election Officials (ACEEEO), Draft Convention on Election Standards, Electoral Rights and Freedom; and
- OSCE, Guidelines for Reviewing a Legal Framework for Elections.

While none of these documents expressly address internal displacement, legislators will find valuable guidance on particular aspects of the electoral process, including issues of residency and documentation, which are essential to address in order to ensure IDPs' voting rights.⁴⁸

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

States experiencing internal displacement will differ in terms of their historical experience with elections. Some will have established electoral frameworks in place, while others may have limited or no prior democratic experience and must devise the framework from scratch, often in the context of an interim constitution and a transitional parliament. In the former situation, the inclusiveness and transparency of the framework will contribute to the integrity of electoral processes and the ability of IDPs to participate once displacement occurs. In the latter case, careful consideration of the unique needs of IDPs is essential to guaranteeing their voting rights.

⁴⁸ See Office of the United Nations High Commissioner for Human Rights, *Compilation of Documents or Texts Adopted and Used by Various Intergovernmental, International, Regional and Subregional Organizations Aimed at Promoting and Consolidating Democracy*, available at http://www2.ohchr.org/english/law/compilation_democracy/index.htm.

Prior to Displacement

Prior to displacement, the electoral framework should be institutionalized in the form of an independent and non-partisan electoral management body (EMB).⁴⁹ In particular, the electoral framework should be robust enough to withstand the political and natural forces that lead to displacement. This includes provisions that allow for the re-issue of documentation, the ability to update a voter's information in the registration system, provisions to keep backup copies of the databases in a centralized location, mechanisms to facilitate absentee balloting, and the basic guarantees associated with the conduct of free and fair elections, including principles of non-discrimination and equality of the vote. To ensure their implementation, these provisions will need to be translated into specific procedures, adequate resources will need to be allocated, and EMB staff at the national and local levels trained.

During Displacement

Elections are often conducted in environments where substantial numbers of persons are already displaced, and new displacements and spontaneous or organized returns may continue throughout the election cycle. As a result, special procedures are required to ensure that IDPs are able to participate; their participation does not threaten their physical security and access to humanitarian services; and their participation is transparent and promotes confidence in the overall electoral process. The basis for the realization of these rights is the electoral framework, supplemented by additional statutory and constitutional provisions, particularly a national IDP policy.

Most countries use sub-national electoral districts to elect members of parliament, requiring unique ballots for each constituency.⁵⁰ Elections for

⁴⁹ See ACE Electoral Knowledge Network, available at <http://aceproject.org/ace-en/topics/em>.

⁵⁰ Jeremy Grace & Jeff Fischer, *Enfranchising Conflict-Forced Migrants: Issues, Standards, and Best Practices*, PEP Discussion Paper No. 2, 11-12 (2003), available at http://www.geneseo.edu/~iompres/Archive/Outputs/Standards_Final.pdf.

regional and municipal legislative bodies also require unique ballots. This raises two immediate issues. First, where should IDPs who reside outside their regular electoral constituency cast their ballots and for which contests? Second, how should eligibility requirements be structured so as to guarantee the right of IDPs to participate?

Absentee Balloting and Residency Requirements

Any election conducted in a situation of ongoing conflict-induced displacement indicates that IDPs do not feel secure enough to return to their homes—even temporarily—in order to participate. However, especially when displacement is used as a political tool used to forcibly alter demographic “facts” in support of contested political claims to a territory, guaranteeing IDPs the right to vote, should they so choose, for their pre-displacement home district via an absentee ballot can be essential to countering this political manipulation. The electoral framework should explicitly provide for absentee voting.

In situations of protracted displacement, however, it can be expected and is entirely reasonable that IDPs may prefer to participate in the political life of their current location. Under such circumstances, IDPs generally should have the choice to vote in elections for their current place of residence instead of being limited to vote for their home district. Indeed, political participation in their current place of residence can facilitate IDPs’ ability to organize and advocate for better protection while in displacement. In cases where IDPs choose to settle permanently in their new location, IDPs’ equal access to political participation and voting will be instrumental and indeed be an essential measure of their integration into the local community.

Residency requirements establish a genuine link between the voter and their electoral constituency (district). In some situations, this requirement obligates the voter to be present in the constituency on polling day in order to cast a ballot. In other cases, the voter must prove residence in the constituency at or before a previous date (often six months prior to the election, but in some cases several years), which further demonstrates a genuine link. In states that allow absentee voting, residency requirements mean that the voter must have resided within the constituency during a defined time period (ranging from six

months to as many as twenty years) in the past in order to remain eligible to vote from outside of the constituency.⁵¹

Residency requirements impact IDPs in two ways. First, for IDPs who wish to vote for their previous constituency (whether in person or by absentee ballot), the required date of last residence in the constituency will determine whether they can exercise this right. Legislators should ensure that the length of absence built into the residency requirement allows any displaced voter to participate in their original constituency, so long as the individual has not permanently resettled elsewhere. Second, for IDPs who wish to vote in the constituency where they reside while displaced, the residency requirement operates to ensure an effective link to that territory. However, legislators will need to consider both how long the IDP has been in residence in the district and how IDPs came to be in their current residence when determining an appropriate date for proving residence.

The determination of an appropriate length of residence in the current constituency can be a politically charged issue, especially where there are large numbers of IDP electors. However, basic human rights obligations hold that citizens should have a right to change their place of residence and participate in politics equally, after a reasonable period of time, with other residents of their new constituency.

In cases where displacement is forced and intended to establish political control over an area through demographic manipulation (as in Bosnia and Herzegovina, Kosovo, and Iraq) and IDPs generally prefer to eventually return, a longer period of residence in the current location might be appropriate. A best practice in this regard can be identified in the post-conflict elections organized by the OSCE Provisional Election Commission (and later by the Central Election Commission) in Bosnia-Herzegovina (BiH). The 1995 General Framework Agreement on Peace (the Dayton Agreement) explicitly

⁵¹ See Venice Commission of the Council of Europe, *Guidelines on Elections*, CDL-AD (2002) 13, Sec. I 1 (July 5-6, 2002), available at <http://www.venice.coe.int/site/interface/english.htm>; U.N. Human Rights Committee, General Comment 25 (57), International Covenant on Civil and Political Rights, art. 40, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.7.

addressed the voting rights of displaced populations, providing that “a citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote, in person or by absentee ballot, in that municipality ... Such a citizen may, however, apply to the Commission to cast his or her ballot elsewhere.”⁵²

The election rules and regulations gave effect to this right by holding that, “[e]very effort will be made ... to facilitate the return of citizens to the municipality where they were registered in 1991 to vote in person. Those who cannot do so will be provided, on application, with an absentee ballot.”⁵³ Given that a central aim of one of the parties to the conflict had been to secure control of territory through ethnic cleansing, political actors were especially interested in whether the displaced would choose to vote in their current or their original municipality. In order to prevent attempts to influence the election outcome by pressuring IDPs to cast their ballot for particular constituencies, the Provisional Election Commission (PEC) established a residency requirement that limited displaced voters’ right to vote for their current location. The *1997 Rules and Regulations* provided that:

Article 10 Displaced Persons who were citizens of Bosnia and Herzegovina on 6 April 1992, but who have changed their place of residence...either forcibly as a result of war or voluntarily, may apply during the voter registration period to vote in person in the municipality in which they now live and intend to continue to live, only if they present documentary proof of continuous residence in the current municipality since 31 July 1996 or before.⁵⁴

⁵² Office of the High Representative, *The General Framework Agreement for Peace in Bosnia and Herzegovina*, Annex 3, art. IV (Dec. 14, 2005), available at http://www.ohr.int/dpa/default.asp?content_id=371.

⁵³ Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights [OSCE/ODIHR], *Rules and Regulations: As Amended and Recompiled from the 1996 Rules*, Provisional Election Commission Doc. (Oct. 14, 1997).

⁵⁴ *Id.* at 14.

Thus, in the 1997 municipal elections, IDPs were able to vote for their original municipality (either in person or by absentee ballot) or for their current municipality, subject to proof of residence on or before July 1996. This meant that voters who had moved to a new municipality less than fourteen months prior to the election could not select this option. Subsequent elections have continued to allow IDP voters to make this choice, although the residency requirement has been decreased to six months prior to each subsequent election.

Constituencies Not Under the Control of the Recognized Government

Elections conducted in countries where part of a state's territory is not under the effective control of the central government raise specific questions. Georgia, for example, employs a parallel system for electing parliament, where some seats are elected via single-member constituencies and the rest are elected through national or regional party lists. IDPs displaced from Abkhazia and South Ossetia (secessionist areas controlled by insurgent forces), however, were specifically denied by law the right to participate in the single-member component of the election. Under considerable pressure from the OSCE, the Council of Europe, and following questioning of the Georgian Government regarding IDP voting rights in the UN Human Rights Committee as well as consideration of a case brought by IDPs to the Georgian Constitutional Court, the Georgian parliament modified the electoral framework in August 2003. The Georgian parliament removed restrictions in legislation on IDP participation in the majoritarian contests and also guaranteed their voting rights in local elections, making clear that this was without placing IDPs' benefits in jeopardy.⁵⁵

In Azerbaijan, legislators continue to struggle with the issue of electing representatives from the disputed region of Nagorno-Karabakh. For the 2005 parliamentary elections, the election law established eleven "constituencies in exile" for these regions. IDP voters, who overwhelming are ethnic Azeri, were

⁵⁵ Mooney & Jarrah, *supra* note 24, at 32-38. The amended law is found in The Organic Law of Georgia: Unified Election Code of Georgia, as amended Aug. 14, 2003, available at <http://www.cec.gov.ge/kanonebi/kodeqsiENG.pdf>.

able to register and vote for their constituencies of origin, which are currently under Armenian control, from elsewhere in Azerbaijan. While the parliament sought to also allow ethnic Armenians resident in the Nagorno-Karabakh constituencies to vote, no mechanism could be established for their participation. These eleven constituencies were therefore essentially virtual. According to the OSCE's Office for Democratic Institutions and Human Rights (the OSCE/ODIHR), "[s]ome 283,000 voters were on the voter list in the IDP polling stations located either 'in exile' within other regions or in areas that are partially occupied."⁵⁶ However, IDPs have not been allowed to exercise their voting rights by voting for the constituencies in which they have been residing for more than fifteen years, since their displacement from Nagorno-Karabakh in the early 1990s.

In Sri Lanka, the issue of elections for the constituencies under the control of the Liberation Tigers of Tamil Elam (LTTE) has been addressed through administrative decrees issued by the Commissioner of Elections. The Sri Lankan Government does maintain a limited presence in LTTE-controlled areas through appointed government agents, who also act as voter registration officers. Thus, all voters inside these areas, whether displaced or not, are able to register in their current location. However, since police and other government officials cannot enter the LTTE areas, the Commissioner of Elections has established "cluster polling stations" in the government-controlled areas along the line of control. On voting day, the Department of Elections works with the LTTE to provide transportation for all voters resident in the LTTE-areas, including IDPs, to the cluster stations. Unfortunately, this means that the Department of Elections is not able to fully implement all aspects of the election law, particularly regarding campaigning throughout the country, and many voters are subject to pressures from the LTTE political and militia structures prior to arriving at the line of control.⁵⁷

⁵⁶ Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights [OSCE/ODIHR], *Republic of Azerbaijan Parliamentary Elections: Election Observation Mission Final Report*, ODIH R.GAL/7/06, Sec. V (Feb. 1, 2006), available at http://www.osce.org/documents/odihr/2006/02/17923_en.pdf.

Aside from the issue of IDPs' electoral district, additional common issues confronting these "exile" constituencies include difficulty presenting election-related information to the affected voters, administration of the voter registration, and threats to voter safety if they are forced to travel to a polling station on the other side of a frontline.⁵⁸ While the electoral framework should include specific provisions to mitigate these challenges, including codes of conduct for campaigning, it will obviously be difficult to fully implement protective measures in electoral districts in areas where the state is unable to exercise effective sovereignty.

Voter Registration

As a starting point, voter registration needs to capture data on the current location of IDPs, their previous residences, and whether they intend to return to vote or wish to vote by absentee ballot. Electronic registration is highly desirable (although not always financially realistic), as the resulting database can easily adjust to notification by voters of their movements and allow for duplicate registrations to be identified. Registration should also result in the issuance of a receipt or voter identification card that can be used to verify entry on the voters list and allow voters to change their assigned constituency and polling station should they move prior to election day. Local election commissions (LECs) should be provided the capacity to verify these registrants, and communicate change of registration information to the national election commission and the local commission where the returnee originally registered. If the returns occur at a point too late in the election cycle for the final voter registration to be updated, returning IDPs should be able to cast a provisional or tendered ballot.⁵⁹

⁵⁷ See Jeremy Grace, *Sri Lanka: Voting Rights of IDPs, Refugees, and Economic Migrants*, Action Plan V, (Apr. 2006), available at http://www.geneseo.edu/%7Eiompress/Archive/Outputs/Sri_Lanka_Final.pdf.

⁵⁸ Other cases include Moldova and Cyprus. See Mooney & Jarrah, *supra* note 24, at 32-41.

⁵⁹ See *Provisional or Tendered Ballots*, ACE Electoral Knowledge Network, available at <http://www.aceproject.org/ace-en/topics/vo/voa/voa02/voa02f>.

As a general rule, registration processes should drive the election timeline. Election organizers must allow sufficient time following the close of registration to produce a provisional voters register (PVR), remove duplicate registrants, adjudicate disputed claims to eligibility, allow public inspection of the PVR, make updates based on claims and challenges to the PVR, calculate which ballots will be needed at which polling station, and ensure sufficient time to transport these ballots. This requires that a fixed date for the end of registration be established well in advance of election day. Nevertheless, the Electoral Management Body (the EMB) might consider whether to extend deadlines specifically for IDPs or returnees.

Documentation

In order to ensure that only eligible voters are able to participate and to prevent double voting, the electoral framework must provide guidance on which documents will prove the voter's identity, citizenship, and residency in a particular constituency. However, IDPs have often lost these documents, or they have been confiscated or destroyed.⁶⁰ IDPs should never be required to return to their original municipalities—which may be controlled by hostile military or political forces—in order to apply for and receive replacement documents. In a best case scenario, authorities would conduct a document re-issuance program prior to, or in conjunction with, voter registration. However, since situations of internal displacement often result in the breakdown of administrative services, IDPs may have limited or no means of re-acquiring documents prior to voter registration and/or the elections.

Thus, the electoral framework must provide guidance on how persons lacking documentation will be accounted for without compromising the integrity of the overall electoral process or the safety and rights of the internally displaced. The first and most basic statutory need is to guarantee IDPs' right to documentation, as affirmed in Guiding Principle 20. Many national IDP policies draw directly from the language in this Principle, a practice that should be encouraged. Often, however, national capacity may be unable to

⁶⁰ Tim Cocks, *Displaced Congolese Struggle to Take Part*, GULF TIMES, Oct. 29, 2006, available at http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=114854&version=1&template_id=39&parent_id=21.

provide for the implementation of this right. Legislators in post-conflict countries must therefore determine how to enfranchise IDPs who lack requisite documentation. Three possible mechanisms include:

1. Using pre-crisis data obtained from census and civil registration programs and other municipal records to verify citizenship and eligibility, combined with special mechanisms for electoral authorities to perform documentation searches and/or verifications (this model was used in Bosnia and Herzegovina and Iraq);
2. Conducting a census or civil registration prior to the elections and using these newly issued documents as a basis for voter registration (this model was used in Kosovo); and,
3. Allowing “social documentation” through which applicants to vote are allowed to swear their identity, residence, and/or citizenship in front of a recognized legal authority or village/traditional notable (this model was used in East Timor,⁶¹ Sierra Leone, and Afghanistan).⁶²

Whichever mechanism or combination of mechanisms is to be employed should be clearly stated in the electoral code, along with relevant rules regarding evidentiary requirements, in order to provide clear and consistent guidance to election administration staff on how to accommodate persons who lack documents at the time of voter registration.

⁶¹ United Nations Mission in East Timor [UNAMET], *Notification I: Guidelines on Assessments of Documents*, Sec. D1 (1999), available at <http://www.geneseo.edu/~iompress/LeftNav/PRESS/ElectionArchive.htm>.

⁶² Issues associated with each of these types of program are considered in detail in Jeremy Grace & Jeff Fischer, *Enfranchising Conflict-Forced Migrants: Issues, Standards, and Best Practices*, PEP Discussion Paper No. 2, 34 (2003), available at http://www.geneseo.edu/~iompress/Archive/Outputs/Standards_Final.pdf.

Voter Information

“Knowledge is the crucial link to the effective empowerment of marginalized groups.”⁶³ Among the key measures for countries therefore to take is to ensure that IDP voters are equipped with election-related information. Targeted voter education programs should be developed to reach IDPs and address their particular situation. Information on the following two issues will be required: (1) elections processes and (2) party and candidate platforms. Election process information (when, where, and how to participate) should be made widely available by the EMB through media and press outlets, posters, civil society organizations, and relief organizations working directly with the displaced. Platform information (the programs and priorities of candidates and political parties) should normally be produced and distributed by the parties and candidates, either through paid advertisements, posters, and rallies, or through radio/press coverage and editorials. Moreover, the most effective voter education programs to marginalized communities emphasize not only the technical aspects of voting but also the importance of the electors’ voice in the political process.

In countries with modern communications infrastructure, the internet can prove a valuable outreach tool. However, the states most affected by internal displacement are often those with the weakest information technology capabilities. Even when these capabilities exist, IDPs are among the most economically disadvantaged communities and thus cannot be assumed to have access to digital media. In these situations, more direct voter education methods are required. In particular, the EMB should work closely with IDP associations, civil society organizations, and with international agencies in order to provide outreach and information on process information as widely as possible.

In camp situations, EMBs should make special efforts to engage IDP camp leadership structures as conduits for voter information. Capacity building and training for the camp leadership structures is particularly useful and can be

⁶³ Muna Ndulo, *Enhancing the Role of Women in Electoral Processes in Post-Conflict Countries: Constitutional and Legislative Measures*, in SECURITY, RECONSTRUCTION AND RECONCILIATION: WHEN THE WARS END 126 (Muna Ndulo ed., 2007).

organized under the leadership of the Local Election Commission in cooperation with camp management agencies. Humanitarian agencies can also serve as important information conduits and should be consulted by the EMB throughout the electoral process. As women often are not adequately represented in camp leadership structures, additional efforts should be made to reach IDP women voters. International technical assistance agencies engaged in voter education can play a particularly useful role in this regard.

The issue of political party campaigning in IDP camps requires careful consideration. High population densities, difficult living conditions, weak security infrastructure, and the risk of politicization of the IDP issue may make the campaign period especially dangerous. As a general rule, political parties should be allowed to campaign in the IDP camps during the official campaign season; but, their activities should be monitored and subject to clearly defined regulations to safeguard against manipulation of IDP voters. Party access to the camps should be coordinated through the camp leadership structures, LECs, civil society organizations, and security organizations as required. The EMB should also consider organizing political party “pact,” through which parties and candidates pledge not to campaign coercively within camps. Actions such as distributing food or benefits near the registration centers in the camps should also be prohibited.

The pact should guarantee that all parties will be provided equal access to the camps. The local EMB would ensure compliance with the pact and accredited international and domestic monitors should be permitted free access to the camps in order to report on party activities throughout the campaign period. The EMB should also make special arrangements to collect and distribute platform information for IDPs residing in the areas where candidates are not focusing their efforts. In addition, IDPs running as candidates for constituencies where they are not resident may need assistance in delivering their platforms to voters in other IDP camps and to voters in their original constituency. Finally, the EMB is responsible for ensuring that IDPs are provided with adequate voter information in a language they understand.

Non-discrimination

The electoral framework should guarantee voting rights to all segments of the state's population on a non-discriminatory basis. These provisions should be subject to judicial remedy based on individual and collective petitions to an electoral appellate body or to the courts. The principle of universal and equal suffrage should be clearly embedded in the constitution, re-stated in the core election laws and regulations (with mechanisms to petition the EMB and/or a judicial body for redress), and again in the National IDP Policy. For states undergoing a post-conflict democratic transition, it would be especially useful to articulate the voting rights of IDPs (and refugees) directly into the peace agreement and/or interim constitution, as was done in the Dayton Agreement for Bosnia and Herzegovina (BiH).

The electoral framework should also address issues of discrimination based on gender, race, religion, ethnic/social groups, language, and other grounds, which may have a disproportionate impact on internally displaced communities. Particular attention must be paid to removing any legal or practical barriers hindering women's equal right to participate in the political process.⁶⁴ Specific guarantees of equality of the vote and remedies for its arbitrary denial, either through direct petition of the EMB or domestic adjudication procedures capable of providing effective remedies, should be embedded in the election law. Discrimination against minority communities in terms of the right to register or to vote should be explicitly prohibited and judicial remedies prescribed for minority groups to pursue claims of discrimination. The right of all candidates and parties to have access to IDP populations, particularly those residing in camps and welfare centers, should be protected.

In addition, the electoral framework needs to address non-discrimination in terms of the ability to communicate and receive information in a language IDPs understand. In Kosovo, for example, the election law governing the 2000 and 2001 municipal elections required the EMB to produce all election-related information in four languages, Serbian, Albanian, Romani, and Turkish.

⁶⁴ *Id.* at 117-130.

Election Facilities

In situations where large numbers of IDPs reside in camps and welfare centers, authorities should ensure that these camps have adequate election facilities that are staffed by personnel trained in the unique processes associated with absentee balloting. For IDPs not in camps, authorities might consider establishing IDP-specific registration and polling stations. Co-mingling voters with varying identification and balloting needs can create overcrowded and potentially insecure polling stations. In the 1997 BiH municipal elections, for example, the typical IDP station had to distribute up to 139 different municipal ballots to IDPs scattered across the country. Some of these municipalities had been redistricted as part of the Dayton Agreement and some were not even conducting elections. The IDP stations generated long lines of frustrated voters, and several were forced to shut-down when angry voters mobbed the facilities.

Absentee polling also requires mechanisms to track the movement and issuance of ballots. The more constituencies involved in the election, the greater the number of specific ballots that will need to be distributed to polling stations, placed in the correct ballot box or sorted after the close of the polls, and assigned to the correct constituency during the vote count. The EMB will also need to determine whether the absentee ballots should be:

- Counted on-site following the close of polling with results reported via the EMB headquarters and added to the relevant constituency totals;
- Moved to a centralized sorting and counting facility for all absentee ballots; or
- Moved to the municipality where the ballots are counted and mixed with regular ballots from within that municipality.

Depending on the number of constituencies involved, poll workers may not be able to count the ballots on-site in a timely fashion, delaying the return of results. A centralized counting facility can alleviate this problem, although the EMB will need to ensure security for the movement of uncounted ballots in sealed boxes. International election observers and police forces can be

engaged to monitor and secure ballot movements. Accredited domestic observers (political party and civil society) should also be allowed to monitor the ballot movement, although they should never be directly tasked with physically controlling the ballots.

Ballots from IDP camps should generally be moved to a central sorting and counting station where they are to be mixed with all other ballots. This prevents political parties or other actors from calculating the electoral results from each camp and reduces the likelihood of retribution (threatened or actual).

Election Security

IDPs displaced by violence, war, and human rights abuses have been forced to flee a community because their physical security has been threatened and they are unable to access national protection. Unless these threats have been removed and their safety can be assured, return to their area of origin is unrealistic and, according to international law, cannot be compelled. In addition, IDPs may lack the ability to make free political choices, as they often depend upon the services of a government seeking to retain power or upon political/military forces controlling the area where they reside.⁶⁵ Thus, the election security of IDPs should be considered more broadly than simply their right to cast a ballot without risking their lives or property. Legislators should also consider the effects of IDP dependence on humanitarian support networks and address attempts by political actors to use this dependence to their advantage.

The electoral framework should guarantee that the principle of the secret ballot is respected and that voters are able to cast their ballots without fear or intimidation. Specific guidance should be provided on the appropriate role of military and police forces in the electoral process, the prohibition of weapons in or near registration and polling facilities, and the demarcation of a defined space surrounding these facilities where political campaigning and posters are prohibited. In the event of a disturbance, only duly constituted and legally

⁶⁵ See Grace & Fisher, *supra* note 62.

recognized police forces should be allowed entry into election facilities, and only until such time that the disturbance persists.⁶⁶

In situations where conflict-displaced IDPs prefer to vote in their home communities but are unable to do so due to security concerns, absentee balloting mechanisms are advisable. Best case examples of this principle can be found in BiH, Kosovo, and Sri Lanka, all of which provided for absentee balloting in the electoral framework.

While election-related violence is a potential threat to both displaced and non-displaced voters, the electoral framework should make specific reference to the inherent rights of IDPs to participate in elections without risking their physical security (i.e., forcing them to return to their home communities) or compromising their access to basic social services (e.g., the previous rule in Georgia that discontinued benefits to IDPs who registered to vote in their current place of residence). Model language in this regard is contained in the 2002 Rules and Regulations governing general elections in Bosnia and Herzegovina. In Article 3.7, the law provides that:

[n]o citizen of Bosnia and Herzegovina shall forfeit any right or entitlement because he or she has registered as a voter, or because his or her registration to vote for a municipality is not the one in which he or she currently resides ... No person shall be required to present any document issued to him or her by a competent municipal body relative to the registration or voting for any other purpose except as necessary for the purpose of voter registration, confirmation of registration or voting.⁶⁷

⁶⁶ See, e.g., the OSCE Mission in Kosovo Central Election Commission, Electoral Rule No. 11/2001, §4(a).

⁶⁷ *Bosnia and Herzegovina: Electoral law of Bosnia and Herzegovina* (translated by OSCE, 2002), available at http://www.geneseo.edu/~iompress/Archive/BiHelection_law-eng_language2002.pdf.

The electoral framework should also establish procedures and institutions that minimize the potential for electoral-related violence. The rules should be designed so that all actors have a fair chance of contesting the election, and that their interests are not discriminated against. Transparency in the framework can convince all sides that the process is fair, making it more difficult for spoilers to claim that the electoral process is biased. Key procedures in this regard include:

- A balanced and non-partisan election commission to ensure that all groups are represented;
- A neutral authority to provide transparent judicial overview of the process;
- An effective and workable elections appeals and complaints procedure;
- Transparent election processes, including the ability for interested political parties and grass-roots organizations to monitor all phases of the elections process; and
- Reasonable timeframes to accomplish the movement of ballots and counting procedures, combined with effective public information campaigns explaining why results may not be available for several days after the balloting.⁶⁸

Finally, in order to prevent political actors from exploiting the vulnerabilities of IDPs, the electoral framework should prohibit government relief ministries, other humanitarian actors, and political parties from linking electoral participation or where one participates to the continued provision of humanitarian benefits.

In the Context of Durable Solutions

IDP participation in the political affairs of their state can, if organized transparently and inclusively, contribute to the amelioration of the structural causes that led to displacement. In addition, it can facilitate and, indeed,

⁶⁸ See Grace & Fisher, *supra* note 62.

counts among the key benchmarks of their reintegration into their home communities. The post-displacement electoral framework should be able to accommodate population movements by allowing re-registration in the home community or normalization of residence rights in the current location. This entails a broad review of any restrictive citizenship and/or residency requirements. Residency requirement thresholds should be relaxed for returnees, as they may not meet the current requirement as a consequence of their previous displacement. Mechanisms should also be in place to issue documents promptly and without placing undue burdens on the returnees (such as special fees or unreasonable conditions), and special procedures may be needed to allow returnees to update their voter registration details.

Similarly, in cases where IDPs instead opt to resettle in their current place of residence or elsewhere in the country, even after conditions permit return, the right to register and vote in elections in their new permanent place of residence will be an essential component of integration and attainment of a durable solution. IDPs should be provided the right to normalize their status in their current location, be issued documents and receive other administrative services from the local authorities on an equal basis with original residents, and be fully integrated into the political and social life of that community. In particular, voting rights should not be linked to expectations of their eventual return, as IDPs also have the right *not* to return, but instead to resettle elsewhere in the country.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Prior to Displacement

Countries with a history of genuine democratic elections will have an established national EMB and local administrative capacity to implement the substantive and procedural rules governing the electoral process. EMBs should establish offices at the regional and local level. It should remain highly independent from political parties and function under the electoral framework promulgated by the national legislature. The EMB also requires staff well versed on electoral legislation, in particular, provisions on exceptional measures required for absentee registration and balloting and the relaxation of

residency requirements in the event of population displacement due to conflict or disaster.

During Displacement

For elections occurring in situations of displacement, the EMB should establish an IDP unit or focal point that reports directly to the Chief Election Commissioner. The unit should include EMB staff from the legal, information technology, logistics, and training divisions. *Ex-officio* representatives from other key national actors (i.e., ministries with responsibility for IDP protection and police forces) should also be included in discussion, although they should not be able to dictate procedures. The participation of the national human rights commission would also be useful in ensuring that policies developed accord with human rights standards. In some cases, representatives from international agencies such as the UN or regional inter-governmental organizations might also be invited to participate in the EMB-IDP unit.

The IDP unit or focal point would be charged with:

- Reviewing national electoral legislation and procedures to assess potential implications for IDPs' ability to exercise their rights to political participation, identifying areas requiring reform, and recommending necessary legislative reform and procedural amendments;
- Ensuring that the electoral rules, constitutional guarantees, and amended policies and procedures concerning IDP voting rights are understood within different branches of the EMB at the national as well as regional and local levels, in terms of the implications for election programming;
- Developing operational plans for registration of the displaced, including contingencies for different movement scenarios and procedures for a relaxation of residency requirements;
- Ensuring, in cooperation with other relevant branches of government, that IDPs are (re)issued documentation or alternative documentation procedures are put in place such as "social documentation" to enable IDPs to exercise their rights to political participation;

- Producing voter information for IDPs, both through public information campaigns and by establishing voter information networks among IDP communities and producing IDP specific information on the election process and any specific procedures that apply in their case;
- Working with political parties to ensure that candidates campaign in accordance with best practices vis-à-vis IDP voters;
- Training regional and local staff and election workers on the specific procedures and considerations relevant to IDP voters;
- Working with the election complaints and appeals mechanisms to ensure that IDPs are not discriminated against in their access to judicial remedies should their voting rights be unfairly restricted; and
- Evaluating IDPs' access to exercise their political rights in elections and where obstacles are noted, including by domestic and international observer groups, addressing these in further amendments to electoral legislation, procedures, and programming.

In the Context of Durable Solutions

In some situations, elections may be conducted while substantial IDP returns are underway. Coordination between the national and local EMBs and amongst local EMBs directly can facilitate the ability of IDPs to change their registration details and ensure that IDPs are able to exercise rights to political participation in areas of return or resettlement. Local and national EMBs should also establish channels of communication with national agencies overseeing return and resettlement programs, as well as international agencies providing protection and movement assistance to IDP populations. These channels can be used to ensure proper updating of the voter's registration, ensuring IDPs have access to all necessary documentation to register to vote, and the distribution of election information to newly returned voters.

INTERNATIONAL ROLE⁶⁹

Technical Assistance in Electoral Legislation Reform

At the global level, the United Nations Electoral Assistance Division (EAD) of the Department of Political Affairs has extensive experience providing technical assistance to governments undergoing democratic transitions and is mandated to provide a variety of election-related support activities.⁷⁰ OSCE/ODIHR also provides guidance to member countries to ensure that electoral frameworks meet the criteria for free and fair elections embedded in the relevant instruments applicable to OSCE member states. The Venice Commission of the Council of Europe also has commented widely on the electoral laws (both current and proposed) of member states in terms of whether they meet the criteria for genuine elections established under various human rights instruments. The Southern African Development Community (SADC) has also provided advice for a number of transitional electoral processes in Southern Africa. The International Institute for Democracy and Electoral Assistance (IDEA) is another inter-governmental mechanism providing technical and legal experts to assist national authorities. Outside of the intergovernmental system, a number of NGOs (funded primarily by national donors) provide assistance on reform of the electoral framework.

Technical and Capacity Building Assistance in Electoral Administration

Both UN EAD and the OSCE have extensive experience with electoral administration and can provide electoral administration support directly to EMBs. At the regional level, the Organization of American States (OAS) Unit on Democracy provides advice and assistance as well. IFES also provides donor financed technical support to election administrators around the globe,

⁶⁹ For further guidance, see the chapter action sheet on political participation rights for IDPs in the *Handbook for the Protection of Internally Displaced Persons, Provisional Edition* (Global Cluster Protection Working Group, Dec. 2007), at 263-268.

⁷⁰ United Nations Electoral Assistance, *Types of Assistance*, available at http://www.un.org/depts/dpa/french/electoral_assistance/ea_content/ea_types_of_assist.htm.

and its many experts have extensive familiarity with IDP-related issues in an electoral context.

Special note should be made of the work of the International Organization for Migration (IOM), which has extensive experience organizing electoral processes for displaced persons (both refugees and IDPs) on behalf of the national authorities and the United Nations, including in BiH, East Timor, Kosovo, Afghanistan, and Iraq. In addition, it has recently stepped up its advocacy for the voting rights of persons displaced by conflict through the Political Rights and Enfranchisement Strengthening Project,⁷¹ which is working to identify global standards and provide national strategies for the electoral inclusion of IDPs and refugees.

Donor supported programs extend beyond direct assistance to EMBs to also include capacity building for local NGOs in the areas of voter education and election observation. Important examples exist of programs targeting voter information dissemination efforts to reach IDP communities and explain the particular electoral procedures and processes in place to address their situation and enable them to exercise their voting rights. The U.S. based National Democratic Institute for International Affairs (NDI) has frequently undertaken programs along these lines, as have IFES and other NGOs, including the Norwegian Refugee Council.

Election Observation and Election Monitoring

Election observation has become increasingly important for verifying the inclusiveness and transparency of election processes in terms of meeting global standards for genuine elections. At the inter-governmental level, the UN, the Commonwealth Secretariat, the European Union, the OAS, the AU, and the OSCE/ODIHR have all fielded election observers around the globe in recent years. While some work is needed to ensure better coverage of IDP political and voting rights by these organizations, many of the resulting reports have discussed specific instances of IDP disenfranchisement and/or the curtailment of other rights. International non-governmental organizations such

⁷¹ Political Rights and Enfranchisement System Strengthening Project, *available at* <http://www.geneseo.edu/~iompress>.

as the Carter Center, NDI, and the International Republican Institute (IRI) also field election observation missions and have begun reporting on the ability of IDPs to participate in elections.

To encourage systematic attention to the issue, it is important that election monitors are sensitized, through training and guidance notes, to the rights of IDPs and the particular obstacles that they often face in exercising their voting rights. These issues should be integrated in their reports.

Donors have also provided funding for domestic NGOs to enhance their capacity to field election observation teams. Local ownership of election observation is essential to the sustainability of democratic transitions and can contribute to the long-term health of an independent civil society. In some instances, donor support to local NGOs has specifically helped these organizations to observe the implementation of voting rights for IDPs, a practice which should be encouraged.

Monitoring State Compliance with International Human Rights Standards

The international human rights treaty bodies have a particularly important role to play in monitoring state compliance, both in law and practice, as regards IDPs' rights to political participation and should systematically address the issue in their consideration of reports from states experiencing internal displacement. The UN Human Rights Committee, which monitors state compliance with the ICCPR, has a particularly important role and has begun to give attention to this issue. In a particularly significant initiative, the Committee on the Elimination of Racial Discrimination issued, in 1996, a General Comment which includes attention to the issue of IDP voting rights, in particular in the context of return.⁷² The UN Committee on the Elimination of Discrimination against Women, which monitors state compliance with

⁷² Comm. on the Elimination of Racial Discrimination, General Rec. XII, *Refugees and Displaced Persons*, U.N. Doc. A/51/18, annex VIII at 126 (1996), *reprinted in* *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 211 (2003), art. 2(d).

CEDAW, also has a role to play. The Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, an independent expert tasked with promoting the rights of IDPs, also has begun to give attention to the issue, both generally and in the context of specific country missions.⁷³ Similar mechanisms have existed at the regional level, including the African Commission on Human and Peoples' Rights (which had a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons), the Council of Europe, and the European Court on Human Rights.

SUMMARY OF RECOMMENDATIONS

To protect and promote the practical realization of IDPs' rights to political participation, in particular the right to vote and the right to be elected, there are key steps that governments would do well to take.

1. Review the impact of national electoral legislation and procedures on the political participation of IDPs and introduce legislative and procedural reform as required to ensure IDPs' ability to exercise their rights to political participation. Special attention should be paid to residency and documentation requirements and their potential repercussions for internally displaced voters.
2. Prepare for the possibility of displacement, for instance in ensuring that electoral residency requirements have built-in safeguards against the disenfranchisement of voters in the event of displacement, temporary loss of residence, and loss of documentation.
3. Establish, in countries affected by internal displacement, a special office or focal point within the national electoral management body to monitor and work to ensure the equitable political participation of IDPs, promoting legislative reform and other initiatives to support this.

⁷³ Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Keynote Address at the International Organization for Migration: Political Rights of Persons Displaced by Conflict (June 12-13, 2006).

4. Issue replacement documentation to IDPs as soon as possible and without unreasonable conditions such as having to return to the place of origin, and ensuring women are issued with individual documentation in their own names.
5. Enable IDPs to choose their electoral district, as either their place of origin or to re-register in another part of the country where they are residing while displaced, without repercussions such as loss of assistance or other benefits.
6. Provide absentee voting facilities when IDPs are unable, due to reasons such as safety or distance, to physically vote in their habitual place of residence and electoral district.
7. Consult with, and enable the participation of, IDPs, including women and affected minority groups, in the formulation, monitoring, review, and appraisal of national, regional, and local electoral legislation and procedures, so as to ensure the particular obstacles IDPs may face to their political participation are understood and taken into account as well as effectively addressed.
8. Train electoral officials on the right of IDPs to political participation, the particular types of obstacles that IDPs often face in exercising this right, and the national legislative and procedural provisions in place to enable IDPs to exercise this right.
9. Educate voters on their rights, ensuring that voter education campaigns reach IDP communities and provide clear and timely information in a language they understand, including on the particular electoral procedures in place to enable IDPs to exercise their rights to political participation.
10. Ensure safe access to voting, including safe transportation for IDP voters to and from polling stations.
11. Clarify through a revised General Recommendation of the UN CERD Committee and the formulation of a General Comment of the UN Human Rights Committee that IDPs have political rights during displacement as well as whether they opt to return or resettle.

12. Facilitate access by domestic and international election observers and take into account the recommendations made by election observation missions as regards ensuring equitable political participation of IDPs.

Chapter 14

Legal Implementation of Human Rights Obligations to Prevent Displacement Due to Natural Disasters

David Fisher*

INTRODUCTION

Natural disasters are among the greatest causes of internal displacement worldwide. In the last two decades alone, they displaced over 115 million persons.¹ In fact, many more persons are displaced by disasters than by armed conflicts. For example, in 2006, over 6.2 million people were newly displaced by natural disasters² as compared to an estimated four million newly displaced by armed conflicts.³ Yet, while it has long been plainly understood to be an obligation of states to work to prevent displacement in wartime and likewise to prevent industrial accidents and other “man-made” disasters that might lead to homelessness, it has traditionally been considered that natural disasters are “acts of God” against which little can be done except hope for the best and prepare for the worst.

However, as observed by former UN Secretary-General Kofi Annan, “the term ‘natural disaster’ has become an increasingly anachronistic misnomer. In reality, human behavior transforms natural hazards into what should really be

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¹ EM-DAT: The OFDA/CRED International Disaster Database, <http://www.cred.be/emdat> (Université Catholique de Louvain, Brussels, Belgium).

² *Id.*

³ Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2005*, 9 INTERNAL DISPLACEMENT MONITORING CTR. (2006).

called unnatural disasters.”⁴ Human vulnerability is now recognized as a major component of what turns a natural hazard (such as a rainstorm) into a full-fledged disaster (such as a flood-provoked displacement crisis).⁵

The *Guiding Principles on Internal Displacement* (hereinafter, the *Guiding Principles*),⁶ like most international human rights instruments, speaks only indirectly to the topic of preventing disasters, but the Principles are germane to certain issues of human vulnerability as well as to the question of state responsibility. Moreover, the role of governments in reducing vulnerability through law and policy (among other means) has received greater attention, leading to many new developments in national legislation in recent years.

On the other hand, it must be acknowledged that international law—and particularly human rights standards—do not speak to the full range of choices that governments confront in this area. Particularly in the last few decades, governments have experimented with a wide range of legislative and policy mechanisms to mitigate disaster risk. This chapter will not attempt to cover the full spectrum of those approaches. Instead, it will focus on those steps that states have taken that might be considered to be required or at least particularly encouraged by international legal norms as re-articulated by the *Guiding Principles*.

⁴ The Secretary General, *Report of the Secretary-General to the United Nations General Assembly on the Work of the Organization*, ¶ 11, U.N. Doc. No. A/54/1 (1999). For purposes of convenience, I will nevertheless use the term ‘natural disaster’ in this paper.

⁵ The UN’s International Strategy for Disaster Reduction expresses this concept as a formula: ‘Risk = Hazard x Vulnerability,’ noting that ‘[t]he negative impact—the disaster—will depend on the characteristics, probability and intensity of the hazard, as well as the susceptibility of the exposed elements based on physical, social, economic and environmental conditions.’ International Strategy for Disaster Reduction, *Living with Risk: A Global Review of Disaster Reduction Initiatives* 36 (2004) [hereinafter *Living with Risk*].

⁶ U.N. Doc. No. E/CN.4/1998/53/Add.2 (1998).

LEGAL FRAMEWORK

Relevant Provisions of the Guiding Principles

The *Guiding Principles* have three provisions of relevance to the prevention of displacement from natural disasters. Those provisions are in Principles 5, 6, and 9.

Principle 5 lays out the duty of governments to abide by their obligations under international law, including human rights and humanitarian law, to prevent and avoid conditions that might lead to displacement in the first instance. Principle 6 articulates a prohibition against “arbitrary displacement,” which it does not define but does illustrate with a non-exhaustive list of examples. That list refers only to cases where displacement is caused by means of (unjustified) human intervention. Even its allusion to natural disasters is focused on evacuation rather than the effect of natural forces.⁷ However, the definition of internally displaced persons (IDPs) in paragraph 2 of the *Guiding Principles* makes clear that “displacement” extends not only to human-caused flight, but also to that directly caused by natural disasters.

It seems reasonable to conclude, therefore, that disaster-induced displacement could be considered “arbitrary” in the sense of Principle 6, if it is imputable to governmental authorities. This would be the case if the government’s acts unjustifiably expose persons to the risk of disaster or if it fails to act to mitigate disaster risks when there is a duty under human rights law to do so.⁸ Principle 9 provides that particular care should be taken to avoid displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with

⁷ The affirmative evacuation of persons due to a disaster is not addressed in this paper. However, human rights considerations relevant to such situations are discussed in the Inter-Agency Standing Committee’s Operational Guidelines on Human Rights and Natural Disasters: Protecting Persons Affected by Natural Disasters (2006), at §A.1.

⁸ Cf. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12, *The Right to Adequate Food*, ¶ 15, E/C.12/1999/5 (1999) (noting that governmental responsibilities pursuant to the right to food include not only refraining from actions that could reduce food availability but also many required ‘pro-active’ steps to guard against hunger).

special dependency and attachment to their lands. Other Principles discuss relevant rights (such as the rights to life, housing, and health, as discussed below) but mainly in terms of their enjoyment by persons who have already been displaced.

Legal Basis

The Duty to Abide by International Law, including Human Rights

Human Rights

While none of the major human rights instruments specifically refer to disaster mitigation, many do address core issues related to disaster vulnerability and consequent displacement. There are many types and causes of such vulnerability, but developmental issues related to urbanization and rural poverty have been identified as key factors.⁹ Low-income areas in cities tend to be located in the most seismically dangerous areas, receive little effective supervision of land use and construction standards, and are usually overcrowded.¹⁰ Marginalized groups, such as migrants and indigenous persons, disproportionately populate these areas.¹¹ Similarly, the rural poor tend to occupy marginal lands more greatly subject to floods and droughts due to environmental degradation and have few resources to sustain the loss of crops.¹² As noted by Didier Cherpitel, former Secretary-General of the International Federation of Red Cross and Red Crescent Societies (IFRC), “[d]isasters seek out the poor and ensure they stay poor.”¹³

⁹ United Nations Development Programme, *Reducing Disaster Risk: A Challenge for Development*, 58 (2004) [hereinafter *Reducing Disaster Risk*].

¹⁰ *Id.* at 61.

¹¹ *Id.* at 60.

¹² *Id.* at 66-70.

¹³ International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2002: Focus on Reducing Risk 11* (2002) [hereinafter *WDR 2002*].

Accordingly, the “soft law” right to development as recognized by the UN General Assembly is probably the most obviously on point, inasmuch as it implies that “states have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”¹⁴

The right to adequate housing, as recognized in such instruments as the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR),¹⁵ is also clearly implicated. The UN Committee on Economic, Social and Cultural Rights has construed that right to include an element of “habitability,” which requires states to ensure the availability of housing that provides adequate protection from health and safety hazards.¹⁶

Likewise, the right to life has been construed to include a duty of the government to take reasonable measures to protect against deadly hazards.¹⁷ The right to health entails obligations to act to prevent health crises (for example, through environmental hygiene and preventative medical

¹⁴ Declaration on the Right to Development, UN General Assembly Resolution 41/128, o.p. 2(3) (1986).

¹⁵ International Covenant on Economic, Cultural and Social Rights (1966), art. 11.

¹⁶ Comm. on Econ., Soc. and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing* (1991), ¶ 8(d), reprinted in U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) [hereinafter CESCR, GC 4].

¹⁷ Cf. Human Rights Committee, General Comment 6: Article 6, *Compilations of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, ¶ 5, U.N. Doc. No. HRI/GEN/1/Rev. 6 (1994) (asserting that ‘protection of this right requires that States adopt positive measures’ including, for example, ‘all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics’).

treatment).¹⁸ The right to food includes a core obligation that governments act to prevent hunger.¹⁹ The “soft law” right to a healthy environment²⁰ is interpreted to include an element of security. Violations of any of these rights can result in circumstances (e.g., disease outbreaks and famine conditions) that prompt persons to flee their homes. Inasmuch as race, gender,²¹ and other

¹⁸ See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, art. 12, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]; see also Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14, *The Right to Highest Attainable Standard of Health*, ¶ 15, U.N. Doc. E/C.12/2000/4 (2000) (interpreting this provision to require measures to ensure ‘the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health’) and ¶ 40 (inferring also a collective responsibility of the international community to address transmissible diseases as well as a special responsibility of economically developed states parties to assist the poorer developing states in this regard).

¹⁹ See General Comment No. 12, *supra* note 8, ¶ 14 (asserting that ‘[e]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.’).

²⁰ See, e.g., Principle 1 of the Stockholm Declaration of the United Nations Conference on the Human Environment of 1972, *available at* <http://www.unep.org> (‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.’); Council of Europe Parliamentary Assembly Recommendation 1614, at 2 (2003) (recommending that member states ‘recognize a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level’); Draft Principles On Human Rights And The Environment, U.N. Doc. No. E/CN.4/Sub.2/1994/9, Annex I (1994), Principle 1 (‘All persons have the right to a secure, healthy and ecologically sound environment.’).

²¹ With regard to the heightened disaster risks often borne by women, see United Nations Division for the Advancement of Women, *Making Risky Environments Safer, in Women 2000 and Beyond*, at 6-8 (2004).

discrimination is often a factor in who ends up living and working in marginal and endangered areas, the right to freedom from discrimination can also be critical.²²

Finally, there is a nascent movement among some activists to promote a “right to safety.”²³ As one advocate has urged, it could guarantee “not the right to be safe... [but] a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of safety,” along the model of the “right to the highest attainable standard of health.”²⁴ While this proffered right has not yet been expressly taken up by an intergovernmental forum, a growing consensus at least as to the corresponding state obligation can be detected in the declaration adopted by delegates to the World Conference on Disaster Reduction in 2005. “We affirm that States have the primary responsibility to protect the people and property on their territory from hazards, and thus, it is vital to give high priority to disaster risk reduction in national policy, consistent with their capacities and the resources available to them.”²⁵

²² See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, art. 2, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, art. 5, U.N. Doc. A/6014 (1966) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, art. 2, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW].

²³ See Delhi Declaration on Peoples’ Right to Safety, Fifth World Conference on Injury Prevention and Control (2000), available at <http://web.iitd.ac.in/~tripp/righttosafety/deldeclaration.pdf>; WDR 2002, *supra* note 13, at 13; John Twigg, *The Right to Safety: Some Conceptual and Practical Issues*, Benfield Hazard Research Centre Disaster Studies Working Paper No. 9 (2003).

²⁴ See Twigg, *supra* note 23, at 11.

²⁵ Hyogo Declaration, World Conference on Disaster Reduction (2005), ¶ 4, available at <http://www.unisdr.org/wcdr/intergover/official-doc/L-docs/Hyogo-declaration-english.pdf>.

Environmental Law

Outside the domain of human rights, there is a large number of international environmental instruments that are relevant to reducing the potential for hazards that could lead to disasters (and are thus relevant to Principle 5). In fact, it is difficult to set conceptual limits in this area, as nearly any environmental treaty could be said to be linked, to one degree or another, to this goal (albeit often with regard to so-called “man-made” rather than natural hazards).²⁶ It is beyond the ambition of this chapter to provide a full agenda on human rights and the environment, but it does seem worthwhile to make particular reference to two treaties that resonate with themes that can be derived from the human rights obligations discussed above.

The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification (UNCCD) of 1994²⁷ requires its 192 state parties,²⁸ among other things, to accord “due priority to

²⁶ Potentially relevant treaties range from those focused on reversing the effects of climate change (now widely believed to be increasing the risks of extreme weather disasters) such as the United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, and its Kyoto Protocol, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1, to instruments addressed to protecting the biological diversity that many scientists and states see as key to staving off future famines, epidemics and other calamities, such as the Convention on Biodiversity of 1992, the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 and the International Treaty on Plant Genetic Resources for Food and Agriculture of 2001, (see, e.g., Pascal Girot, *Biodiversity Conservation and Disaster Risk Reduction*, available at <http://www.undp.org/biodiversity/biodiversitycd/biodev4.htm>; United Nations University, *Biodiversity Conservation May Help Reduce Natural Disaster Impacts* (Mar. 30, 2006), available at http://www.terradaily.com/reports/Biodiversity_Conservation_May_Help_Reduce_Natural_Disaster_Impacts.html; The Hague Ministerial Declaration of the Conference of Parties to the Convention on Biological Diversity, ¶ 8 (2002), reprinted in 32 ENVIRONMENTAL POLICY AND THE LAW 186 (2002).

²⁷ Convention to Combat Desertification, 33 I.L.M. 1328 (1994), art. 5.

²⁸ See United Nations Treaty Section, available at <http://untreaty.un.org> (updated as of Nov. 15, 2007).

combating desertification and mitigating the effects of drought, and allocate adequate resources in accordance with their circumstances and capabilities.” It further requires that state parties integrate anti-desertification measures in development plans; address socio-economic factors in desertification; promote the awareness and participation of local populations, particularly women and youth, in anti-desertification measures; and strengthen or enact appropriate legislation. Thus, in this critical area of famine prevention, states are obligated to take very specific steps involving communities through national law.

Similarly, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998²⁹ requires its forty-one state parties (currently only in Europe and Central Asia)³⁰ to gather environmental data, respond positively to most public requests for environmental information, promote public participation in decisions impacting upon the environment, and ensure access to legal redress where public information requests are denied or for acts damaging to the environment in contravention of national law. “Environmental information” is defined quite broadly to include, among other things, “the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment.”³¹

The Hyogo Framework

Probably the most widely known international instrument on the prevention of disasters is the Hyogo Framework for Action (the Hyogo Framework),³² which was adopted at an international conference and later approved by the UN

²⁹ 38 I.L.M. 517 (1999).

³⁰ See UN Economic Commission for Europe, Aarhus Convention, Status and Ratifications, available at <http://www.unece.org/env/pp/ratification.htm> (updated as of Sept. 18, 2007).

³¹ See *id.* art. 2(3)(c).

³² U.N. Doc. No. A/Conf.206/6 (2005) [hereinafter Hyogo Framework].

General Assembly in 2005.³³ Building upon a previous international consensus document (the Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action of 1994³⁴), the Hyogo Framework sets out the following five priority areas of action for governments and other stakeholders for the period of 2005-2015:

1. Ensure that disaster risk reduction is a national and a local priority with a strong institutional basis for implementation;
2. Identify, assess and monitor disaster risks and enhance early warning;
3. Use knowledge, innovation and education to build a culture of safety and resilience at all levels;
4. Reduce the underlying risk factors; and
5. Strengthen disaster preparedness for effective response at all levels.³⁵

Among the detailed recommendations it offers pursuant to each of these priorities, the Hyogo Framework calls on governments to develop “national platforms” to facilitate coordination across sectors; enact or revise special national legislation and policy frameworks; allocate appropriate resources to risk reduction activities; ensure the active participation of potentially affected communities; gather relevant statistical information; promote dialogue and education on disaster risk; integrate a gender perspective in risk reduction activities; and promote “diversified income options” for communities living in high-risk areas.³⁶

³³ See UN General Assembly Resolution 60/195, ¶ 2, U.N. Doc. No. A/RES/60/195 (2005).

³⁴ The Yokohama Strategy, in turn, had built upon the activities and conclusions reached through the ‘International Decade of Disaster Reduction’ which was proclaimed by UN GA Resolution 42/169, U.N. Doc. No. A/RES/42/169 (1987).

³⁵ See Hyogo Framework, *supra* note 32, ¶ 14.

³⁶ *Id.* at ¶¶ 16-19.

Preventing Displacement of Special Groups

In support of the requirement for the “particular care” included in Principle 9 concerning the prevention of displacement of “minorities, peasants, pastoralists and other groups with special dependency and attachment to their lands,” the *Guiding Principles on Internal Displacement: Annotations* (the *Annotations to the Guiding Principles*) cites ILO Convention No. 169 of 1989. Article 13(1) provides that “governments shall respect the special importance for the cultures and spiritual values of their relationship with the lands or territories, or both as applicable, which they can occupy or otherwise use, and in particular the collective aspects of this relationship.”³⁷

This sentiment was recently reiterated in the United Nations Declaration of the Rights of Indigenous Peoples (the Declaration), which was adopted by the United Nations Human Rights Council in 2006³⁸ and the UN General Assembly in 2007.³⁹ The Declaration provides that “States shall provide effective mechanisms for prevention of, and redress for:...[a]ny action which has the aim or effect of dispossessing [indigenous peoples and individuals] of their lands, territories or resources.”⁴⁰ Arguably, this language is broad enough to include the failure to adequately protect indigenous peoples from loss of their homes due to disasters.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

In contrast to many of the other topics addressed in this volume, the obstacles in the area of natural disaster risk reduction and early warning reside generally with governments, societies, and communities attempting to identify, adopt, and implement effective programs, rather than particularly with the

³⁷ WALTER KÄLIN, *GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 22-23* (2nd ed., 2007) [hereinafter *ANNOTATIONS*].

³⁸ U.N. Doc. No. A/HRC/1/L.10 (2006).

³⁹ U.N. G.A. Res. 61/1295, U.N. Doc. No. A/RES/61/1295 (2007).

⁴⁰ *Id.* art. 8.

“potentially displaced.” On the positive side, these obstacles and their potential solutions are increasingly well-known and international momentum for addressing them is growing. On the negative side, this knowledge still has not necessarily rendered the necessary changes easy to achieve.⁴¹

Institutional Tradition and Culture

Traditionally, disaster policies and initiatives, at both the national and international levels, have been primarily aimed at preparation for an adequate response, rather than reducing risk in the first place. Thus, in an analysis of national reports provided by states in preparation for the 2005 World Conference on Disaster Reduction, the United Nations International Strategy for Disaster Reduction (ISDR) noted that 80 percent of those responding reported having relevant decrees, laws, national policies or strategies, however, “many legislative initiatives and political mechanisms [were] still mainly focused on disaster management.”⁴²

While since that time a number of new national laws and plans have been developed that specifically refer to disaster risk reduction, a 2007 ISDR analysis found that many of the laws and plans still mainly focused on post-disaster response.⁴³ It attributed this to the fact that the central coordinating

⁴¹ As noted by the former UN Secretary-General at the closing of the International Decade of Natural Disaster Reduction, “[w]e know what has to be done. . . . What is now required is the political commitment to do it.” WDR 2002, *supra* note 13, at 18.

⁴² See United Nations International Strategy for Disaster Reduction, Summary of National Information on the Current Status of Disaster Reduction, as Background for the World Conference on Disaster Reduction, Kobe, Japan, Jan. 18-22, 2005, at 7 [hereinafter 2005 Hyogo Report], available at <http://www.unisdr.org/wcdrpreparatory-process/national-reports.htm>.

⁴³ International Strategy for Disaster Reduction, Disaster Risk Reduction: Global Review 2007 (2007) at 40 [hereinafter Global Review 2007]. See also WDR 2002, *supra* note 13, at 25 (noting that the majority of existing national disaster plans ‘focus on emergency response, creating committees and listing governmental and civil responsibilities during disasters; [n]ational plans may mention longer term mitigation and preparedness, but lack detailed and dedicated resources’).

agency in many countries remains with the organization responsible for disaster response.

Political Forces

In addition to the simple force of institutional habit, there are common political forces that can impede the development of political will to take necessary steps for risk reduction. As pointed out by a 2004 study undertaken by the United Kingdom Department for International Development:

[t]here is a perverse architecture of incentives stacked against disaster risk reduction. It is generally a long-term, relatively low-visibility process, with no guarantee of tangible rewards in the short term and little media interest. When a disaster is prevented or its impacts substantially mitigated through appropriate risk reduction measures, it is often not obvious how much worse matters would have been had those measures not been taken...For politicians in hazard-prone countries, being associated with disaster response, for example the distribution of food aid or the reconstruction of schools and hospitals, yields quick political returns. Any such kudos that might result from success in the introduction of longer-term risk reduction measures is likely to be limited in comparison, and outside most politicians' time horizons.⁴⁴

The problem is not only an absence of incentives, but also a number of disincentives to action on risk reduction. Governments have often hesitated to address evolving risks where doing so might result in negative impacts on powerful interest groups—particularly where those at risk belong to a disfavored minority or indigenous community. For example, it has been reported that “Afro-Honduran Garifuna communities on the north coast of Honduras have failed to stop the erosion of their traditional land-use practices

⁴⁴ Department for International Development, *Disaster Risk Reduction: A Development Concern* at 36 (2004), available at <http://www.dfid.gov.uk/pubs/files/drr-scoping-study.pdf>.

by commercial plantations and road construction—changes that have destroyed rainforest covers, affected watersheds and apparently led to much greater vulnerability to flooding.”⁴⁵

Likewise, governments have hesitated to admit the existence of developing risks because of the negative light they might cast on their own performance. For example, governments have often been hesitant to admit to a developing famine risk.⁴⁶

Breadth of the Topic

Progress on risk reduction is further complicated by the sheer breadth of the initiatives that should be undertaken, and the number of institutions and persons that should be involved to address the relevant issues. As mentioned above, disaster risk results not only from the danger of particular hazards (such as hurricanes or earthquakes) but also from the vulnerabilities of particular persons and places to large impacts from those hazards. Thus, risk reduction programs must simultaneously address issues ranging from environmental management, land use, and urban planning to poverty reduction, health policy, social development, gender policy, anti-

⁴⁵ John Twigg, *Disaster Risk Reduction: Mitigation and Preparedness in Development and Emergency Programming*, 9 HUMANITARIAN NETWORK GOOD PRACTICE REVIEW 210-11 (2004).

⁴⁶ See, e.g., *Humanitarian Issues in Niger: HPG Briefing Note* (Overseas Development Institute, Aug. 2005), available at <http://www.odi.org.uk/hpg/papers/HPGBriefingNote4.pdf> (noting that “[a]voiding the famine label has often been convenient for those needing to justify slow or failed responses”); Walker, P. (1989) *Famine Early Warning Systems*, (noting that “[i]f the state viewed famine as anything other than temporary and abnormal, it would mean admitting some degree of responsibility. Some states have been willing to do this but not many”); WDR 2002, *supra* note 13, at 25 (arguing that ‘El Salvador’s disastrous landslides in January 2001 exposed the reluctance of a neo-liberal government to address key factors that it had earlier acknowledged as increasing vulnerability to disasters: inadequate public health services, insecure livelihoods, poor housing in unsafe locations, outdated government prevention and response structures, and a severely degraded environment’).

discrimination, and education.⁴⁷ Moreover, “many actors need to be involved, drawn from governments, technical and educational institutions, professions, commercial interests, and local communities.”⁴⁸ At the same time, care must be taken to ensure that promoting this complex mix of activities does not drift into an amorphous push for development.⁴⁹

Lack of Resources and Enforcement

Finding the resources needed for such far-reaching measures is another crucial issue. Particularly in developing countries, it can be difficult to justify the expenditure of scarce funds for an event that may or may not occur in the future, as discussed above.⁵⁰ International donors are still much quicker and more generous in providing resources for disaster relief and reconstruction than prevention.⁵¹ Thus, it is no surprise that ISDR has repeatedly noted that “[m]any countries, particularly in Africa, highlight lack of resources

⁴⁷ See *Living with Risk*, *supra* note 5, at 21.

⁴⁸ *Id.*

⁴⁹ See WDR 2002, *supra* note 13, at 48-50 (noting that ‘development will [not] of itself reduce vulnerability’ and that ‘[t]he development agenda has often submerged genuine and important debates about managing risks’).

⁵⁰ See *id.* at 15-16; see also Department for International Development, *Reducing the Risk of Disasters—Helping to Achieve Sustainable Poverty Reduction in a Vulnerable World: A DfID Policy Paper 10* (2006), available at <http://www.dfid.gov.uk/pubs/files/disaster-risk-reduction-policy.pdf> [hereinafter DfID Policy Paper].

⁵¹ See DfID Policy Paper, *supra* note 50, at 10; see also Report of the Secretary-General on International cooperation on humanitarian assistance in the field of natural disasters, from relief to development, ¶ 31, U.N. Doc. No. A/60/227 (2005) (“[p]aradoxically, it is still much easier to mobilize support for post-disaster relief efforts than for preparedness and mitigation activities that would avoid or minimize the loss of life and the destruction of vital assets and infrastructure.”).

earmarked for disaster risk reduction as one of the key constraints on implementing the Hyogo Framework priority areas, in particular Priority 1.”⁵²

Perhaps even more importantly, certain risk management measures, such as strict enforcement of environmental laws, land use regulations, and building codes, may interfere with short term economic gain from development (boding ill for support from economic and social elites) and/or negatively impact the poor (who, for example, frequently inhabit dangerous buildings and zones because they have little other choice).⁵³ It is little wonder, therefore, that lack of enforcement of existing law is a common complaint, particularly in the area of building codes.⁵⁴

REGULATORY FRAMEWORK

Inasmuch as disaster risk reduction touches on so many different topic areas, it cannot be expected that it will be addressed through a single legal instrument or even in instruments of a single type. However, the Hyogo Framework recommends the establishment of a flagship national policy and law to link the different instruments and subject areas.

⁵² Global Review 2007, *supra* note 43, at 46. Likewise, in 2005, ISDR reported that ‘[o]ver three quarters of national information identifie[d] resources constraints (financial, technical or human) as the main impediment to realizing a more efficient approach to disaster risk reduction. Almost three quarters explicitly refer[red] to financial resource[s], with Africa as the most concerned region.’ 2005 Hyogo Report, *supra* note 42, at 5.

⁵³ See, e.g., WDR 2002, *supra* note 13, at 54-55 (relating allegations that risk mapping activities in Peru had acted to the detriment of poor communities); Andrew Maskrey, *Disaster Mitigation: A Community Based Approach*, at 42 (1989) (noting that building regulations had had little impact in Lima, Peru, in part because ‘[l]ow income groups are forced to occupy marginal land irrespective of seismic intensities, because no other land is available through market mechanisms’ and that ‘tenants and owners have neither the economic capacity nor the will to reinforce or rebuild to adequate technical norms’).

⁵⁴ See, e.g., World Conference on Disaster Risk Reduction, Thematic Discussion Paper Cluster 1—*Governance: Institutional and Policy Frameworks for Risk Reduction*, Kobe, Japan, Jan. 18-22, 2005, at 6.

Some of the issues discussed in this chapter can only be addressed through enacted law. Examples are institutional and budgetary arrangements, zoning rules, building codes, environmental standards, and legal remedies for affected persons. Others might be addressed through less formal means such as national policies, plans, or operating procedures, but are more likely to be successful if reinforced through law. These include measures to address gender and vulnerable groups, data collection, and information-sharing arrangements and the inclusion of civil society and communities in risk reduction planning and programming.

Still, policies, plans, and procedures for risk reduction are equally important, inasmuch as they can be more flexible and more easily adopted than laws. Also, they can make the links between different legal regimes and inspire the development of new laws where required.

SUBSTANTIVE ELEMENTS OF STATE REGULATION

At present, just over a dozen governments have adopted specific laws or plans on internal displacement.⁵⁵ Of these, few have adopted a definition of “IDP” wide enough to cover displacement by disaster,⁵⁶ and none expressly refer to the prevention of this kind of displacement. However, the constitutions and disaster management statutes of a number of states include provisions relevant to this question.

Acknowledging a State Duty to Reduce Disaster Risk

A few states have adopted constitutional provisions that expressly provide for an obligation to reduce the risk of disasters. For example, Ethiopia’s constitution provides that the “Government shall take measures to avert any

⁵⁵ See Jessica Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, HUM. RTS. BRIEF 8 (Winter 2006).

⁵⁶ One exception is Uganda’s policy on internal displacement. See Uganda National Policy for Internally Displaced Persons, Office of the Prime Minister, Department of Disaster Preparedness and Refugees, Aug. 2004, at x.

natural and man-made disasters.”⁵⁷ Likewise, Uganda’s constitution commits the state to “institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or serious disruption of their normal life.”⁵⁸ Macedonia’s constitution includes among its “fundamental values of the constitutional order,” “proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development.”⁵⁹

A substantial number of states have also enshrined the individual human rights described above, the rights to development,⁶⁰ housing,⁶¹ life,⁶² food,⁶³ health,⁶⁴ and a healthy environment, in their constitutions in ways that might be interpreted to extend to protection against disaster risk. The language that some of these constitutions use to guarantee the latter right seems particularly apt to the context of disaster prevention. For example, South Africa’s constitution guarantees citizens the right to “an environment that is not harmful to their health or well-being.”⁶⁵ Ecuador’s constitution establishes “the right to live in a safe environment that is ecologically balanced and free

⁵⁷ CONST. OF ETH. art. 89(3).

⁵⁸ CONST. OF UGANDA art. 23.

⁵⁹ CONST. OF THE FORMER YUGOSLAV. REPUBLIC OF MACED. art. 8.

⁶⁰ *See, e.g.*, CONST. OF UGANDA art. 9; CONST. OF REPUBLIC OF MALAWI art. 30.

⁶¹ *See, e.g.*, CONST. OF THE KYRG. Republic art. 33; CONST. OF SPAIN art. 47.

⁶² *See, e.g.*, CONST. OF THE REPUBLIC OF TURK. (as amended in 2007) art. 17; CONST. OF THE REPUBLIC OF CROAT. art. 21.

⁶³ *See, e.g.*, CONST. OF THE PEOPLE’S REPUBLIC OF BANGL. art. 15; CONST. OF THE REPUBLIC OF GUAT. (as amended in 1993) art. 99.

⁶⁴ *See, e.g.*, CONST. OF BURK. FASO (as amended in 2000) art. 26; Constitution of Romania art. 34.

⁶⁵ CONST. OF S. AFR. art. 24.

of contamination.”⁶⁶ Belgium’s constitution provides for “the right to enjoy the protection of a healthy environment.”⁶⁷ Mongolia’s constitution set out “the right to a healthy and safe environment and to be protected against environmental pollution and ecological imbalance.”⁶⁸

Other states have acknowledged a duty to reduce disaster risks in their disaster management legislation. For example, Costa Rica’s National Law on Emergencies and Reduction of Risk provides that “[i]t is the responsibility of the Costa Rican State to prevent disasters. To this end, all institutions are required to take account of risk and disaster concepts in their programs and to include measures to reduce risks in their ordinary work, promoting a culture of risk reduction.”⁶⁹ Likewise, Indonesia’s 2005 Law on Disaster Management provides that “the Republic of Indonesia has the responsibility of protecting all people of Indonesia and their entire native land in order to protect life and livelihoods, including from disaster.”⁷⁰

While potentially rather rhetorical in the absence of a concrete remedy (as discussed below), formal statements of state responsibility are certainly consistent with the human rights norms described above. At least they set a positive tone for the interpretation and implementation of the more concrete steps in disaster management legislation.

⁶⁶ POLITICAL CONST. OF ECUADOR art. 23(6).

⁶⁷ CONST. OF BELG. (as amended in 2006) art. 23.

⁶⁸ CONST. OF MONGOLIA art. 16(2).

⁶⁹ Ley Nacional de Emergencias y Prevención del Riesgo, Decreto Legislativo No. 8488, Expediente No. 14.452, art. 25 (2006) (Costa Rica) (unofficial translation by the author).

⁷⁰ Law Concerning Disaster Management (2005), prelim. ¶ a, art. 6 (Indonesia) (unofficial translation).

Developing Specific National Legislation and Plans for Disaster Risk Reduction

Human rights norms⁷¹ also support the call of instruments such as the Hyogo Framework and the UN Convention to Combat Desertification (the UNCCD Convention) that governments ensure an adequate priority to disaster risk reduction efforts through the adoption of dedicated national legislation and plans. This is because experience has shown that it is unlikely that all reasonable precautionary steps will be taken in the absence of dedicated legal and policy frameworks.

This is not to say that international norms require that all activities and authority be centralized at the national level. On the contrary, as expressed in the Hyogo Framework,⁷² it is widely accepted that responsibility for some disaster risk reduction tasks can, and should, be decentralized to the local level.⁷³ A number of states (including both those with federal and non-federal systems) have taken this approach. For example, Nicaragua's disaster management law sets up governmental coordinating structures at the national, departmental, regional, and municipal levels.⁷⁴ Draft legislation under review in the Philippines would call for even more structures, with committees at the

⁷¹ Cf. CESCR GC 4, *supra* note 16, ¶ 12 (asserting that '[w]hile the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose').

⁷² See Hyogo Framework, *supra* note 32, ¶ 16(i)(d) (calling on governments to '[r]ecognize the importance and specificity of local risk patterns and trends, decentralize responsibilities and resources for disaster risk reduction to relevant sub-national or local authorities, as appropriate').

⁷³ See, e.g., Living with Risk, *supra* note 5, at 82.

⁷⁴ See Ley No. 337: Ley Creadora del Sistema Nacional para la Prevención, Mitigación y Atención de Desastres (Nicaragua) (2000).

national, provincial, city, municipal, and *barangay* (community) level.⁷⁵ United States law contemplates that most disaster management activities will be governed and performed at the state and local levels, with the national government generally acting in a secondary role to assist them.⁷⁶ It is important that appropriate resources, or at least the authority to obtain resources, follow any devolution of responsibilities to lower levels of government.⁷⁷

Prompted in large part by the growth of international interest in risk reduction, a number of states have adopted new risk reduction laws and plans in recent years. In a 2004 study of disaster risk reduction and development, UNDP identified nine countries (Algeria, China, El Salvador, Haiti, India, Nicaragua, Madagascar, Turkey, and South Africa) that had recently adopted new plans and or laws of this kind.⁷⁸ In 2007, ISDR noted that Mozambique, Kenya,

⁷⁵ See Philippines Senate Bill 2013, Disaster Risk Management Act of 2008, filed Jan. 30, 2008, available at http://www.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-2013.

⁷⁶ See Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288 as amended as of 2007, at §101(b) (United States) (noting Congress' intent 'to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters').

⁷⁷ See, e.g., Wafula Nabutola, *Risk and Disaster Management: A Case Study of Kenya*, 3rd Fédération Internationale de Géomètres Regional Conference, Jakarta, Indonesia, at 5, Oct. 3-7, 2004 (noting that, '[a]t the time of independence, the local authorities operated relatively independently and had well-structured sources of revenue. This made it possible to manage their own affairs and provide quality social service. Through a series of legislations, however, the Central Government took over most of the revenue generators leaving the local government helpless and penniless but still expected to deliver service like fire fighting.').

⁷⁸ See Reducing Disaster Risk, *supra* note 9, at 78-79.

Zambia, Tanzania, Honduras, St. Lucia, and a number of Caribbean states had also adopted or were considering similar legislation⁷⁹

Including Measures for Flood Mitigation

Historically, floods have been by far the largest cause of displacement due to natural disasters worldwide⁸⁰ and they are a high on-going risk in over ninety countries.⁸¹ According to the Intergovernmental Panel on Climate Change, increased flooding is one result that can be expected in the short term due to the effects of climate change.⁸² Thus, for many states, inclusion of flood mitigation measures in domestic law and/or policy should be considered a minimal element of avoiding arbitrary displacement.

Floods have a number of predictable causes, including deforestation, wetland degradation, and desertification, all issues susceptible to mitigation through governmental regulation.⁸³ For example, in May 2004, a storm struck the border region between Haiti and the Dominican Republic causing floods in both countries. Massive deforestation was identified as a major factor for the extent of the damage caused on the Haitian side of the border, where over 2,600 persons were reported dead or missing and over 31,000 were affected.

⁷⁹ See Global Review 2007, *supra* note 43, at 39-40.

⁸⁰ According to the CRED Database, *supra* note 1, nearly 80 million persons have been displaced by floods worldwide since 1970. This is over four times the number of those displaced by earthquakes.

⁸¹ See Reducing Disaster Risk, *supra* note 9, at 40. The World Bank has identified the Midwestern United States, Central America, coastal South America, Europe, eastern Africa, northeast India and Bangladesh, China, the Korean peninsula, Southeast Asia, Indonesia, and the Philippines as at particularly high risk. See World Bank, *Natural Disaster Hotspots: A Global Risk Analysis*, Disaster Risk Management Series No. 5, at 43 (2005).

⁸² See Inter-governmental Panel on Climate Change, Fourth Assessment Report, Working Group II Report: *Impacts, Adaptation and Vulnerability*, at 371-73 (2007).

⁸³ See World Bank, *Development Actions and the Rising Incidence of Disasters*, at 25 (2007).

In comparison, in the Dominican Republic, where logging had been officially banned since 1967, 688 were reported dead or missing and just over 10,000 were affected.⁸⁴

Moreover, in many cases, lands highly susceptible to future flooding are possible to predict in advance. Development of these areas can then be managed through zoning regulations to minimize residential development and promote other uses such as agriculture, which are less likely to expose human life and habitation to destruction.⁸⁵ Where development is permitted, requirements can be included to minimize risk. For example, Algeria's disaster management law provides for the development of flood risk maps setting out certain zones where no building would be allowed and others (with comparatively less risk) where building would be allowed only if protected by special precautions against the effects of floods.⁸⁶

Adopting and Updating Building Codes

The second and third largest causes of disaster-related displacement are windstorms and earthquakes, respectively.⁸⁷ For these types of disasters in particular, a primary factor of vulnerability is the resilience of homes and buildings. Accordingly, building codes are indispensable means for preventing the potential displacement (as well as death and injury) that these hazards may cause, in addition to zoning and environmental efforts as mentioned above.

⁸⁴ See *id.*; CRED Database, *supra* note 1. Many of those reported as 'affected' in these statistics can be presumed to have been displaced, though displacement-specific statistics are not available for both countries.

⁸⁵ See United Nations Department of Economic and Social Affairs et al., *Guidelines for Reducing Flood Losses*, at 34-35 (2004).

⁸⁶ See Law No. 04-20 of Dec. 25, 2004, arts 24-25 (Algeria) (concerning the prevention of major risks and the management of disasters in the framework of sustainable development).

⁸⁷ According to the CRED Database, *supra* note 1, since 1970, 44.2 million persons have been displaced by windstorms and 19.5 million have been displaced by earthquakes.

Armenia recognized this when it included the “construction of buildings, engineering nets, hydro-technical structures, constructions, ways of transport communication and highways with the necessary levels of safety and reliability” among the key “preventive activities” described in its 1998 Law on Population Protection in Emergency Situations.⁸⁸ Similarly, Saint Lucia specifically incorporated powers and procedures for “hazard inspections” of potentially dangerous buildings in its Disaster Management Act of 2006.⁸⁹

While most states already have regulation of some kind in this area, some gaps still remain. For example, as of 2006, Djibouti reported to the United Nations Centre for Regional Development that it had no earthquake-related building code (though a draft was under consideration).⁹⁰ Likewise, in 2005, the French Ministry of Ecology and Sustainable Development reported that French territories in Polynesia were not covered by national seismic zoning rules and had no regulation on this topic.⁹¹ Moreover, it has been reported that many building codes are outdated and ill-prepared to handle modern construction trends and developing natural hazards.⁹²

⁸⁸ See Law on Population Protection in Emergency Situations (1998) (Armenia), available at <http://www.brookings.edu/projects/idp/Laws-and-Policies/armenia.aspx>.

⁸⁹ See Law No. 30 of 2006, Disaster Management Act of 2006, ¶ 23 (Saint Lucia).

⁹⁰ See United Nations Centre for Regional Development, *Survey of Building Code Enforcement/Dissemination in Seismic Countries: Summary Report (2006)*, at 3, available at <http://www.hyogo.uncrd.or.jp/hesi/survey.htm>.

⁹¹ See Ministère de l'Écologie et du Développement Durable, Programme National de Prévention du Risque Sismique (Nov. 2005), at 13, available at <http://www.ecologie.gouv.fr/Le-Plan-Seisme.html>.

⁹² See International Strategy for Disaster Reduction, *Building Code Enforcement and Dissemination: Safer Buildings for Sustainable Habitat*, Report of a Side-Event at the Global Platform for Disaster Risk Reduction, Geneva, Switzerland, June 5, 2007, at 3, available at [http://www.preventionweb.net/globalplatform/first-session/docs/side-events/June 5 Tue/05 Building Code Enforcement/Building Codes report detailed .pdf](http://www.preventionweb.net/globalplatform/first-session/docs/side-events/June%205%20Tue/05%20Building%20Code%20Enforcement/Building%20Codes%20report%20detailed.pdf).

Addressing Uncertain Land Tenure⁹³

Insecurity of land tenure has been identified as an important contributing factor to vulnerability to disasters and, in particular, to disaster-induced displacement.⁹⁴ Persons without a clear legal title to the land they occupy are often deterred from taking steps (both physical and political) that might reduce disaster risks to the plots they occupy.⁹⁵ Moreover, once displaced by a disaster, such persons face greater difficulties in finding long-term solutions to their plight, as they normally fall outside reconstruction and resettlement schemes keyed to the losses of land owners.⁹⁶

⁹³ Chapter ten in this volume discusses property rights and land tenure issues.

⁹⁴ See, e.g., UN-Habitat, *Scoping Report: Addressing Land Issues After Natural Disasters*, at 33 (2008); International Strategy for Disaster Reduction, *Words Into Action A Guide for Implementing the Hyogo Framework*, at 158 (2007) (recommending that states enact laws to ‘ensure security of land rights as incentives for risk-reducing investments’).

⁹⁵ For example, it has been noted that ‘[o]wing to unequal land tenure policies and skewed resource distribution, many of Central America’s farmers own small plots of land on ecologically-fragile, disaster-prone lands. With little access to credit, land titles and technical assistance to diversify and enhance their livelihoods, these farmers have little incentive to invest in sustainable farming practices. Clear-cutting of forestlands for timber, ranching and farming, and widespread burning have led to massive losses of protective vegetative cover, leaving hillsides barren and unable to absorb or retain water. During Hurricane Mitch, heavy rainfall led to massive runoffs on these degraded hillsides, which carried away tons of topsoil, rocks and vegetation. Debris-choked rivers overflowed their banks, causing extensive damage to human and natural systems that lie in their paths.’ International Institute for Sustainable Development et al., *Livelihoods and Climate Change*, at 13 (2003); See also Mark Pelling, *Cities are Growing More and More Vulnerable*, *Habitat Debate* 6 (2006) (arguing that ‘[i]nsecure land tenure compounds vulnerability, acting as a disincentive for families and city authorities to invest in basic services and secure construction. People living in informal settlements and those in rental accommodation are among those most at risk’).

⁹⁶ See UN-Habitat, *supra* note 94, at 33.

Pursuant to the right to adequate housing, the Committee on Economic, Cultural and Social Rights has asserted that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats” and called on all states to take “immediate measures” in this regard.⁹⁷ While land tenure is a complex and highly sensitive policy issue that is unlikely to be solved within the confines of disaster management legislation, some states have identified legislative reform in this area as an important component of building a legal framework for risk reduction. For instance, the Tanzania Land Use Planning Commission identified a 1995 National Land Policy designed to strengthen land tenure as a “major milestone” in its work to reduce environmental disaster risk.⁹⁸

Procedural Elements of State Regulation

Encouraging Accountability

While legally formalizing commitments to disaster risk reduction is critical, it is not enough by itself to ensure sustained action. As noted by ISDR, even exhaustively crafted legislative and policy processes often later fall prey to declining political commitment in the implementation phase, and thus, “[i]n spite of recent legislative and institutional reforms, there is little evidence of enforcement or accountability for risk reduction.”⁹⁹ Accordingly, legal frameworks for risk reduction should also include specific measures to ensure that good intentions are actually carried out.

⁹⁷ See Comm. of Econ., Soc. and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing* ¶ 8(a) (1991).

⁹⁸ See Gerald Mango, *The Role of Environmental Management in Disaster Risk Reduction in Tanzania*, presentation to the panel discussion on Ecosystems and Environment for Disaster Reduction at the Global Platform for Disaster Risk Reduction, Geneva, Switzerland, June 6, 2007, at 5.

⁹⁹ See Global Review 2007, *supra* note 43, at 47. See also Reducing Disaster Risk, *supra* note 9, at 36 (noting that lack of enforcement of building regulations were important factors in earthquakes in Turkey in 1999 and Algeria in 2003).

Ensuring Adequate Funding

One important step in this direction, as noted by the Hyogo Framework,¹⁰⁰ would be to adopt measures to ensure that risk reduction activities are adequately funded. This can be promoted through budgeting processes that are specific and transparent as to how funds are allocated toward risk reduction objectives.

For example, in Guatemala, the 1996 Law on the National Coordinator for the Reduction of Natural or Man-Made Disasters provides for the creation of a dedicated National Fund for Disaster Reduction for the use of the coordination system.¹⁰¹ In Pakistan, a 2006 disaster management ordinance called for the establishment of similar funds both at the national and regional levels.¹⁰² Similarly, in 2000, the Ethiopian government established a National Disaster Prevention and Preparedness Fund as well as an Emergency Food Security Reserve (a revolving grain stock).¹⁰³

Costa Rica's 2002 disaster management law not only created a national disaster fund, but also required all departments and levels of government to maintain a separate budget line for disaster risk reduction activities.¹⁰⁴ Moreover, it required all national agencies to direct 3 percent of any budget

¹⁰⁰ See Hyogo Framework, *supra* note 42, ¶ 16(ii).

¹⁰¹ See Decreto 109-96: Ley de la Coordinadora Nacional para la Reducción de Desastres de Origen Natural o Provocado (1996), art. 15 (Guatemala).

¹⁰² See Ordinance No. 40 of 1996, National Disaster Management Ordinance, arts. 29-30 (Pakistan).

¹⁰³ See Francois Grünewald et al., *Ethiopia: Real Time Evaluation of the 2006 Emergency Response*, at 25 (2006), available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docid=1008392>.

¹⁰⁴ República de Costa Rica, Ley Nacional de Emergencias, No. 7914, arts. 43-45 (Feb. 3, 2002), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

surplus they might have each year into the national disaster fund.¹⁰⁵ Likewise, Madagascar allocates an annual budget line for disaster risk and management activities and requires each national ministry to allocate a proportion of its annual budget to disaster risk reduction and response activities.¹⁰⁶

Incorporating Risk Reduction into Development Planning

Another useful way to make disaster risk reduction goals real is to incorporate them into mainstream development planning. Several states mandate this by law. For example, India's Disaster Management Act requires "every Ministry or Department of the Government of India to...integrate into its development plans and projects, the measures for prevention or mitigation of disasters in accordance with the guidelines laid down by the National Authority[.]"¹⁰⁷ Likewise, Indonesia's disaster management law requires both the national and regional governments to incorporate disaster risk elements into their development programming, and to ensure that "[e]very development activity involving high disaster risks is equipped with disaster risk analysis as part of a disaster management effort in accordance with power vested."¹⁰⁸

Requiring Reporting to Legislative Oversight Bodies

Requiring assigned executive agencies to regularly report on their activities to reduce disaster risk to parliamentary bodies can provide an additional incentive for efficient action. One example of this is Pakistan's 2006 disaster management ordinance, which requires both the national and provincial governments to make annual reports of their disaster management activities to their respective legislative bodies.¹⁰⁹ South Africa's 2002 disaster management law calls on the national, provincial, and municipal disaster centers to submit

¹⁰⁵ *Id.* art. 46.

¹⁰⁶ *See* Global Review 2007, *supra* note 43, at 46-47.

¹⁰⁷ Disaster Management Act of 2005, Bill No. LV-F of 2005, ¶ 36(b) (India).

¹⁰⁸ *See* Indonesia, *supra* note 70, arts. 6-7, 9, 40.

¹⁰⁹ *See* Pakistan, *supra* note 102, art. 41.

annual reports to their legislative bodies on their activities, the results of their monitoring of prevention and mitigation initiatives, any disaster that occurred and problems experienced, evaluating disaster plans and strategies, and making recommendations.¹¹⁰

Providing for a Legal Remedy

An under-used means to increase accountability in this area is to ensure that communities affected by disasters have a right to a legal remedy where their losses in a natural disaster are properly considered to be partially due to culpable inaction by their government or third parties. However, some national disaster management laws would appear to allow for a remedy of this sort.

For example, Indonesia's disaster management law, which sets out a number of responsibilities of national and regional governments for disaster risk reduction, also includes a provision on dispute resolution which indicates a preference for seeking amicable solutions but, in the event this is not possible, allows for "out-of-court or in-court settlement."¹¹¹ A separate provision of the same act also makes it a criminal offense to "implement high risk development without disaster risk analysis."¹¹² Likewise, Armenia's emergency management law provides that "[o]fficials and citizens are responsible for the breach of the present law...and for creating conditions and preconditions for emergency situation[s]...[as] defined by the order of the [Republic of Armenia's] legislation."¹¹³

Other states preclude governmental liability in these circumstances. For example, Pakistan's disaster management ordinance renders the government, as well as its officers, immune from court jurisdiction for their disaster-related

¹¹⁰ See Act No. 57, Disaster Management Act of 2002, Government Gazette No. 24252 (2003), at arts. 24, 36, 50 (South Africa).

¹¹¹ See Indonesia, *supra* note 70, at art. 47.

¹¹² *Id.* art. 75(a).

¹¹³ See Armenia, *supra* note 88, art. 23.

work (even as it makes it a criminal offense for private actors to disobey governmental orders).¹¹⁴ Likewise, Micronesia's disaster relief law provides that its provisions "shall [not] be construed to create or authorize any cause of action against the National Government, its officials or employees for failure to prevent or mitigate the effects of a disaster."¹¹⁵

The concern to avoid excessive litigation is certainly understandable in this area in light of the frequent tendency to assign blame liberally after a major catastrophe.¹¹⁶ However, it would be more reasonable, and more consistent with human rights standards,¹¹⁷ to achieve this by defining a limited right to a remedy by statute rather than excluding legal recourse altogether. For example, the right to bring a case against the government could be limited to situations of gross negligence or reckless behavior and/or confined to an administrative proceeding before a neutral decision-maker rather than being allowed to go to a civil court.

Allowing Special Powers for Risk Reduction

Where these types of measures prove insufficient to raise the profile of disaster risk reduction commitments, another approach, exemplified by

¹¹⁴ See Pakistan, *supra* note 102, arts. 33, 42-44.

¹¹⁵ See Micronesia: Disaster Relief Assistance Act of 1989, §710, available at http://www.fsmlaw.org/fsm/code/title41/T41_Ch07.htm#705. Compare also Cain Burdeau and Michael Kunzelman, *Katrina Levee Lawsuit Dismissed*, Fox News (Jan. 31, 2008) (reporting on the dismissal of a legal case against governmental authorities in the United States for failure to adequately prepare the levees in New Orleans on the basis of governmental immunity), available at http://www.foxnews.com/wires/2008Jan31/0.4670_KatrinaLeveeSuit.00.html.

¹¹⁶ Cf. Twigg, *supra* note 45, at 209 (noting the potential positive potential of public interest litigation for improving risk reduction, but also expressing the concern that the adversarial nature of legal remedies might 'undermine opportunities for collective efforts').

¹¹⁷ Cf., e.g., Committee on Economic and Social Rights, Concluding Observations on the Report of Zambia, ¶ 33, U.N. Doc. E/C.12/1/ADD.106 (2005) (reaffirming the principle that all economic, social and cultural rights should be justiciable).

Jamaica's Disaster Management Act, could be to provide the executive with special powers to enforce prevention measures in the face of especially dangerous situations. Under Jamaica's law, the Prime Minister may, on recommendation of the Office of Disaster Preparedness and Emergency Management, declare a part of the Island a disaster zone where existing law is insufficient to address a "local condition tending to endanger public security."¹¹⁸ This then allows him/her to take "measures recommended by the Office or any other measures that he thinks expedient for removing or otherwise guarding against any such condition and the probable consequences thereof or mitigating as far as possible, any such hazard."¹¹⁹ Of course, as noted by the Government of Jamaica in a recent report on legal issues in disasters,¹²⁰ care must be taken in invoking extraordinary powers where the measures selected might impinge on the human rights of persons affected (e.g., where property is condemned or persons ordered to vacate their homes).

Gathering and Disseminating Relevant Information

In addition to governments paying adequate attention to risk reduction issues, they must actively encourage their populations to do so as well. This requires systems for efficiently gathering and sharing relevant information.

Ensuring Early Warning

The term "early warning" is generally used to refer to systems of alert for imminent hazards. Effective early warning systems are plainly critical for saving lives and, in some circumstances, they can also help to avoid displacement. For instance, early warning alerts on food security can lead to expedited action to avoid localized famines which could result in population displacement. Similarly, for windstorms and wildfires, early notice can

¹¹⁸ See Act 15 of 1993, Disaster Preparedness and Emergency Management Act (June 25, 1993), art. 12 (Jamaica).

¹¹⁹ *Id.*

¹²⁰ See Candice Rochester, *Legal Challenges to the International Response to Natural Disasters in Jamaica: Context of Hurricanes Ivan, Dennis and Emily*, at 4 (2007), available at <http://www.ifrc.org/Docs/pubs/idrl/idrl-amforum-jcrochester.pdf>.

provide communities an opportunity to secure their homes to some degree against potential damage. Unfortunately, governments have sometimes fallen short in providing a useable early warning to their populations, in part due to ambiguity in the allocation of institutional responsibility, both for monitoring, disseminating, and developing hazard information.

On the other hand, a number of states have enacted laws that successfully define methods and assign responsibilities in this area. For example, Nicaragua's disaster management law sets out three color-coded levels of alert for disaster risk, corresponding to various stages of an impending hazard (such as a developing hurricane), and tasks specific departments and ministries with monitoring and public announcements of threats.¹²¹ Similarly, by standing order, Bangladesh has instituted a Cyclone Warning System, which mandates that the Government begin providing initial warnings on the basis of meteorological predictions twenty-four hours in advance of a potential cyclone, announce a "Danger Stage" eighteen hours in advance, and then a "Great Danger Stage" ten hours in advance.¹²² Bangladesh's government has also entered into an extremely successful partnership with the Bangladesh Red Crescent Society and the International Federation of Red Cross and Red Crescent Societies to operate a "people-centered" cyclone preparedness program, employing radio broadcasts and 33,000 village-based volunteers using megaphones and hand-operated sirens to warn communities of impending storms.¹²³

Collecting Data

Data collection about potential hazards (e.g., seismological, meteorological, tidal, and riparian data) is of obvious importance in predicting and anticipating disasters. Equally critical, however, is gathering and updating population data, both as a matter of mapping vulnerability and as a basis for needs assessment

¹²¹ See Nicaragua, *supra* note 74, arts. 26-30.

¹²² See Asian Disaster Reduction Center, *Total Disaster Risk Management: Good Practices*, at 66 (2003).

¹²³ See WDR 2002, *supra* note 13, at 16.

if a disaster does strike and planners must be able to estimate the likely number of displaced and other affected persons. The latter type of data gathering should be supported by law, carried out or at least coordinated by public institutions, and accorded appropriate funding.

A good example of this is South Africa's Disaster Management Act, which created a National Disaster Management Centre, among whose duties was to "act as a repository of, and conduit for, information concerning disasters and disaster management."¹²⁴ Among the types of information the Centre is required to collect are data on hazards, risk factors, areas and communities that are particularly vulnerable, and indigenous knowledge on disaster management.¹²⁵ The Centre is also empowered to seek information from any organ of state or person, in the latter case under pain of criminal sanction in case of failure to comply.¹²⁶

Guaranteeing a Right to Disaster Information

States should also make sure that the public is provided a right to access information in the hands of the government that is necessary for their protection from disasters. In some states, this might be covered to some extent by general legislation on access to governmental information. However, a number of states have also adopted specific legislation on sharing information about environmental hazards.

For example, several state parties to the UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) have codified a specific governmental responsibility to provide information about environmental hazards to the public upon

¹²⁴ See South Africa, *supra* note 110, art. 17.

¹²⁵ *Id.*

¹²⁶ See *id.* at ¶¶ 18, 60.

request.¹²⁷ Likewise, the Russian Federation's 1994 disaster management law provides that "citizens...have the right to be informed of hazard[s] they can be exposed to at certain places of their residence within the [Russian Federation's] territory as well as of safety-provision measures."¹²⁸

Taking Gender Issues Adequately into Account

Studies show that women tend to be disproportionately affected by major disasters.¹²⁹ While various reasons have been forwarded for this phenomenon, many of them are traceable to the effects of gender-based discrimination.¹³⁰ Unfortunately, few states have included specific provisions concerning gender issues in their disaster management legislation.¹³¹ More have done so in less formal plans and strategies. One example is Bangladesh, whose Standing Order on Disaster Management of 1999 includes a model Union/Municipal Corporation Disaster Action Plan which calls for disaster committees to have

¹²⁷ See, e.g., Statutory Instrument No. 3391, Environmental Information Regulations (2004), art. 5 (United Kingdom); Loi du 5 août 2006 relative à l'accès du public à l'information en matière d'environnement, Moniteur Belge (Aug. 8, 2006), at 42538 (Belgium).

¹²⁸ See Law on Protection of Population and Areas From Natural Disasters and Human-Created Accidents (Dec. 21, 1994), art. 18(1) (Russian Federation), unofficial translation available at http://www.adrc.or.jp/manage.php?URL=./management/RUS/Russia_Statute1.htm&Lang=en&NationCode=643.

¹²⁹ See, e.g., United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, *Making Risk Environments Safer*, WOMEN 2000 AND BEYOND, at 6 (Apr. 2004); Pan American Health Organization, Gender and Natural Disasters (undated), available at http://www.paho.org/English/DPM/GPP/GH/gender_disasters.pdf.

¹³⁰ *Id.*

¹³¹ See Global Review 2007, *supra* note 43, at 78 (lamenting that, 'although there has been a history of engagement in the subject of gender and disaster risk management and recovery—on behalf of international agencies, NGOs and even some ministries in select countries, serious efforts to incorporate the issue into risk reduction and recovery practice is conspicuously absent').

at least two women representatives,¹³² provide specialized training for women in first aid and purification of water,¹³³ and draw up lists of families who might need assistance after a disaster, with special attention to female-headed households.¹³⁴

Similarly, in India, the Gujarat State Disaster Management Policy lists “address[ing] gender issues in disaster management with special thrust on empowerment of women towards long term disaster mitigation” among its primary objectives. It provides a number of measures in its capacity building activities with local communities and civil society groups to promote and support the role of women in disaster mitigation.¹³⁵

Devoting Specific Attention to Other Potentially Vulnerable Groups

There are likewise relatively few states that have devoted specific attention to other vulnerable groups, such as indigenous peoples, in existing domestic law on preventing disasters. One exception is Article 9 of Peru’s Law Concerning Internal Displacements, which specifically requires the state “to take measures for the protection of Andean indigenous peoples, ethnic groups in the Amazon basin, *campesino* minorities and other groups having a special dependency on their land or a special attachment to it.”¹³⁶

¹³² See Bangladesh: Standing Order on Disaster Management (1999), at annex H, ¶ 2.

¹³³ *Id.* ¶¶ 9.3-9.4.

¹³⁴ *Id.* ¶ 12.1.

¹³⁵ See Gujarat State Disaster Management Policy (India).

¹³⁶ Republic of Peru, Law No. 28223 Concerning Internal Displacements, art. 2, May 19, 2004, available at http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx, specifically requires the state ‘to take measures for the protection of Andean indigenous peoples, ethnic groups in the Amazon basin, campesino minorities and other groups having a special dependency on their land or a special attachment to it.’

INSTITUTIONAL ELEMENTS OF STATE REGULATION

The first priority for action of the Hyogo Framework not only commits states to make disaster risk reduction a priority, but also to give it “a strong institutional basis for implementation.” To do this, it recommends the creation of “multi-sector national platforms,” meaning “national mechanisms for coordination and policy guidance on disaster risk reduction that need to be multi-sectoral and inter-disciplinary in nature, with public, private and civil society participation involving all concerned entities within a country (including United Nations agencies present at the national level, as appropriate).”¹³⁷ As of 2006, thirty-five countries had developed such national platforms.¹³⁸

Most national disaster management laws already devote substantial (sometimes near exclusive) attention to defining institutional structures. Traditionally, these structures have centered on a single civil defense or civil protection agency and this continues to be the case in many countries.¹³⁹ However, pursuant to the suggestion of the Hyogo Framework and the encouragement of ISDR, there is a trend in more recent legislation to establish inter-ministerial councils as well as inter-departmental provincial and municipal councils to increase the coordination and participation of the many sectors that are implicated by risk reduction.¹⁴⁰

Some states also make specific provision in their laws for the inclusion of civil society actors and communities in the planning and implementation of disaster mitigation activities. As auxiliaries to the public authorities in the humanitarian field, these should include, at a minimum, the National Red

¹³⁷ See Hyogo Framework, *supra* note 42, at 11, n.9.

¹³⁸ See Sálvano Briceño, *Progress on the Implementation of the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters* (Powerpoint Presentation to the ISDR ECOSOC Side Event, July 19, 2006), available at <http://www.unisdr.org/eng/isdr-system/docs/1>.

¹³⁹ See Global Review 2007, *supra* note 43, at 39.

¹⁴⁰ *Id.*

Cross or Red Crescent Society.¹⁴¹ As of 2004, seventy-seven existing National Societies reported being mentioned in such laws.¹⁴²

It is also highly desirable for these laws to provide for the direct involvement of communities in making themselves less vulnerable. One good example in this area is Nicaragua's disaster management law, which sets the "involvement of the population in the activities of the different public and private entities participating in the National System for Prevention, Mitigation and Response to Disasters" among its fundamental principles.¹⁴³

INTERNATIONAL ROLE

United Nations

ISDR

The International Strategy for Disaster Reduction (ISDR)¹⁴⁴ reports to the Under-Secretary General for Humanitarian Affairs (also known as the Emergency Relief Coordinator). It serves as the secretariat to the Hyogo Framework, and as such has a central role in promoting and assisting member states in the development of appropriate laws and policies to implement the Hyogo priorities. The ISDR has developed a large database of national laws

¹⁴¹ See Final Goal 2.1.1, 27th International Conference of the Red Cross and Red Crescent (1999) (calling on states to including National Red Cross and Red Crescent Societies on appropriate national disaster policy and coordination bodies).

¹⁴² See International Federation of Red Cross and Red Crescent Societies, *Well-Prepared National Society: Self-Assessment 2002-2004*, at 11 (2005). For two examples, see Act on the Protection against Natural and other Disasters (2006) (Official Gazette of the Republic of Slovenia No 28/06, Mar. 17, 2006), art. 74(2) (Slovenia); Robert T. Stafford Disaster Relief and Emergency Assistance Act (as amended as of June 2007), sec. 204(c) (United States).

¹⁴³ See Nicaragua, *supra* note 74, art. 2(10).

¹⁴⁴ See International Strategy for Disaster Reduction Home Page, <http://www.unisdr.org>.

and policies on disaster risk reduction as well as detailed guidance for the development and promotion of national risk reduction platforms.

UNDP

The United Nations Development Programme's Bureau of Crisis Prevention and Recovery¹⁴⁵ has initiatives focused on the prevention of conflict, disaster risk reduction, and recovery and reintegration in dozens of countries around the world. It supports the advisory services of UNDP country offices in the area of disaster risk reduction, which have worked with a number of governments to update their laws in many of the areas discussed in this chapter.

Red Cross/Red Crescent Movement

International Federation

The International Federation of Red Cross and Red Crescent Societies is an international membership organization formed by the national Red Cross and Red Crescent Societies around the world. The Federation's International Disaster Response Laws, Rules and Principles (IDRL) Programme¹⁴⁶ gathers and disseminates information on national and international law on disaster relief and recovery, as well as researching outstanding legal issues in this area. In addition to its legal database, publications and trainings, it has provided support to national societies for their advocacy with governments for the development of appropriate law and policy in these areas.

Climate Centre

The Red Cross/Red Crescent Climate Centre supports National Red Cross and Red Crescent Societies to eventually reduce the loss of life and the damage

¹⁴⁵ *See id.*

¹⁴⁶ *See* International Federation of Red Cross and Red Crescent Societies [IFRC], *International Disaster Response Laws, Rules and Principles*, available at <http://www.ifrc.org/idrl>.

done to the livelihoods of people affected by the impacts of climate change and extreme weather events. It has produced a number of publications aimed at explaining the potential effects of climate change and highlights successful strategies for preparing to address those effects, particularly at the community level.

Other Actors

ProVention Consortium

The ProVention Consortium is a global coalition of international organizations (notably including the World Bank, UN entities, and the International Federation), governments, the private sector, civil society organizations, and academic institutions dedicated to increasing the safety of vulnerable communities and to reducing the impacts of disasters in developing countries. It provides a forum for multi-stakeholder dialogue on disaster risk reduction and a framework for collective action. It has produced a large number of studies and papers on best practices in risk reduction and sponsors workshops and high-level conferences on the various issues.

SUMMARY OF RECOMMENDATIONS

1. Governments should develop specific national platforms and policies on disaster risk reduction, consonant with the Hyogo Framework. Responsibilities for risk reduction and early warning should also be integrated into institutional arrangements for disaster relief and recovery to ensure a holistic approach.
2. Governments should ensure that zoning regulations and building codes address disaster risk and that they are adequately enforced. Care should be taken to mitigate the potential negative effects of such enforcement on the poor and marginalized.
3. Governments of countries that face the possibility of floods should ensure that a comprehensive approach to flooding mitigation, including environmental regulations and zoning approaches, is included in their legislation and plans.

4. Governments should devote adequate attention to equitable solutions for insecure land tenure issues to increase incentives for communities to make their own land less vulnerable.
5. Disaster risk reduction activities should be assigned specific budgets and sufficiently funded.
6. Governments should incorporate risk reduction elements into development planning.
7. Governments should ensure that agencies tasked with disaster risk reduction activities regularly report to legislative oversight bodies.
8. Governments should provide a legal remedy to affected communities where disaster-related damages are attributable to gross negligence by government actors.
9. Governments should ensure that adequate procedures are in place to provide early warning to their populations of impending hazards, including community-level actors as much as possible in their implementation.
10. Governments should ensure that procedures are in place to regularly collect data on potential hazards and on populations in order to support contingency planning, and ensure a public right to such information.
11. The involvement of civil society and communities should be sought out and promoted in risk reduction and, particularly, early warning initiatives. The role of National Red Cross and Red Crescent Societies, as auxiliaries to the public authorities in the humanitarian field, should be clearly set out in disaster legislation.
12. Gender issues and the needs of vulnerable groups should be adequately taken into account in disaster risk reduction legislation and planning.

Chapter 15

Development-induced Displacement and Forced Evictions

Shivani Chaudhry*

INTRODUCTION

The massive and rapidly growing spate of forced evictions in the name of “development” around the world is creating a grave humanitarian and human rights crisis, which could and should be mitigated through the use of international human rights law and policy and a strong political will of national governments and other actors, including international organizations, involved in such “development” projects. How international law can guide, and how national law can guarantee the human rights of internally displaced persons (IDPs) and the prevention of more IDPs around the world, is a challenge confronting policy-makers, human rights advocates, and others.

This chapter will mainly cover cases of relocation and forced eviction, i.e., “planned” displacement, in the context of ostensible “development” projects (“development-induced” displacement). In some instances, such displacement is justified as “permissible,” though this chapter questions the permissibility component through the lens of the international human rights framework. Such displacement is also generally irrevocable and precludes the right to return, which makes the legal enforcement and protection of the right to resettlement and rehabilitation critical. Planned displacement occurs in various contexts. They include displacement caused by so-called “development” and infrastructure projects such as dams and roads; urban renewal projects; market-based evictions; zoning and planning laws; large sporting events and international conferences necessitating new buildings and infrastructure; environmental and conservation projects; and resettlement on request.

This chapter is concerned, in particular, with the human right to adequate housing as a legal basis for preventing forced evictions or arbitrary displacement of individuals, groups, and communities from their original habitats and places of residence. The principles of human rights law, which

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guarantee the right of every man, woman, child, and youth to an adequate standard of living, including adequate housing, clearly serve to act as affirmative provisions prohibiting the violation of these rights in the case of forced eviction.

The chapter also makes the legal argument for the human right to land, which though not articulated distinctly in international law, has indirect references in various conventions and declarations, and is a fundamental prerequisite to guaranteeing the human right to adequate housing, and thereby preventing displacement. In particular, the human right to land holds significance for natural resource-dependent and land-based communities such as indigenous peoples, pastoralists, peasants, farmers, forest dwellers and others, including those who are legally considered landless.

While drawing on international legal provisions that guarantee these rights, this chapter further expounds on the *Guiding Principles on Internally Displaced Persons* (the *Guiding Principles*) and also makes references to the *Basic Principles and Guidelines on Development-based Evictions and Displacement* (the *Basic Principles and Guidelines*).¹ It attempts to harmonize the key principles in both these documents with a view to preventing displacement, and where it is absolutely inevitable, to ensuring that states and other actors adhere to international human rights standards in all processes related to displacement, including resettlement and rehabilitation.

The *Guiding Principles*, though they contain preventive guidelines, are more relevant during the time people remain in displacement since they cover the rights of those who have already been displaced. The *Basic Principles and Guidelines* cover the phases prior to, during, and after evictions, and especially focus on “development-related” displacement. Displacement resulting from ostensible “development” projects and disasters that tend to be of an irreversible nature require guidelines that go beyond the *Guiding Principles*.

¹ Presented in the report of the former UN Special Rapporteur on adequate housing, A/HRC/4/18, Dec. 2007, available at <http://www2.ohchr.org/english/issues/housing/annual.htm>, and formally acknowledged by the UN Human Rights Council in Human Rights Council Resolution 6/27, A/HRC/6/L.11/Add.1, Dec. 19, 2007, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_27.pdf.

The *Basic Principles and Guidelines* have thus been cited, where applicable, with the aim of supplementing and strengthening the Guiding Principles to ensure that states respect, protect, and promote the human rights of all IDPs within their countries.

LEGAL FRAMEWORK

Relevant Guiding Principles

Several of the *Guiding Principles* provide for the human rights to adequate housing, land, and property in the context of displacement. Principle 5 is of special significance as it stresses the responsibility of states to avoid displacement. It provides, “[a]ll authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.” Principles 6 through 9, 12, 14, 15, 18, 21, and 28 are also significant.

Principle 6 provides, *inter alia*, that “every human being shall have the right to be protected against being arbitrarily displaced.” Principle 6 further provides that “[t]he prohibition of arbitrary displacement includes displacement...[i]n cases of large-scale development projects, which are not justified by compelling and overriding public interests” and “displacement shall last no longer than required by the circumstances.”

Principle 7 states that “[p]rior to any decision requiring the displacement of persons, the authorities... shall ensure that all feasible alternatives are explored in order to avoid displacement.” If no alternatives exist, Principle 7(2) further provides that “[t]he authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.”

According to Principle 8, “[d]isplacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.”

Principle 9 provides that “States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”

According to Principle 15, IDPs have “[t]he right to seek safety in another part of the country...[and] [t]he right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.”

Principle 18 provides that “[a]t the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to...[e]ssential food and potable water...[and] basic shelter and housing.”

Principle 21 prohibits, *inter alia*, arbitrary deprivation of property and possessions of IDPs, including pillage, and states that “[p]roperty and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.”

Finally, Principle 28 provides that:

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Legal Basis: Right to Adequate Housing²

Human Rights Treaties

Adequate housing has been recognized as a distinct human right since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Article 25(1) states that “[e]veryone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

Several different texts proclaimed and adopted by the United Nations explicitly recognize the human right to adequate housing. The obligation of states to take steps towards the realization of the right to adequate housing for all is laid down in a number of international legally binding human rights instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) perhaps contains the most significant foundation of the right to housing found in international human rights law. Article 11(1) of the ICESCR provides that “State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions.”

The UN Committee on Economic Social and Cultural Rights (CESCR) further clarified the normative and legal content, as well as state obligations under this right in its General Comment 4 on the International Covenant on Economic, Social and Cultural Rights, “The Right to Adequate Housing.” Consistent with Article 2 of the ICESCR, the Committee detailed how progressive realization of this right is required under international law, and also affirmed that deliberate or negligent retrogression of housing conditions is a violation of the ICESCR. General Comment 4 specifies the state’s obligations to ensure progressive realization of the human right to adequate housing. Key aspects of

² See also Chapter 5 of this volume on planned evacuations and shelter, and chapter ten on the rights to housing, land and property.

the criteria of “adequacy,” are categorized as: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.³ The “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of” the right to housing is violated, according to the Committee’s General Comment No. 3 on the “Nature of States parties’ obligations.” It establishes that a state party “is, prima facie, failing to discharge its obligations under the Covenant” if a “significant number of individuals is deprived of [...] of basic shelter and housing.”⁴

Article 17 of the International Covenant on Civil and Political Rights (the ICCPR) protects the right to adequate housing implicitly by, affirming that “1. [n]o one shall be subjected to arbitrary or unlawful interference with” inter alia, “his privacy” and that, “2. [e]veryone has the right to the protection of the law against such interference or attacks.” Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), prohibits any discrimination with regard to “[t]he right to housing.”

As affirmed by the 1989 Convention on the Rights of the Child (the CRC) in Article 27.3, the right to adequate housing is integral to the realization of other basic rights of children. Similarly, women’s right to adequate housing, as an inalienable, integral, and indivisible component of all human rights has been recognized, implicitly and explicitly, in a range of international and regional human rights instruments. This means that women enjoy the equal right to

³ Housing rights groups (such as the Housing and Land Rights Network: <http://www.hlnr.org>) and the UN Special Rapporteur on adequate housing, have further developed the list of components of “adequacy” beyond those mentioned in General Comment 4. These include: physical security; participation and information; access to land, water and other natural resources; freedom from dispossession, damage and destruction; resettlement, restitution, compensation, non-refoulement and return; access to remedies; education and empowerment; and freedom from violence against women. Also see, Questionnaire on Women and Housing, available at <http://www2.ohchr.org/english/issues/housing/docs/questionnaireEn.doc>.

⁴ Committee on Economic, Social and Cultural Rights, General comment No. 3, *The Nature of States Parties’ Obligations* (art. 2, ¶ 1, of the Covenant), U.N. Doc. E/1991/23, ¶ 10.

own, access, use, manage, and control land, housing, and property. Article 14.2(h) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ensures for rural women the right “[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.” Lack of access to and control over land, housing, and property constitutes a violation of human rights and contributes significantly to women’s increasing poverty and marginalization.⁵

Article 21 of the 1951 Convention relating to the Status of Refugees states that “[a]s regards housing, the Contracting States, insofar as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

The right to adequate housing is also guaranteed in Article 43.1 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The 2007 Convention on the Rights of Persons with Disabilities protects the right to adequate housing and prohibits discrimination with regards to access to housing for persons with disabilities in Article 9.1 and 28.

⁵ Report of the former Special Rapporteur on adequate housing, E/CN.4/2005/43 (Feb. 25, 2005).

*International Declarations and Recommendations*⁶

The Declaration of the Rights of the Child (1959), proclaimed by General Assembly resolution 1386 (XIV) on 29 November 1959, states in Principle 4 that “[t]he child shall have the right to adequate nutrition, housing, recreation and medical services.” International Labour Organization (ILO) Recommendation No. 115 on Worker’s Housing (1961), Principle 2, provides that:

[i]t should be an objective of national [housing] policy to promote, within the framework of general housing policy, the construction of housing and related community facilities with a view to ensuring that adequate and decent *housing* accommodation and a suitable living environment are made available to all workers and their families. A degree of priority should be accorded to those whose needs are most urgent.

Several conventions of the International Labour Organization (the ILO) also contain provisions that safeguard the human right to adequate housing. The ILO conventions include Convention No. 161 Concerning Occupational Health Services (1985); Convention No. 117 Concerning Basic Aims and

⁶ United Nations resolutions on the right to adequate housing; forced evictions; housing and property restitution; and equal access to, control over and ownership of land and property without regard to social status, are relevant in establishing the rights of persons affected by development-induced displacement and forced eviction. Those UN resolutions include General Assembly resolution 42/146, “The Realization of the Right to Adequate Housing,” adopted on Dec. 7, 1987; Commission on Human Rights resolution 1988/24, “The Realization of the Right to Adequate Housing,” adopted on Mar. 7, 1988; Commission on Human Rights resolution 1993/77, “Forced evictions,” adopted on Mar. 10, 1993; Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1991/12, “Forced evictions,” adopted on Aug. 28, 1991; Sub-Commission on Human Rights resolution 2002/7, “Housing and property restitution in the context of refugees and other displaced persons,”; and Commission on Human Rights resolution 2005/25, ‘Women’s Equal Ownership of, Access to and Control Over Land and the Equal Rights to Own Property and to Adequate Housing.’”

Standards of Social Policy (1962); Convention No. 110 Concerning Conditions of Employment of Plantation Workers (1958); and Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989).

The 1969 Declaration on Social Progress and Development⁷ guarantees in Article 10(f) “[t]he provision for all, particularly persons in low-income groups and large families, of adequate housing and community services.” The right to adequate shelter is recognized in Section III (8) of the 1976 Vancouver Declaration on Human Settlements.⁸ The 1986 Declaration on the Right to Development, adopted by General Assembly resolution 41/128, provides in Article 8(1) that “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.”

Other Relevant Guidelines and Declarations

The June 2006 Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters (the IASC Guidelines)⁹ contain specific provisions related to the human right to adequate housing in the context of natural disasters. Paragraph B.2.4 provides that “[t]he right to shelter should be understood as the right to live somewhere in security, peace and dignity...[and such] criteria should be used as benchmarks in planning and implementing shelter programs, taking into account the different circumstances during and after the emergency phase.” Paragraph C.3.2 provides that “[t]he criteria for adequacy are: accessibility, affordability,

⁷ General Assembly resolution 2542 (XXIV) of Dec. 11, 1969.

⁸ Habitat: United Nations Conference on Human Settlements, Vancouver, Canada, May 31- June 11, 1976.

⁹ Addendum to the report of the Representative of the Secretary-General on human rights of internally displaced persons, A/HRC/4/38/Add.1 (Jan. 2006). These Operational Guidelines are presently being revised.

habitability, security of tenure, cultural adequacy, suitability of location, ...access to essential services such as health and education...[and] [r]espect for safety standards aimed at reducing damage in cases of future disasters[.]”

Other international guidelines are relevant in reaffirming the human right to adequate housing. Those guidelines include the 2002 *Plan of Implementation of the World Summit on Sustainable Development*,¹⁰ and the *Practice of Forced Evictions: Comprehensive Human Rights Guidelines on Development-Based Displacement*, adopted by the June 1997 Expert Seminar on the Practice of Forced Evictions.¹¹

Regional Treaties, Declarations, and Guidelines

Certain regional instruments also provide the legal basis for the progressive realization of the human right to adequate housing. Article 16 of the 2005 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides that “[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.” Article 19(c) provides for “women’s access to and control over productive resources such as land and guarantee their right to property.” The 1994 Addis Ababa Document on Refugees and Forced Population Displacement in Africa¹² and the 2001 New Partnership for Africa’s Development (NEPAD) framework document also reinforce this right.

Article VIII of the 1948 American Declaration on the Rights and Duties of Man provides that “[e]very person has the right to fix his residence within the

¹⁰http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImp1.pdf.

¹¹ The Realization of Economic, Social and Cultural Rights, Expert Seminar on the Practice of Forced Evictions, Report of the Secretary General, July 2, 1997, E/CN.4/Sub.2/1997/7.

¹² Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Sept. 8-10, 1994.

territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.” Article IX provides that “[e]very person has the right to the inviolability of his home.” The 1969 American Convention on Human Rights, the 1948 Charter of the Organization of American States (amended 1993), and the 2003 American Declaration of Human Rights and the Environment reinforce the above-referenced rights.

Article 31 of the Additional Protocol to the European Social Charter provides that “[e]veryone has the right to adequate housing.” Articles 16, 19, 23, 30, and 31 of the European Social Charter, Article 8 of the 1950 European Convention on Protection of Human Rights and Fundamental Freedoms, and Article 34.3 of the Charter of Fundamental Rights of the European Union reinforce the right to adequate housing. In the Middle East and North Africa, the 1995 Rabat Declaration, the 2000 Manama Declaration, and the 2004 Arab Charter on Human Rights recognize the right to adequate housing.

Legal Basis: Forced Evictions and Arbitrary Displacement

The concepts of “forced evictions” as defined in General Comment 7 of the Committee on Economic, Social and Cultural Rights,¹³ the *Basic Principles and Guidelines*¹⁴ and elsewhere, and that of “arbitrary displacement” as defined in the *Guiding Principles*, have attained acceptance as terms in international law. They refer to overlapping practices, which involve the following three basic elements: removal of individuals or groups from their places of habitual residence and work; forced, in the sense of being undertaken involuntarily or through coercion vis-à-vis those removed; and illegal by virtue of their non-conformity with domestic law and/or arbitrary by virtue of their non-conformity with international law.

¹³ General Comment 7 of CESCR, *The Right to Adequate Housing* (art. 11 (1) of the Covenant): *Forced Evictions*, UN Doc E/1998/22, annex IV.

¹⁴ Basic Principles and Guidelines on Development-based Evictions and Displacement, presented in the report of the former UN Special Rapporteur on adequate housing, A/HRC/4/18, Dec. 2007, available at <http://www2.ohchr.org/english/issues/housing/annual.htm>.

At a practical level, arbitrary displacement is a result, in many contexts, of forced evictions. At a conceptual level, the broad concept of displacement from one's community or homeland overlaps with, and may even incorporate, the somewhat narrower concept of eviction from one's specific home or land. The success of both normative frameworks—the human right to adequate housing and protection from internal displacement—depends to a significant degree on their consistent and complementary definition.

In paragraph 4 of the *Basic Principles and Guidelines*, forced evictions are described as sharing many consequences “similar to those resulting from internal displacement, population transfer, mass exodus, ethnic cleansing and other practices involving the coerced and involuntary movement of people from their homes, lands and communities.” When read in conjunction with the *Guiding Principles*, the definitions only serve to reinforce the illegality of such acts under international law, which only allows for evictions under exceptional circumstances and in full conformity with human rights standards.¹⁵ Paragraph 4 of the *Basic Principles and Guidelines* further define forced evictions as:

acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.

The UN Commission on Human Rights resolutions 1993/77 and 2004/28 pronounce that, “the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing.” Arbitrary displacement could violate the rights to freedom of movement, freedom to choose one's residence, freedom from arbitrary interference with one's home, and the right to adequate housing. In both “development” and disaster-related cases, measures ostensibly justified with reference to development or public

¹⁵ These exceptional circumstances are further elaborated in General Comment 7 of CESCR, *supra* note 13, and the Basic Principles and Guidelines, *supra* note 14, ¶ 21.

health goals may actually evince intent to accomplish ethnically-based segregation, domination, or dispossession. This makes the above principle especially significant.

Forced evictions are said to create situations of arbitrary displacement when they destroy homes, communities, and original habitats. The destruction of livelihoods and dissociation of communities or individuals from their sources of work and residence may amount to arbitrary displacement, even when resettlement is provided. The absence of adequate resettlement that ensures the provision of adequate housing, proximity to original work places, access to natural resources, and access to services, including education, health, sanitation, and water, fosters the undesirable situation of arbitrary displacement. Such arbitrary displacement consists of the forced eviction or removal of large numbers of people who are then forced to search for alternatives in the dire absence of availability of opportunities and options.

While forced evictions and arbitrary displacement are often used to refer to a cause-effect phenomenon (displacement is generally considered to begin when evictions end), for the purpose of this chapter, they will be used interchangeably, as synonyms for the illegal act of forcibly shifting or moving people or communities to alternative locales due to external factors not related to their safety or security. In this context, eviction is not limited to the physical act of removal of people but to the phenomenon, just as displacement is not merely the result of an eviction but also the process itself. A more holistic and encompassing understanding of both “eviction” and “displacement” render both terms as descriptive of, and referring to, the same phenomenon.

General Comment No. 7 of the Committee on Economic, Social and Cultural Rights (CESCR), The right to adequate housing (Art. 11.1 of the International Covenant on Economic, Social and Cultural Rights): forced evictions, recognizes the occurrence of forced evictions as a violation of human rights while laying down guidelines to prevent and mitigate the phenomenon. Paragraph 2 of General Comment No. 7 cites the Habitat Agenda where “Governments committed themselves ‘to protecting all people from, and providing legal protection and redress for, forced evictions that are contrary to the law, taking human rights into consideration; [and] when evictions are

unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided.”

Paragraph 3 of General Comment No. 7 defines forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” Paragraph 3 further provides that:

[o]wing to the interrelationship and interdependency which exists among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

Paragraph 8 of General Comment 7 defines state responsibility. It provides that “[t]he State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.” This approach is reinforced by Article 17.1 of the International Covenant on Civil and Political Rights (ICCPR), which complements the right not to be forcefully evicted without adequate protection. That provision recognizes, *inter alia*, the right to be protected against “arbitrary or unlawful interference” with one’s home. It is to be noted that the state’s obligation to ensure respect for that right is not qualified by considerations relating to its available resources.

The *Basic Principles and Guidelines* elaborate on the specific human rights violations occurring under situations of forced evictions. Paragraph 6 provides that “[f]orced evictions constitute gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement.” Article 10 of the 2007 Declaration on the Rights of Indigenous Peoples provides that “[i]ndigenous peoples shall not be forcibly removed

from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” Chapter II (A.3) of the Vancouver Declaration on Human Settlements further protects against forced evictions. It states that “[t]he ideologies of States are reflected in their human settlement policies. These being powerful instruments for change; they must not be used to dispossess people from their homes or land or to entrench privilege and exploitation.”

International law thus clearly recognizes the human rights violations inherent in situations of forced evictions. Even where displacement is considered permissible, the process is generally fraught with tension and unrest, which makes adherence to the *Guiding Principles* imperative. Furthermore, national standards should be developed, which go beyond these Principles in order to develop stronger safeguards to protect people from any potentially threatening situations that jeopardize their lives and livelihoods.

Legal Basis: Right to Land¹⁶

Though the right to land is not articulated specifically as a distinct human right in international law, the human right to an adequate standard of living, in particular the human right to adequate housing, has increasingly been interpreted as including the human right to land, as is evident in reports of the former UN Special Rapporteur on adequate housing.¹⁷ It is also an integral part of the human rights to livelihood and food, as expounded in reports of the former UN Special Rapporteur on the right to food.¹⁸ The right to land is arguably also encompassed in the right to work as the right to access productive land. Given the indivisibility of human rights, the right to land

¹⁶ See also Chapter 10 of this volume on the rights to housing, land and property.

¹⁷ See reports of the former UN Special Rapporteur on adequate housing (A/HRC/7/16, and A/HRC/4/18), including his recommendations to the Human Rights Council to recognize the right to land as a human right, *available at* http://ap.ohchr.org/documents/dpage_e.aspx?m=98.

¹⁸ The Special Rapporteur, Report of the former Special Rapporteur on the right to food, E/CN.4/2006/44/Add.2 (Mar. 20, 2006).

cannot be treated in isolation, neither can it be accorded a status other than that of a human right that must be defended and upheld.

The human right to land can be defined as the right of all women, men, youth and, children to land that ensures an adequate standard of living and the right to a productive livelihood, which enables them to live in peace, security, justice, and dignity. All people have the fundamental human right to dignified work and livelihood, including equal access to land and productive resources, and to basic labor protections.

Underlying the human right to adequate housing and land is the human right to life with dignity. The failure to provide adequate living conditions, including adequate housing, land, and the provision of essential services results in a violation of human dignity. The right to life with dignity is the most fundamental and non-negotiable human right and is the core for the realization of all other human rights.

The state must ensure equitable access to, and distribution of, land and, where necessary, implement land reform measures to ensure that marginalized and vulnerable groups are not left out. Similarly, every community must have access to natural resources necessary for its survival and livelihood, including *inter alia*, fuel, fodder, water, and access to agricultural inputs, building materials, and credit. Access to natural resources must be sufficient to meet community needs, including nutritional requirements.

International law specifically recognizes the human right to land of indigenous peoples in Article 17 of the 1989 Indigenous and Tribal Peoples Convention (No. 169) and Articles 25 through 27 of the 2007 UN Declaration on Rights of Indigenous Peoples. The 2004 Voluntary Guidelines to Support the Progressive Implementation of the Right to Adequate Food in the Context of National Food Security¹⁹ also provide useful guidance.

The Inter-American Human Rights Court on August 31, 2001—in a judgment regarding the case *Awas Tingni v. Nicaragua*—ruled that Nicaragua had violated the rights of

¹⁹ Adopted by the 127th Session of the FAO Council, Nov. 2004.

the Awas Tingni community by granting concessions to a company to log within their lands and for failing to uphold the community's rights to its lands. On 14 December 2008, the Government of Nicaragua finally gave the Awas Tingni community title to its ancestral territory, which consists of 74,000 hectares of densely forested lands. This judgment is an important legal precedent for recognizing and protecting the right to land, especially of indigenous communities.

International law is yet to evolve in order to legally recognize the right to land as a human right, but governments can take the lead by incorporating the elements of this right, which have already been widely recognized and promoted, in their own national laws and policies. The progressive realization and legal guarantee of the human right to land is the most fundamental prerequisite to preventing displacement and addressing poverty, and lies at the crux of the development-displacement debate.

Legal Basis: Right to Property²⁰

Though an inherent component of the human rights to adequate housing and land, the right to property is considered a distinct right in law, with broader connotations. Property extends beyond housing and land.

Guiding Principle 21 and paragraph 50 of the *Basic Principles and Guidelines* both clearly specify that IDPs cannot be arbitrarily deprived of their property or possessions. Principle 21, paragraph 3, of the *Guiding Principles* provides that property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation, or use. Without housing and real property restitution, the voluntary, safe, and dignified return of IDPs to their homes and original places of residence often becomes impossible. Authorities are obliged to pay adequate compensation for confiscations and other forms of lawful taking of property. One particular risk internally displaced persons face is the loss of property and the inability to recover it. Legal recognition of property rights is

²⁰ See also Chapter 10 of this volume on the rights to housing, land and property.

thus a crucial element in preventing and also to finding solutions to internal displacement.

The right to property has also been upheld in regional human rights law. The right to property is recognized in Article 17.1 of the 2000 Charter of Fundamental Rights of the European Union, Article XXIII of the 1948 American Declaration of the Rights and Duties of Man, Article 21 of the 1969 American Convention on Human Rights, Articles 14 and 21 of the 1981 African Charter on Human and Peoples' Rights, and Article 1 of the 1952 First Option Protocol to the European Convention on Human Rights.

Legal Basis: Right to Restitution and Return

Principle 2.2 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons (commonly referred to as the Pinheiro Principles),²¹ which were finalized in 2005, establishes the right to restitution. It provides that “States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice.” The Pinheiro Principles contain provisions regarding the right of refugees and IDPs to “have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and / or property that is factually impossible to restore as determined by an independent, impartial tribunal.” Principle 16.1 extends these rights to “tenants, social occupancy rights holders and other legitimate occupants or users of housing, land, and property” and assert that such claimants should, “to the maximum extent possible,” be “able to return to and re-possess and use their housing, land and property in a similar manner to those possessing formal ownership rights.” While the Pinheiro Principles are not legally binding, they are an important tool for strengthening the rights of IDPs if they are applied in conjunction with the *Guiding Principles*.

²¹ The Special Rapporteur, *Final Report of the Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons Submitted in Accordance with Sub-Commission Resolution 2004/2*, E/CN.4/Sub.2/2005/17 (June 28, 2005).

The right to return is critical to the resumption of normal life for IDPs. In the context of development-induced displacement and disaster-induced displacement, the physical return of IDPs to their original homes and lands is often not possible due to changed land use, installation of infrastructure on their original sites of habitation, and in certain post-disaster cases, the actual loss or submergence or erosion of land. International human rights law, however, recognizes the right to choose one's place of residence which includes the right to return to one's own home.²²

Legal Basis: Right to Participation

The right to participation has been internationally recognized as a human right as part of the right to self-expression in several instruments, including the Universal Declaration of Human Rights. Participation forms an integral component of not just the right to adequate housing but also of several other human rights, including the right to live with dignity. Article 19.1 of the ICCPR and regional instruments, including Article 9.1 of the African Charter on Human and Peoples' Rights, guarantee the right to receive information.

Effective participation in decision-making is essential to the fulfillment of all other rights, as well as to the elements of the human right to adequate housing. At all levels of the decision-making process in respect of the provision of and rights to adequate housing and land, individuals and communities must be able to express and share their views. They must be consulted and be able to contribute substantively to processes that affect housing, including location, spatial dimensions, design, cultural aspects, community relations, and livelihood. The state must ensure that building and housing laws, policies, and programs do not preclude free expression, including cultural and religious

²² See Article 13 of the UDHR; General Comment No. 27: art. 12 (Freedom of movement), Human Rights Committee, 1999; Copenhagen Declaration, World Summit for Social Development, 1995; Basic Principles and Guidelines on Development-based Evictions and Displacement, 2007; and Declaration on the Rights of Indigenous Peoples, 2007.

diversity.²³ There can be no democratic participation in decision-making without transparency and information-sharing.

Legal Basis: Rights of Marginalized Groups

While displacement adversely impacts all sections of the population, there are certain groups that suffer more from it because they are already suffering. Certain populations who are already marginalized in society face graver effects of displacement and are more vulnerable to human rights abuses that often accompany unjust evictions and resettlement. These are historically marginalized groups who face violations of their human rights on a systematic basis and thus need special protection in the context of displacement. Such groups include women, especially single women, children, the elderly, persons with disabilities, persons living with HIV/AIDS and mental illness, indigenous peoples, peasants, landless people, migrants, sexual minorities, and communities facing historical discrimination. The principles of non-discrimination and substantive equality are of particular importance in ensuring that the rights of these vulnerable groups are upheld and not violated further.

The rights of women are protected by, *inter alia*, CEDAW in particular in Article 14.2(h) on their right to housing. Women's rights to adequate housing are also supported by paragraph 19 of General Comment 28 of the Human Rights Committee (2000) on the equality of rights between men and women; General comment No. 16 (2005) of the Committee on Economic, Social, and Cultural Rights on "The equal right of men and women to the enjoyment of all economic, social and cultural rights,"²⁴ Commission on Human Rights, resolution 2005/25 on "Women's equal ownership, access to and control over

²³ Housing and Land Rights Network, *Do Peoples' Voices Matter? The Human Right to Participation in Post-tsunami Housing Reconstruction* (Dec. 2006).

²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005), "The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)," E/C.12/2005/4.

land and the equal rights to own property and to adequate housing,²⁵ and Article 10(a) of the Plan of Implementation adopted by the United Nations 2002 World Summit on Sustainable Development.

Certain groups of women such as domestic workers, migrant women, victims of domestic violence, commercial sex workers, elderly women, women living with HIV/AIDS, mental illness and disability, single women, and pregnant women are more vulnerable to the impacts of evictions. An intersectionality approach to gender equality thus needs to be adopted in addressing and mitigating the impacts on such groups of women.

Articles 16(1), 16(2), and 27 of the CRC are the strongest international provisions protecting the rights of children to housing, safety, and security, which should be strictly upheld in the context of displaced children.²⁶ Concerted efforts must be made to address the long-term impacts of evictions on children such as trauma, loss of self-esteem, fear, insecurity, loss of family support systems and break down of community. These often manifest as adverse health effects such as loss of appetite, sleep disorders, and malnutrition. Care must be taken to ensure that children are able to resume

²⁵ UN Commission on Human Rights, Resolution 2005/25, Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing, E/CN.4/RES/2005/25.

²⁶ Other international human rights treaties, declarations and resolutions that specifically guarantee and protect children's rights to housing, among others, include Resolution 1994/8, Children and the Right to Adequate Housing; Commission on Human Rights resolution 1994/93, The Plight of Street Children; General Assembly resolution 50/153, The Rights of the Child; General Assembly resolution 54/148, The Girl Child; General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42, 44, ¶ 6), Committee on the Rights of the Child; General Comment No. 17: Article 24 (Rights of the child), Human Rights Committee, 1989; World Declaration on the Survival, Protection and Development of Children, World Summit for Children, 1990; Declaration on Social Progress and Development, 1969; Vancouver Declaration on Human Settlements, 1976; and the Istanbul Declaration and Habitat Agenda, 1996.

their education at the earliest. Of particular importance is that evictions are not carried out prior to, or during, school examinations.

International legal provisions protecting the rights of people living with HIV/AIDS, mental illness, and persons with disabilities include Article 28 of the 2006 Convention on the Rights of Persons with Disabilities on their right to housing, including to public housing programs. They are reinforced by the 2006 *International Guidelines on HIV/AIDS and Human Rights*²⁷; the Principles for the protection of persons with mental illness and the improvement of mental health care, adopted by UN General Assembly resolution 46/119 in 1991; and the 1975 Declaration on the Rights of Persons with Disabilities. General Comment No. 5: “Persons with disabilities,” of the UN Committee on Economic, Social and Cultural Rights (CESCR), also provides guarantees for adequate housing for persons with disabilities.²⁸

The rights of migrants are best protected in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Development projects and natural disasters may sometimes result in the displacement of refugees, who while being protected under international refugee law, find themselves undergoing repeated displacement within the country of their asylum. In such cases, they need to be protected by international refugee law.

Displacement tends to adversely affect older persons, especially the relocation and resettlement component of it, as it is much harder for older people to move and to re-establish their lives. They must be accorded special protection and their rights to housing and land upheld both under the *Guiding Principles* and other provisions, including Principle 1 of the United Nations Principles for Older Persons, adopted by General Assembly resolution 46/91.²⁹

²⁷ http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf.

²⁸ <http://www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>.

²⁹ <http://www.un.org/documents/ga/res/46/a46r091.htm>.

Across all societies there are certain marginalized groups who have suffered historical discrimination on the grounds of ethnic descent. These include the Quilombos (descendants of slave communities) in Brazil, the Roma in Europe, the Dalits in India, and African-Americans in the United States. Though the Committee on the Elimination of Racial Discrimination (CERD) strictly prohibits such discrimination, it is deep-rooted and often institutionalized. IDPs of these particular groups are therefore more vulnerable to discrimination, particularly when they are resettled in areas where host communities are hostile. Special care has to be taken that religious, ethnic, and other minorities' rights are not further violated in the context of displacement and its aftermath, and that their cultural rights are protected.

General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, *Non-Discrimination in Economic, Social and Cultural Rights* (Article 2, paragraph 2),³⁰ includes strong provisions for non-discrimination with regard to housing, land, water, and sanitation.

Large-scale inequalities in the ownership of land abound in most of the world, with the majority of landholdings concentrated in the hands of a few. Thousands of families, though they toil on the land, do not enjoy ownership rights over it and are legally considered "landless." This includes communities living under flyovers, bridges, along railway tracks in cities, as well as landless agricultural laborers. As mentioned in the report of the former Special Rapporteur on the right to adequate housing, "[a]n average of 71.6 per cent of rural households in Africa, Latin America, and Western and East Asia (excluding China) are landless or near landless."³¹

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights*, art. 2, ¶ 2, E/C.12/GC/20, June 10, 2009.

³¹ Report of the former Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, E/CN.4/2005/48, ¶ 40.

Development projects severely impact the landless and homeless. Such groups should not be omitted from rehabilitation and compensation plans. Alternative land and housing must be provided to all those who are displaced irrespective of whether they hold legal titles to the land and property they live and work on. This includes tenants who do not hold ownership or property deeds but must still be provided alternative housing and compensation in the event of housing lost as a result of natural disasters or development projects. Such measures could also help in reducing the gross inequalities in wealth ownership and also help to promote more equitable land reform.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

The *Guiding Principles* are important as they identify the special needs and rights of IDPs within the international human rights normative framework, and in that they define standards and lay out substantive and operational guidelines to realize the rights of IDPs.

The obstacles to their implementation arise largely from the fact that they are not legally binding and that states are not committed to ensuring their realization. This is also true for development-induced displacement. The lack of political will to adopt and implement the *Guiding Principles* poses one of the greatest obstacles. The absence of institutional frameworks such as special national agencies to address issues of evictions and IDPs, the lack of effective monitoring mechanisms to oversee displacement operations and minimize harm, the failure of states to involve affected communities and consult them in project planning and policy-making, and the inter-play of competing interests including contradictory policies of multilateral development banks, donor agencies and national governments, further contribute to the weakening of the implementation of the *Guiding Principles* and in following the standards that they attempt to establish. Complexities also arise because of the lack of coordination between the multiple actors involved in providing assistance, protection, and development aid to IDPs.

Laws discriminating against returnees, the absence of a corruption-free and independent judiciary, or the loss of land titles and other relevant documentation, can render a just resolution of housing and property difficult to

achieve. Moreover, even where the laws or judicial institutions are adequate to address the task, authorities sometimes resist their implementation.³²

Gender discrimination and gender insensitive practices and policies in countries also tend to affect the equal application of the *Guiding Principles*. Internally displaced married women often face particular problems if their husbands die. Legal norms or rules of customary law on registration and inheritance may discriminate against such women, for instance, by declaring them unable to inherit land or other property. Even where the law is non-discriminatory, women may experience difficulties in regaining their homes and property in practice. For instance, across the northeast coast of Sri Lanka, women have a tradition of owning land. Muslims and Tamils follow a matrilineal system for property inheritance, unlike the Sinhalese. However, this practice is not always followed when houses and land are allocated as compensation. New titles are generally given to “heads of households,” who are perceived to be men, or, at best, women may have joint titles, but never sole title. This is a clear case of denying women their original property rights.

IDPs who depend on customary law are particularly vulnerable to land grabbing and find it more difficult to reclaim land and housing lost during displacement. In several countries, including Indonesia and Sudan, unoccupied land is considered state property that can be sold. In Colombia, it is estimated that 87 percent of the displaced people who owned land have had to abandon it.³³

There must be legal recognition of community-based property rights³⁴ and collective systems of management, ownership, and control of natural resources

³² See Walter Kälin, *Internal Displacement and the Protection of Property*, Swiss Human Rights Book, Vol. 1, Realizing Property Rights, July 2006.

³³ Office of the Coordination of Humanitarian Affairs, <http://www.reliefweb.int/idp/>.

³⁴ For a conceptual discussion on the issue of property rights, see Owen Lynch & Shivani Chaudhry, *Community-based Property Rights: A Concept Note*, Center for International Environmental Law, 2002, available at <http://www.ciel.org/Publications/cbpr.pdf>.

that would ensure that local communities' rights are not unfairly or illegally usurped or violated.

REGULATORY FRAMEWORK

National authorities, not international institutions, are ultimately responsible for implementing and ensuring the protection of human rights within their territories. Legally, they enjoy greater power to enforce human rights and to ensure that national legislation and policies and practices of their various agencies adhere to standards set by international human rights agencies such as the United Nations. In order to address the issues of internal displacement and to mitigate the disastrous consequences that government and non-state actors impose on their people through the implementation of adverse projects, it is imperative that national governments pay attention to, and participate in, standard-setting with regard to IDPs.

Implementation of the *Guiding Principles* and the *Basic Principles and Guidelines* call for review and revision of existing law, including in such matters as development planning, urban development, and protection of natural habitats, to ensure conformity with international human rights standards as well as a strong political will and commitment to adopt specific measures towards ensuring that displacement is minimized. Where absolutely inevitable, planned displacement must incorporate adequate safeguards and protection for IDPs, including just and proper resettlement and rehabilitation grounded in international law obligations. In particular, the standards of Guiding Principle 7, set out above, must be strictly adhered to.

Protecting Internally Displaced Persons: A Manual for Law and Policymakers,³⁵ published in 2008 by the Brookings-Bern Project on Internal Displacement, is intended to provide recommending guidelines to governments that could be incorporated into their action plans and laws, with the ultimate goal of ending all human rights violations related to the forceful displacement of peoples from their homes, homelands, and natural habitats. While the Brookings-Bern Project on Internal Displacement's Framework for National Responsibility provides an excellent and comprehensive starting

³⁵ http://www.brookings.edu/papers/2008/1016_internal_displacement.aspx.

point for states, this chapter focuses more on the housing and land dimensions of displacement, both as a basis to prevent displacement and to ensure that resettlement and rehabilitation ensure the guarantee of adequate housing—whether in temporary or permanent housing settings.

Though the needs of IDPs may vary depending on the cause underlying their displacement, it is important to underline that all IDPs are entitled to the protection and assistance of their governments. National responsibility therefore means that states undertake, to the best of their efforts, measures to ensure that the rights of IDPs are restored without discrimination and regardless of the reason for their displacement. To be truly national, a government's response to internal displacement must be reflected at all levels of government—local, regional, central.

Relocation for development purposes cannot be carried out in the absence of a comprehensive human rights-based resettlement and rehabilitation policy developed through intensive consultation and collaboration with government, civil society, social movements, and the affected people. A national policy must be in place, and in its absence, international law must drive government and other agencies' actions.

Often, independent agencies develop their own resettlement policies. In India, for instance, the National Hydroelectric Power Corporation, a state enterprise responsible for constructing and financing large dams and thereby responsible for displacing hundreds of thousands, has its own resettlement and rehabilitation policy.³⁶ Apart from not being able to replace an overarching national policy and compromising international standards, including those in the *Guiding Principles* and *Basic Principles and Guidelines*, the adoption of such policies by agencies responsible for large-scale displacement often seeks to justify their actions and facilitates the creation of more IDPs while precluding any external safeguards for human rights protection of the affected people.

³⁶ NHPC Policy, available at <http://nhpcindia.com/writereaddata/english/pdf/rnrpolicy2007.pdf>.

Displacement resulting from “development” projects may concern a number of additional mechanisms. Multilateral development banks such as the World Bank, Inter-American Development Bank, Asian Development Bank, and European Bank for Reconstruction and Development all have policies on resettlement from projects in which they are involved.³⁷ These internal policies must in no way compromise international human rights standards, nor must they replace or substitute national policies on the same. Policies of multilateral development banks and other international financial institutions and local policies of national agencies and corporations cannot be the determining standards for resettlement and rehabilitation.

The trend to harmonize towards the lowest common denominator or standard is common in most projects that involve displacement, and effective checks must be maintained by national governments to ensure that this is not the case. For large borrowers, this is of specific importance, as governments are less likely to resist policies or question operations of institutions that provide them substantial loans. Another significant issue of concern is when these international financial institutions ally closely with the government and directly influence and shape national and state policies related to resettlement and displacement, as in the case of several Eastern European countries. National governments must maintain a process of independent and sovereign law and policy making and monitoring that must only be influenced by international human rights standards, not the dictates of donors and financiers or local project-implementing agencies.

³⁷ World Bank, Policy on Involuntary Resettlement—OP 4.12 (2001); Asian Development Bank, Policy on Involuntary Resettlement (1995); Inter-American Development Bank, Policy on Involuntary Resettlement—OP 710 (1998); European Bank for Reconstruction and Development, Policy on Land Acquisition, Involuntary Resettlement and Economic Displacement—PR 5 (2008); African Development Bank, Involuntary Resettlement Policy (2003).

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Prior to Displacement

Substantive Elements

The overriding priority of any ruling party or government should be prevention of displacement. Governments have a responsibility, as elaborated in the *Guiding Principles* and *Basic Principles and Guidelines*, to prevent and avoid conditions on their territory that might lead to population displacement, to minimize unavoidable displacement and mitigate its adverse effects, and to ensure that any displacement that does occur lasts no longer than required by the circumstances.

The government should ensure that all national policies are based on international human rights standards.³⁸ Laws that do not conform to international human rights standards should be amended or revoked while laws that facilitate displacement such as land acquisition laws should be annulled. National laws must also reconcile provisions to protect both civil and political rights as well as economic, social, and cultural rights without pitting one type of rights against others.

At a minimum, states should enshrine the human right to adequate housing in their legal order, preferably at the constitutional level. The state must take measures to respect, promote, and fulfill the human rights to adequate housing and land of all residents within the country's borders, based on the principle of non-discrimination. Countries that, to differing extents, have enshrined the right to adequate housing in their national constitutions include Belgium, France, the Islamic Republic of Iran, Mexico, Russian Federation, South

³⁸ *Basic Principles and Guidelines*, *supra* note 14, ¶ 29. States should carry out comprehensive reviews of relevant strategies, policies and programs, with a view to ensuring their compatibility with international human rights norms.

Africa, Spain, and the United Kingdom of Great Britain and Northern Ireland.³⁹

A comprehensive national housing law based on international human rights standards on housing should be promulgated for both rural and urban areas where it does not exist, and implemented effectively where it does. Several countries have passed housing policies or have policies in the pipeline, but these are seldom enforced and seldom grounded in international human rights principles.

Pakistan's 2001 National Housing Policy, for instance, seems driven by a market-based approach. India's draft National Urban Housing and Habitat Policy of 2007 fails to even recognize the right to housing as a human right. Cambodia and Sri Lanka have draft housing policies that have been in the pipeline for a while but still not been finalized. While France adopted a new law guaranteeing the right to adequate housing, questions persist on the legal enforceability of this right.

Several national governments, such as the United Kingdom, are increasingly talking about affordable housing and have policies to this effect, but these tend to focus more on market solutions than a human rights-based approach.

States should furthermore enact legislation and set up procedures to protect people against forced eviction, including in the context of development activities. They should include in national development plans and resettlement policies, a clear statement that forced displacement or relocation induced by development projects can only take place in very exceptional cases, must be authorized by law, justified by compelling and overriding public interests, required to protect those interests, and carried out with full respect for the human rights of affected persons, and in accordance with international human rights law and principles.

³⁹ The Special Rapporteur, *Report of the Former Special Rapporteur on Adequate Housing*, E/CN.4/2004/48 (Nov. 2, 2004).

States should also adopt legal and other statutory measures to guarantee security of tenure over all forms of housing and land. Legal security of tenure is the strongest and most effective protection against forced evictions.⁴⁰

States should develop progressive legislation that recognizes communities' rights over their natural resources and collective systems of management, ownership and control of natural resources, including their community-based property rights. This also refers to customary law that recognizes women's separate rights to land, resources, and other property. Even where traditional property rights and tenure systems are not codified, national law should recognize their legal pluralism and ensure that the human rights principles of non-discrimination, equality, and participation underlie all law and policies, especially while ensuring the implementation of the *Guiding Principles*.

The Philippines' Indigenous Peoples' Rights Act of 1997 guarantees indigenous peoples rights over land and other natural resources but its implementation has been fraught with difficulty, from the lack of allocation of sufficient funds to petitions challenging the constitutionality of the Act. The Scheduled Tribes and other Traditional Forest Dwellers' (Recognition of Forest Rights) Act of 2006 in India is a positive step forward towards recognizing the rights of natural resource dependent communities, provided it is implemented effectively.

A comprehensive national resettlement and rehabilitation policy in consonance with international human rights standards should be promulgated and implemented. China's 1993 resettlement rules and regulations for building the Three Gorges Project on the Yangtze River were revised in 2001, but still failed to restore the lives and livelihoods of the millions displaced by the project. They did not recognize the rights of IDPs. While they included provisions for penalties for corruptly using resettlement funds, these have not been implemented.⁴¹ India's 2007 National Rehabilitation and Resettlement

⁴⁰ See Basic Principles and Guidelines, *supra* note 14, ¶¶ 22, 25, 28.

⁴¹ Wei Yi, *Comments on the Revised Resettlement Rules and Regulations of the Three Gorges Dam* (Mar. 29, 2001) available at <http://www.threegorgesprobe.org/tgp/index.cfm?DSP=content&ContentID=1914>.

Policy, while alleging to minimize displacement, fails to protect the human rights to participation, prior informed consent, gender equality, livelihood, adequate housing, land, and rehabilitation.

Specific laws should be in place to deal with concerns of special groups of IDPs, including women, children, indigenous peoples, persons living with HIV/AIDS and mental illness, sexual minorities, migrants, older persons, and persons with disabilities. National laws for these populations should be framed in accordance with international legal standards and in conjunction with policies on internal displacement to ensure that they do not adversely suffer the impacts of forced eviction. Zambia has taken an important step by incorporating displaced persons into the country's National HIV/AIDS Institutional Framework.

Cambodia's 2001 Land Law recognizes the collective ownership of indigenous peoples of their traditional lands (for both residential and agricultural purposes). In principle, a provision like this should protect indigenous people against displacement.

The state should introduce and implement laws to check against the privatization of housing and essential services such as water. Such provisions would help check against market-based evictions.

States should periodically collect disaggregated data on key indicators related to monitoring the progressive realization of the right to adequate housing.⁴²

Programs for public housing and housing subsidies should be in place in the country. A proportion of the state budget must be reserved for social housing for low-income groups, and this should be subject to progressive increases over the years to meet growing costs.

⁴² See Annex II on 'indicators' to the report of the former Special Rapporteur on Adequate Housing, A/HRC/4/18, Feb. 5, 2007, available at <http://www.ohchr.org/english/bodies/hrcouncil/docs/4session/A-HRC-4-18.doc>.

Informal settlements and slums should be regularized, legalized, and upgraded *in situ*, where possible, to ensure they meet the requirements for adequate housing as specified earlier in this paper. All measures relating to upgrades should be undertaken in accordance with human rights standards and must ensure that the residents are better off than they were before and that their human rights, including to the rights to employment, food, water, health, and security of the home and person are not violated.

The *Guiding Principles* should be further disseminated and discussed. They should also be translated into more local languages. The *Guiding Principles* and *Basic Principles and Guidelines* should be incorporated into comprehensive national laws on displacement and rehabilitation. The following human rights in the context of IDPs, in particular, should be recognized and upheld in national law: the right to choice of residence, liberty of movement, return, recognition before law, protection from discriminatory treatment, and return of property and compensation.

Special measures to check the growth of the land mafia and to control excessive speculation in land and real estate need to be enforced.⁴³ This includes the development of legal and regulatory frameworks that place ceilings on both rural and urban land ownership.

Agrarian and land reform should be given priority in order to promote rural development and equality, and to check against the forced migration of people from rural to urban areas in the absence of state support for agriculture and the resulting collapse of agrarian economies. Venezuela's November 2001 Law on Land and Agricultural Development introduced a cap on the size of landholdings, taxes land that is not in production, and provides for the distribution of land to landless peasants. Article 184 of the Brazilian Constitution states that land that is not meeting its social function can be redistributed for purposes of land reform.

Decentralized models of decision-making should be promoted to strengthen local governance to ensure that decisions are not made by those who are

⁴³ See Basic Principles and Guidelines, *supra* note 14, ¶ 30.

disconnected from the needs and problems of the affected communities. This is critical to check against displacement-inducing projects.

Regular coordination with civil society and social movements should be undertaken to ensure that the needs of local communities are given cognizance and are incorporated into national policies and programs. Efforts must be made to ensure that democratic channels are available to people at all stages and levels of governance.

The most important principle for states is that displacement must not render anyone worse off than before. There must ultimately be an overall improvement in the condition of all displaced people.

Procedural Elements

At a minimum, it is necessary to enact provisions on the procedures for eviction or relocation and the available remedies, including resettlement and compensation. The right of affected people to administrative or judicial review of decisions to evict or relocate them must also be safeguarded, and such procedures must be made accessible, in particular for women and the poor.

Alternative options, which would not require displacement, must be explored and exhausted. This includes exploring other locations, alternative technology, and micro-projects that could deliver the same benefits without the grandiose scale of costs and harms.⁴⁴ Strategies to minimize displacement should be developed in close consultation with the community and other government and non-government agencies.

A senior government delegation should visit the area to be affected by the proposed project and carry out consultations with technical experts to understand the viability of the project and its potential harm, after which a feasibility study and impact assessment should be commissioned. An independent body should verify the feasibility study and the findings should be made public.

⁴⁴ *Id.* ¶ 38; CESCR General Comment 7, *supra* note 13, ¶ 13.

The specific decision authorizing the displacement should be taken by a government authority empowered by law to order such measures. The decision must be in keeping with national and international legal obligations and should not violate the national constitution or any other human rights law.

The affected community must be informed of the proposed decision of the project at least one year in advance of commencement of the project. Information must be provided in the local language, both in writing and orally, through public meetings and community consultations. Separate consultations should be held with women of the community to ensure that their views and concerns are taken into account. The project notice should contain a detailed justification for the decision to relocate the community. All final decisions should be subject to administrative and judicial review.

The anticipated costs of the project, the scale, the total area it would cover, the timeline of completion, as well as the potential hazards and benefits, must be communicated directly to the community. All members of the community must be allowed to ask questions and express doubts regarding the feasibility, logistics, and other details of the project.⁴⁵

Dates for at least three public hearings should be fixed and communicated to the community in an appropriate manner and in the local language, at least two weeks before each hearing date, so that as many people as possible can be present to discuss the alternatives and options to the project.

Comprehensive and holistic impact assessments of the proposed displacement-inducing project must be conducted. These should take account of potential social, environmental, and economic impacts of the project. An evictions impact assessment⁴⁶ framework should be developed in order to conduct exhaustive studies and quantify both the material and non-material costs of the

⁴⁵ Basic Principles and Guidelines, *supra* note 14, ¶ 37; CESCR General Comment 7, *supra* note 13, ¶ 15.

⁴⁶ See Basic Principles and Guidelines, *supra* note 14, ¶¶ 32, 33.

potential displacement.⁴⁷ Assessments must be carried out irrespective of the number of families to be affected, and should look at the differential impacts of the eviction on various groups and ensure the collection of disaggregated data. Only when the benefits of the project significantly outweigh all the costs—social, environmental, technological, and economic, and is approved by the community—should the project gain preliminary approval.

The eviction impact assessment must be community-based and should include, among others, the following indicators:

- cost of house at present market value (that would be lost);
- cost of land at present market value (that would be lost);
- cost of other resources such as agricultural crops/fields/trees (that would be lost), as well as loss of income generated from them;
- cost of material possessions (that would be lost);
- difference between current monthly earnings at present site and earnings estimated at the resettlement site;
- difference between current monthly transportation costs (to work place and to schools) at present site and those estimated from the resettlement site;
- change in access to, and cost of, basic services, food, healthcare, and education;
- non-material costs, including loss of education, psychological harm, breakdown of community and social networks.

Data should be collected on the number of people and families likely to be affected. Such data should be disaggregated by age, gender, and other key indicators to ensure that the specific needs of particular groups of IDPs, such as single women, unaccompanied minors, persons with disabilities, older persons, ethnic minorities and indigenous peoples, are adequately addressed.

⁴⁷ See the “Loss Matrix” developed by the Housing and Land Rights Network, available at <http://www.hlrn.org>, to quantify both material and non-material losses during an eviction.

Land of commensurate or superior quality and size should be selected and acquired by the state at least six months before the physical displacement of the community takes place. Project-affected people must be given the opportunity to assess the land and be given the choice to reject it. A very important element of resettlement is the principle of “land for land.” In the case of agricultural communities, the alternative land provided must be cultivable and irrigated.⁴⁸ It must also be located close to the housing site, preferably not more than 500 meters away from the alternative housing being provided.

Resettlement plans must be discussed with the affected persons as early as possible before the displacement takes place. Full information regarding the resettlement site, its exact location, its layout, proximity to the original living site and work place, and accessibility of services must be provided to the community to be displaced.

All housing plans, including the choice of construction material, size of alternative housing, design and floor plan must be developed in close consultation with the affected community, at least six months before the proposed displacement. Communities should have the right to modify or refuse government plans. Provisions for flexibility within plans must be permitted to accommodate individual preferences, cultural attributes, and family size.

Efforts must be made to ensure that women are included in all consultations and stages of decision-making. In addition, efforts should be made to ensure that their specific inputs and needs are incorporated into the framing of resettlement plans and housing designs.

⁴⁸ Though the Narmada Water Disputes Tribunal Award and the Supreme Court of India’s judgments of 2000 and 2005 regarding the Sardar Sarovar Project on the Narmada River in India clearly call for the allocation of alternative land at least one year prior to submergence, the state governments have failed to provide this for the affected families. Instead, cash compensation in direct violation of the orders is being meted out in lieu of land. Where land has been provided, it has largely been barren and non-cultivable and without any facilities for irrigation.

Communities must be able to visit the proposed resettlement site and assess the living conditions for themselves and propose recommendations regarding its development. A “rehabilitation committee” representing all sections of the community should be formed to follow the development of the resettlement site. The committee should regularly engage with the government department responsible for resettlement and rehabilitation and act as the link between the government and the community.

The resettlement site must, at a minimum, have all the facilities of the original site and should offer improved services to the relocated community. It should be located close to a market, must have a layout that is conducive to social and community interaction, must provide for sufficient space between dwellings, respect cultural and religious norms, and should not impose any negative impacts to host communities.

The resettlement site must be adequately developed and ready for habitation at least one month before the displacement takes place. It must contain the following: (a) adequate, affordable, and culturally appropriate permanent housing for each family, including for each adult daughter and son; (b) services, materials, facilities and infrastructure such as potable drinking water, energy for cooking, electricity, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and access to natural and common resources, where appropriate; (c) habitable housing providing inhabitants with adequate space, protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors, and ensuring physical safety of occupants; (d) accessibility for disadvantaged groups, including persons living with disabilities and older persons; (e) access to health-care services, schools, childcare centers, community spaces, markets, and other social facilities, whether in urban or rural areas; (f) sufficient public transport facilities; and (g) proximity to original livelihood sources.⁴⁹

The alternative house must provide for privacy for women and adolescent girls. There should be secure doors, and windows should be built to provide

⁴⁹ See Basic Principles and Guidelines, *supra* note 14, ¶ 55.

adequate ventilation and lighting. Additionally, the resettlement site, including alternative housing, must be culturally appropriate.

Persons likely to be affected by the project must be given a written guarantee that they will gain secure tenure over housing and land at the new site. Legal titles to the alternative house/land must be handed over to the communities before the physical displacement takes place. Titles to housing and land must be issued jointly in the names of both husband and wife for married couples, and individually for single adult women and men.

All existing land records, title deeds, and collective ownership agreements must be documented with the local officials well before relocation to prevent any land and housing related conflicts in the resettlement phase. This would also check against potential disputes arising from the destruction or loss of any documents such as title deeds during eviction.

An inter-ministerial body should be in place to monitor and oversee all issues related to the proposed relocation/eviction. The body should meet regularly and have a permanent office where interested parties may approach them. At the municipal level, a venue should be provided where affected people could file complaints.

During Displacement

Substantive Elements

As an overarching principle, displacement must not be carried out in a manner that violates the human rights to life, liberty, and security of those affected. Moreover, governments have a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on, and attachment to, their lands.

The state must ensure that certain fundamental human rights are respected and guaranteed. These include the right to personal security and safety; right to protection from arbitrary displacement, violence, and injury; and protection of possessions, including personal belongings such as cooking utensils and clothing. Special efforts must be made to ensure that the rights and interests of

special groups such as women, children, older persons, persons with disabilities, persons living with HIV/AIDS and mental illness, indigenous peoples, sexual minorities, and other marginalized and discriminated groups are protected and guaranteed.

Procedural Elements

No displacement is permissible without a reasonable prior notice, which is communicated to all members of the community orally and in writing at least three months in advance of the eviction. Evictions cannot be carried out randomly. Notice of the proposed project must, however, be communicated to the community preferably a year in advance in order to enable their adequate participation in the development of the resettlement site.

Government officials, including women, must be present at the site during the eviction. Paragraph 45 of *Basic Principles and Guidelines* provides that the government officials, their representatives, and persons implementing the eviction must identify themselves to the persons being evicted and present formal authorization for the eviction action.

Neutral observers and representatives of human rights organizations should be present to monitor compliance with international and national human rights standards. At least one lawyer representing the interests of the community should be present to ensure compliance with national and international law.

Evictions must not be carried out in a manner that violates the dignity and human rights to life and security of those affected. States must also take steps to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected. Evictions must not take place in inclement weather, at night, during festivals or religious holidays, during working hours, prior to elections, or during or just prior to school examinations.⁵⁰

⁵⁰ *Id.* ¶ 49.

There should be no use of violence or force by authorities against the communities to be displaced. Any legal use of force should respect principles of necessity and proportionality as well as the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and should be used only to safeguard the security of the community members.⁵¹

People should be given adequate time to voluntarily collect their belongings and possessions. As indicated in the *Guiding Principles*, there can be no arbitrary damage to property or possessions. Property and possessions left behind involuntarily should be protected against destruction, arbitrary and illegal appropriation, occupation or use. Nobody should be forced to destroy her/his own dwelling or property.

Special observers, including women, should be assigned the responsibility of ensuring that there is no damage to property and personal possessions and in the eventuality that there is, they should be entrusted with the task of immediately documenting the losses and damage incurred. This would include documenting any loss of material goods, loss of housing, injury/loss of limbs, and damage to any other movable or immovable property. The special observers must also check that there is no incident of enticing fear or intimidation on the part of external actors responsible for carrying out the eviction. Guiding Principle 12 provides that IDPs shall be protected from discriminatory arrest and detention as a result of their displacement.

The actual cost of transporting a family, its domestic animals, moveable properties, moveable building materials and other belongings from the place of displacement to the place of resettlement shall be entirely borne by the project implementing authority. The cultural heritage of communities as well as other items of religious, archaeological, and historical value must not be destroyed during the eviction.

⁵¹ *Id.* ¶¶ 47, 50.

In the Context of Durable Solutions

Substantive Elements

The state must ensure that the following human rights of all those who have been displaced are protected and guaranteed:

- right to freedom of movement and settlement/ residence;
- right to adequate, timely, gender-sensitive and just rehabilitation;
- right to work and livelihood (ensuring relocation in an area close to original sources of livelihood and the provision of land of commensurate or improved quality and size, including for agricultural communities, cultivable and irrigable land);
- right to adequate housing with full provision of essential services including potable water, food, education, healthcare, transportation;
- rights of children (ensuring that education is not lost and provision of childcare facilities—childcare centers, crèches, schools, and safe play spaces).
- right to effective and timely legal remedy; and
- right to restitution and return, where applicable, and if possible.

The population subject to resettlement should, at a minimum, be able to maintain its current standard of living and should have the opportunity to achieve a higher standard of living after resettlement has taken place. Resettlement should achieve the social and economic re-establishment of those dislocated, on a viable productive basis, through the creation of project-funded new industrial, service sector and agricultural employment and activities. Measures need to be taken to ensure that the resettled community does not suffer from any social, political, or cultural marginalization.

Procedural Elements

In the immediate aftermath of an eviction, all affected persons must have access to timely remedy, including legal counsel. All evicted persons must be immediately taken to the completely developed and approved resettlement

site. Adequate transportation should be provided to all affected persons, and special care must be taken to ensure that the needs of children, women, older persons, persons with disabilities, and those living with mental illness and HIV/AIDS are met.

No person should be rendered homeless,⁵² and no woman, man, child, youth or older person should be subjected to spend even one night without adequate shelter. In no event must a displaced person be forced to spend even one night on the street in the absence of alternative housing.

States should ensure that members of the same extended family or community are not separated as a result of evictions. Entire communities or villages should be resettled together.

In the event that communities are first relocated to a transit camp/intermediary housing site, Guiding Principle 12 regarding camps should apply. All temporary housing, including in camps, must be child-friendly with spaces for children to study and play safely. It should also be accessible to older persons and persons with disabilities. No one should have to live in a transit camp for more than two weeks. Transit camps must be constructed in culturally appropriate and gender sensitive ways to ensure privacy and safety of women.

At a minimum, regardless of the circumstances and without discrimination, competent authorities must ensure that evicted persons or groups have immediate and secure access to: (a) essential food, potable water and sanitation; (b) appropriate clothing; (c) essential medical services and healthcare facilities; (d) livelihood sources; (e) fodder for livestock and access to common property resources previously depended upon; and (f) education for children and childcare facilities.

Immediate and free access to psychologists and counselors must be ensured, especially for children and others who suffer psychological trauma during the eviction and resettlement process. The resettlement site must have facilities for

⁵² CESCR General Comment 7, *supra* note 13, ¶ 16; Basic Principles and Guidelines, *supra* note 14, ¶ 43.

a public health centre where regular and adequate counseling facilities are provided.

Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual and other abuses. Principle 19 provides that special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Of specific importance is paragraph 56(d) of the *Basic Principles and Guidelines*, which specifically states that “[n]o affected persons, groups or communities, shall suffer detriment as far as their human rights are concerned nor shall their right to the continuous improvement of living conditions be subject to infringement. This applies equally to host communities at resettlement sites, and affected persons, groups and communities subjected to forced eviction.”

Living conditions at the resettlement site must ensure the protection of the human rights of all religious, ethnic, linguistic and cultural groups. These groups should not face any threats from host communities and should be able to freely carry on their cultural activities in the new site without any intimidation or discrimination.

The time and financial cost required for travel to and from the place of work or to access essential services should not place excessive demands on household budgets.

Relocation sites must not be situated on polluted land or in immediate proximity to polluting or other hazardous sources that threaten the right to the highest attainable standards of mental and physical health of the inhabitants. The resettlement site must be completely ready at least one month before the eviction takes place, and must fulfill the criteria of adequacy mentioned in the previous section. All displaced persons have a right to refuse to stay in the resettlement site if it does not meet the conditions of adequacy.

Alternative housing developed in close consultation with the community and that meets the criteria of adequacy should be handed over to the community well before the day of eviction. Residents should be given legal security of tenure over the new housing. Titles should be given jointly in the name of both man and woman for couples, and individually for single women and men. Where communities held collective rights over land and other natural resources, these rights should be restored.

House plots and dwelling allocated at new rural and urban sites should ensure improved conditions and take into account predictable growth of affected households. Bathrooms must be adjacent to the houses, if they are not attached, and must have adequate sanitation facilities. Adequate and sufficient street lighting must be in place at the resettlement site.

A thorough and comprehensive assessment of losses suffered as a result of the eviction should be carried out and documented. Disaggregated data should be collected to address the differential impacts on various population groups. Post-eviction impact assessments should look at social, environmental, and economic impacts of the project. The quantification of the effects of the violation would strengthen the argument for remedy and, consequently, help mobilize support to end, redress, and obtain restitution for the violations. The material and calculable costs resulting from the violation are determined for each dwelling unit (household) affected, and then totaled. Alternatively, for estimating values of multiple units affected, a representative sample should be obtained to determine the average values that then would be multiplied by actual numbers of units affected. Both short-term and long-term values should be assessed. In the case of loss of education or bodily injury from the violation, the methods applied in traffic law, insurance law, or divorce settlements in various countries could serve as a rational legal basis for determining compensation and restitution values.

Trained surveyors should assist the community in carrying out a loss assessment. This should cover the following elements:

- Current market value of house lost;
- Current market value of plot/land lost;

- Inventory of items lost calculated at replacement value (the cost of repurchasing/ replacing the items);
- Cost of relocation—of moving items, livestock, and people;
- Increased cost of transportation from new site to workplace, schools;
- Loss of livelihood earnings due to relocation for both women and men (lost monthly earnings);
- Increased cost of access to basic services (in case water was previously free and has to be paid for at the resettlement site) and natural resources, increase in cost of food at resettlement site;
- Increase in cost of access to healthcare and costs of treatment being undergone during eviction/relocation;
- Physical injury incurred during the eviction/relocation and cost of treating the same;
- Loss of vital documentation;
- Educational costs—in case schools are no longer accessible, or children need to enroll in another school where the fees are higher;
- Loss of access to crèches and other childcare facilities;
- The value of livestock lost and the treatment of livestock injured by the event;
- The value of space for livestock and other supportive livelihood goods such as machinery, tools, implements, and space for continuing livelihoods for self-employed persons, especially women;
- Monetary value of loss of women’s time—extra time spent in accessing resources for daily life, for instance, increased distance to walk in order to collect water and other required resources such as fodder, livestock. Loss of access to crèches and social networks also often impacts women’s ability to work;
- Value of loss of cooking facilities;
- Value of loss of sanitation facilities;
- The value of lost agricultural earnings from crops or returns from fruit-bearing or other trees or vegetation;

- Loss of timber and fuel wood and access to other non-timber forest products;
- Ecological damages;
- Cost of alternative housing. This housing value must be calculated on the basis of current market rental rates;
- The time and monetary costs incurred by both bureaucratic processes and legal advice and defense work should be quantified;
- Other incidental costs incurred; and
- Non-material costs such as psychological trauma, loss of community, social disintegration, political marginalization.

All affected persons must have the right to remedy, including a fair hearing, access to legal counsel, legal aid, resettlement, rehabilitation, and compensation.⁵³ The rights accorded to the affected persons should comply with the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁵⁴

Compensation must be immediately paid to all affected persons for losses incurred by them as calculated in the eviction impact assessment. The state is obliged to ensure that no individual is worse off than before the eviction. Cash compensation should under no circumstances replace real compensation in the form of land and common property resources.⁵⁵ Non-material losses including psychological harm, disintegration of the family, and loss of community (including support systems, child-care arrangements) must also be calculated and added to the final total costs. Women and men must be co-beneficiaries of

⁵³ See Basic Principles and Guidelines, *supra* note 14, ¶¶ 64-67.

⁵⁴ *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Commission on Human Rights Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005), adopted and proclaimed by General Assembly resolution 60/147 of Dec. 16, 2005.

⁵⁵ Basic Principles and Guidelines, *supra* note 14, ¶ 60.

all compensation packages. Single women and widows should be entitled to their own compensation. Where bank accounts are set up to pay cash compensation, they should be created in the names of both men and women for married couples, and individually for single men and women.

All resettlement must occur in a just, efficient, gender-sensitive, and equitable manner and in full accordance with international human rights law. In case of proven violation of human rights during the eviction, the state must take exigent measures to ensure that the perpetrators are brought to justice and the victims have immediate recourse.

A grievance redressal commission should be established at both the national and local levels. It must have regular working hours and consist of a body of experts, including preferably at least one legal expert, a social worker, a civil society representative and a government official, who can provide counseling, advice and assistance to all affected persons who suffer violations of their human rights. At least two members of the commission must be women. The functioning and hours of operation of the commission must be communicated to the affected community. Translation facilities must be provided in case the members do not speak the language of the affected people.

National responsibility requires that governments devote, to the greatest extent possible, resources to address the needs and protect the rights of their internally displaced populations. States should consistently track displacement within their countries. Data should be disaggregated by age, gender, ethnicity, population status, physical conditions, and other relevant categories so that the needs of specific groups of IDPs, in particular vulnerable groups, can be adequately addressed.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

Prior to Displacement

States should entrust an independent national body, such as a National Human Rights Institution, to monitor and investigate forced evictions and state compliance with the *Guiding Principles* and other relevant elements of international human rights law. The Government of Burundi, for example,

with the involvement of national and international NGOs, launched the Permanent Framework for Consultation on the Protection of IDPs in February 2001. This provided a much-needed permanent institutional forum for key issues related to displacement while strengthening the applicability of the *Guiding Principles*.

A housing rights taskforce could be established consisting of government and non-government representatives. Such a taskforce was set up in Cambodia in the wake of widespread and violent evictions in order to prevent housing rights violations and to address emergency situations, particularly those of forced evictions with violence. The long-term goal of the taskforce is to develop a comprehensive strategy on housing rights for the use of practitioners.

Municipal authorities should set up facilities to address complaints related to evictions. An inter-ministerial body should be entrusted with the responsibility to monitor, track, and prevent displacement.

There should be close collaboration and consultation with the National Human Rights Institution and other local government bodies responsible for the eviction to ensure that policies and practices are developed in accordance with international human rights standards. National Human Rights Institutions should regularly conduct human rights training programs for judges, lawyers, police personnel and staff of local governing bodies. This could help prevent human rights violations within the context of evictions. Trainings should also be conducted for those who will be evicted and those already displaced on their human rights and constitutional guarantees.

The judiciary should ensure that its judgments are consistent with international law obligations and constitutional provisions. It should ensure that forced evictions and resulting human rights violations are not carried out as a result of its orders. The human right to adequate housing was interpreted as an extension of the right to life by the Indian Supreme Court, though this trend of progressive judgments has been reversed over the last decade with court orders directly resulting in evictions.

The Johannesburg High Court passed a groundbreaking judgment on March 3, 2006, that evictions of occupants of “bad buildings” by the Johannesburg Metropolitan Council were illegal, unless the authorities provided alternative accommodation. It further stated that the City of Johannesburg’s housing policy failed to comply with the Constitution of South Africa as it does not cater to the needs of the inner city poor.

During Displacement

Apex human rights institutions should deploy at least one of their members, preferably a woman, to be present during the relocation to prevent any human rights violations. There should be coordination between various government departments responsible for the eviction to ensure that the relevant human and civil rights institutions are informed about the time and location of the eviction. Such institutions should communicate the human rights standards to be followed by the government agency responsible for the displacement and ensure they are followed during the displacement process.

In the Context of Developing Durable Solutions

The National Human Rights Institution or other human rights institution should, in the event of human rights violations, conduct an investigative fact-finding mission after the eviction. The fact-finding team must have equal representation of women. The report of the findings should be made public within a month of the fact-finding. Recommendations should be made to ensure that the perpetrators are brought to justice and that the victims are fairly compensated.

A land management board should be set up to look into any land, housing, or property related conflicts or disputes arising in the post-displacement context. This would also deal with issues arising from loss of land records and titles. Land courts could be organized to ensure smooth and democratic resolution of land and property-related disputes.

States should actively monitor and carry out quantitative and qualitative evaluations to determine the number of evictions, the number of people affected, the number of IDPs, as well as the long-term consequences of

evictions that occur within their jurisdiction and territory of effective control. Monitoring reports and findings should be made available to the public and concerned international parties in order to promote the development of positive practices and problem-solving experiences based on lessons learned. These findings should feed into national policies that prevent displacement.

INTERNATIONAL ROLE

The principle of international cooperation clearly lays down the responsibility of the international community in assisting national governments to implement human rights standards and meet their legal commitments. With regard to displacement and resettlement, the international community can play an important role in helping states to amend their policies and mitigate the impacts and violations against their people. The UN and other humanitarian organizations need to work more closely and collaborate better with one another to address the problem of internal displacement.

International Donors and Financial Institutions

International donors and financial institutions, while often exacerbating displacement, are also responsible for the failure to tackle the issue of internal displacement adequately. They are obliged to collaborate with other international organizations and exert pressure on national governments to minimize displacement and uphold the rights of IDPs. Their policies should not be internally inconsistent and neither should they violate international human rights standards, as is often the case. Projects funded by international financial institutions (IFIs) like the World Bank, Asian Development Bank, Inter-American Development Bank and others, are often responsible for large-scale displacement. IFIs and donor agencies should also be mandated to carry out comprehensive community-based eviction impact assessments of all projects being funded by them—prior to their implementation—in order to minimize displacement. Their internal policies on resettlement must incorporate international human rights standards, be implemented effectively, and be reviewed periodically. For example, the Organization for Economic Cooperation and Development's (OECD's) Development Assistance Committee (DAC) has never evaluated the impact of its Guidelines for Aid

Agencies on Involuntary Displacement and Resettlement in Development Projects adopted by its members in 1992.

Regional Organizations

Regional institutions should also be strengthened. The Inter-American Commission on Human Rights (IACHR) had a special rapporteur on IDPs from 1996 to 2004, but the mandate has not been renewed since. Outside the Organization of American States (OAS) structure, but in collaboration with Commission members, a unique hemispheric initiative was created in 1992 by the Inter-American Institute of Human Rights to focus on the problem of internal displacement. It is called the Permanent Consultation on Internal Displacement in the Americas, or CPDIA in its Spanish language initials. The *Guiding Principles* were included in the Compendium of the Organization for African Unity (OAU), now reconstituted as the African Union (AU), Instruments and Texts on Refugees, Returnees and Displaced Persons in Africa, published in 2000.

The African Commission on Human and Peoples' Rights has a rapporteur on refugees, internally displaced persons, and migrants in Africa who, however, focuses only on conflict-induced displacement.

UN Agencies and Procedures

The Representative of the UN Secretary General on the human rights of internally displaced persons has a very specific mandate on addressing and protecting the rights of IDPs. Civil society actors across the world can approach the representative for concerns and violations of the rights of IDPs within their countries.

In the case of development-related displacement, depending on the human rights violated and the issues involved, various special procedures can be invoked. The special rapporteurs on the rights of indigenous peoples, adequate housing, health, food, and violence against women, among others, could provide assistance and guidance on issues of IDPs, which concern their mandates.

The Office for the Coordination of Humanitarian Affairs (OCHA) was established to manage complex emergencies (through the Consolidated Appeals Process), natural disasters, and other humanitarian crises. General Assembly Resolution 46/182 established three tools to speed up the response of the international community to emergencies. The Inter-Agency Standing Committee (IASC) formulates and coordinates policy, the Central Emergency Revolving Fund (CERF) is a quick source of emergency funding, and the Consolidated Inter-Agency Appeals Process (CAP) assesses the needs of a critical situation and prepares a comprehensive inter-agency response strategy.

The principal function of the United Nations Disaster Reduction Organization (UNDRO) is that of catalyst and coordinator of donors of aid and services. Its mandate also includes assisting governments in preventing disasters or mitigating their effects by contingency planning, in association with similarly concerned voluntary organizations. It promotes the study, prevention, control, and prediction of natural disasters, and gathers and disseminates information relevant to disaster relief. These mechanisms, however, are hardly relevant for development-induced displacement.

SUMMARY OF RECOMMENDATIONS

1. The people who directly depend on natural resources for their subsistence should have the authority to be involved in decentralized decision-making regarding management and control of such resources.
2. “Public interest” should be well defined in national law. Any project that is approved purportedly for the public interest must meet certain specified, predetermined criteria to ensure that it truly is in the interests of the majority of the people.
3. “Development” needs to be defined and evaluated with certain indicators to assess whether a project is in reality a “development” project, i.e., does it bring about an overall improvement in well-being for the people or does it result in more harm than good? Development also needs to be understood as a process and not merely an outcome.

4. Sustainable alternatives to the displacement inducing project must be explored and adopted where possible. Decision-making processes should address the question of choice of appropriate technology and ideology.

5. Where displacement is absolutely inevitable, utmost priority must be given to ensuring that just and adequate rehabilitation is provided immediately and is based on the principles of community participation, adequate consultation, prior informed consent, substantive equality, non-discrimination, indivisibility of human rights, progressive realization and non-retrogression. Land must be compensated by land of commensurate or better quality. Livelihoods and land rights must be restored where violated. The rights of special groups such as women, children, indigenous peoples, older persons, persons with disabilities, persons living with HIV/AIDS and mental illness, sexual minorities, migrants, and historically discriminated communities must be taken into account and upheld.

5. Comprehensive gender-sensitive eviction impact assessments must be used to determine the just and accurate compensation to be paid, and this must be paid to the affected persons at the earliest through appropriate means that they are able to access. The principle of “justice delayed is justice denied” holds true in all instances of displacement and eviction. Rehabilitation delayed is rehabilitation denied.

6. It is imperative that certain internationally accepted minimum benchmarks are met in order to claim that resettlement and rehabilitation of a displaced community has taken place. These might include:

- Provision of adequate housing;⁵⁶

⁵⁶ Adequacy should be based on the criteria elaborated in General Comment 4 of the Committee on Economic, Social and Cultural Rights as well as other components identified by housing rights groups and the UN Special Rapporteur on adequate housing. These additional useful elements include physical security; participation and information; access to land, water and other natural resources; freedom from dispossession, damage and destruction; resettlement, restitution, compensation, non-refoulement and return; access to remedies; education and empowerment; and freedom from violence against women.

- Provision of cultivable and irrigable land;
- Proximity to natural resources, livelihood sources, workplaces, schools, food sources, hospitals, markets, and police stations;
- Access to healthcare;
- Safe drinking water and adequate access to water for daily needs;
- Access to other basic services, including sanitation, electricity, food and education;
- Provision of public transport and proper roads;
- Child safe spaces, including child-care centers, crèches, and play areas;
- Spaces for community activity, such as community centers;
- Safety of the site—it must not be located on polluted or environmentally hazardous or low-lying land;
- Maintenance of regular income—there should be no loss of income/employment at the new site;
- Regular access to food—there should be no forced change in dietary habits and nutritional intake;
- Overall improvement in lifestyle—no person in the community should be worse off than before the eviction;
- Safety and security for women—there should be no threat of violence or abuse;
- Adequate space and opportunities for women to carry on livelihood activities.

7. Any government guidelines or manuals on addressing development-induced displacement should include the inputs of IDPs and potential IDPs. The final outcome of such a consultation must be vetted among affected communities. The interests of these communities must be factored into the calculus of “national interest” and “public interest.”

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