

# Manual on Internal Displacement

UNITED NATIONS  
HIGH COMMISSIONER FOR  
REFUGEES (UNHCR)  
IN MEXICO

DELEGATION FOR MEXICO  
AND CENTRAL AMERICA OF THE  
INTERNATIONAL COMMITTEE  
OF THE RED CROSS (ICRC)  
COORDINATORS



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## Foreword

During the last ten years, the Law in our country has experienced a true revolution. The 2011 constitutional reform of human rights, interpreted by the Supreme Court of Justice of the Nation, has led to a new paradigm from which the language of the law has been transformed. In this decade, the parameter of constitutional regularity has expanded, novel interpretative tools were created, the binding nature of the decisions made by the Inter-American Court of Human Rights was established, and the obligation of federal judges to carry out unofficial procedures verifying the conventionality of all regulations of which they are informed was affirmed, among many other accomplishments.

Despite these drastic changes in our system, the jurisdictional staff education and training model and supporting materials remained static and did not evolve with them. Therefore, from the beginning of the exercise of my duties as President of the Supreme Court of Justice of the Nation and the Council of the Federal Judiciary, I advocated for the need to consolidate a new profile of judges, based on the training of their own skills and abilities required by the new constitutional paradigm.

In this context, and considering the training needs of our justice operators, the Directorate-General for Human Rights of the National Supreme Court and the Federal Judicial Training Institute designed the editorial project *Manuales de Actuación* (Handbooks of Proceedings), specially addressed to the jurisdictional staff. The Handbooks are meant to be true educational tools that, on the one

hand, facilitate the resolution of cases considering the most updated standards of human rights, and, on the other hand, contribute to specialised training in essential issues for the administration of justice.

As such, the Handbooks address issues that have not been fully explored in the training of judges, despite being transcendental for their work. Some Handbooks develop cross-sectional knowledge to the jurisdictional function, regardless of the subject. Others seek to delve into specific issues related to different subjects, such as criminal, civil, and employment law.

Each Handbook is academically coordinated by a single person who is an expert on the subject. Furthermore, chapters are written by national and international people who are carefully chosen based on their training and experience. The guiding principle has always been to strengthen the administration of justice with pedagogical, accessible, and clear tools, aligned with our vision of a new judicial training.

In this context, I am pleased to present the Manual on Internal Displacement, which is undoubtedly relevant in the context of the significant increase in this phenomenon in recent years. Internal displacements have different impacts on affected people and violate their rights. It is therefore essential to provide an instrument like this one to judges handling cases of displaced persons to ensure their access to justice.

Internal displacement is a complex issue that poses significant challenges to institutions. Although some measures aimed at addressing and dealing with this phenomenon have been taken at the national level, judges play a key role in protecting the rights of displaced people.

Assuming the commitment to advance the human rights agenda for every person, and considering that there is an urgent need for instruments and mechanisms in Mexico to guarantee the protection of the rights of both internally displaced persons and communities at risk of displacement, we present this Manual as an essential tool to accomplish this goal.

Using this Manual, judges will acquire knowledge that allows them to take all the necessary measures to protect the rights of internally displaced persons, including those of a positive nature, as well as to identify, prevent and remove all obstacles and conditions that limit access to justice, in order to guarantee the full exercise of their rights from the moment the displacement takes place until a lasting solution is achieved.

With a clear and educational structure, the text makes theoretical and academic contributions, presenting an analysis of case law criteria that have defined and established standards on internal displacement, in order to provide justice operators in our country with a theoretical and practical view to identify good practices, the specific needs of internally displaced persons and applicable measures in the analysis of internal displacement cases.

Through the nine chapters that make up this publication, the criteria, standards, and elements that judges need to consider in cases involving displaced persons in each of the phases of internal displacement—prevention, assistance and protection, durable solutions, and comprehensive damage repair—are presented.

To this end, the authors address some key points throughout this Manual: firstly, the bases for the protection and rights of displaced persons are addressed; besides, the concept of internal displacement, its characteristics and possible causes are outlined, raising awareness of the situation of vulnerability of internal displacement victims. Furthermore, the rights of internally displaced persons are described, and some guidelines for judges to ensure and protect these rights in their jurisdictional work are established. Moreover, the main state obligations regarding internal displacement are established, including prevention measures, humanitarian assistance, protection, and durable solutions.

Another relevant issue addressed in the Handbook is the need for a differentiated approach that allows addressing the specific needs of internally

displaced persons belonging to historically discriminated-against groups. The Handbook also presents common damages caused by displacement, the victims' right to reparation, its scope, and the obstacles they usually face, as well as the types of durable solutions available. Finally, internal displacement as a crime is addressed, both from international and internal perspectives, in order to gain a comprehensive view of the situation.

Therefore, this Manual has been created with the aim of providing tools to help judges in their jurisdictional work on internal displacement, recognising the importance of having a guide for judges to find the most relevant regulations and standards on human rights regarding internal displacement to guarantee the human rights of displaced persons in all judicial decisions. I am convinced it will facilitate the fulfilment of these important tasks.

**Minister Arturo Zaldívar**

*President of the Supreme Court of Justice of the Nation  
and the Council of the Federal Judiciary*

## Introduction

Internal displacement is a phenomenon that affects much of the global population. According to the *Global Trends*<sup>1</sup> report of the United Nations High Commissioner for Refugees (UNHCR), in 2020 there were forty-eight million people internally displaced due to conflict and violence. As for the Internal Displacement Monitoring Centre (IDMC), it reported that, according to data collected and triangulated by the Mexican Commission for the Defence and Promotion of Human Rights (CMDPDH, by its Spanish acronym) and the IDMC itself, it is estimated that by 2021 there were three hundred and seventy-nine thousand internally displaced persons in Mexico due to conflict and violence, as well as twenty-three displaced persons due to disasters.<sup>2</sup>

As can be seen throughout this handbook, internal displacement is a complex phenomenon that can cause multiple impacts and violations to the rights of its victims. When addressing this situation, judges play a key role in ensuring internally displaced persons and communities at risk of displacement access mechanisms that secure the protection and restitution of their rights.

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<sup>1</sup> Available at <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>.

<sup>2</sup> Cf. IDMC, GRID 2022. *Children and youth in internal displacement*. Available at [https://www.internal-displacement.org/sites/default/files/publications/documents/IDMC\\_GRID\\_2022\\_LR.pdf](https://www.internal-displacement.org/sites/default/files/publications/documents/IDMC_GRID_2022_LR.pdf).

In the international sphere, the standards applicable to internal displacement compile several international law regulations that are an important source in contexts where this phenomenon occurs. In this respect, Mexico acknowledges a body of rights made up of rights included in the Political Constitution of the United Mexican States and in the international treaties signed and ratified by the Mexican State.

In 2019, the Mexican Government acknowledged for the first time the occurrence of the phenomenon of forced internal displacement at the national level. Therefore, it adopted measures aimed at addressing it, such as the preparation and publication of studies on this issue, and the presentation of legislative initiatives for the creation of a specialised legal framework on forced internal displacement.<sup>3</sup> Before said acknowledgement, some significant advances were made to address this issue, such as the drafting of state laws in Chiapas, Guerrero and Sinaloa, as well as the Ley General de Víctimas (General Victims' Law). Additionally, arbitrary displacement has been criminalised in the states of Sinaloa, Sonora and Guerrero.

Despite previous efforts, there are only a few cases of internal displacement that have been judicialized in the country to date. This situation is attributable to several factors, including the situation of vulnerability of displaced persons, who may often face barriers to access justice, such as not having the necessary documentation due to the impacts of the problem, lack of legal advice or representation, mistrust in the authorities, lack of access to information about their rights and possibilities of receiving assistance and protection, as well as the lack of appropriate responses to addressing internal displacement, among others. Additionally, regarding cases related to this issue that have been judicialized, this has been observed to be an underexplored topic, and sometimes there is no adequate knowledge to guarantee the rights of internally displaced persons.

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<sup>3</sup> At the time of writing this document, there are bills in the Senate of the Republic, and one of them has already been passed by the Chamber of Deputies.



It is also worth noticing that, although internally displaced persons are national citizens or residents under the protection of their States, experience has shown that the absence of specific legal frameworks reduces the ability to properly address the challenges caused by internal displacement.

Given the situation of extreme vulnerability in which these people might find themselves, it is up to the State and, therefore, the Judicial Branch, to provide the means to ensure their rights. In this sense, the judicial role in the issue of internal displacement in the regional context has been fundamental, as it has allowed the drafting of laws and public policies specialised in this matter in countries such as Colombia<sup>4</sup> and El Salvador<sup>5</sup>, and has established the guidelines to properly address it from a differential approach, responding to the specific situations of vulnerability of different internally displaced persons.

In view of the above, this handbook is meant to be a practical guide for judges in which they can find the highest norms and standards on human rights and international law regarding internal displacement, for example, the Guiding Principles on Internal Displacement, as well as standards on comparative law that can be useful due to the similarity in the contexts and the displacement dynamics that are observed in the country.

Finally, this handbook is expected to be a useful tool for judges and has the following main objectives:

- Raising awareness among judges about the issue and collecting the most important applicable international and Inter-American standards so that they can resort to them when resolving cases related to internally displaced persons and host communities, particularly when it comes to the rights of internally displaced persons and the main

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<sup>4</sup> See Constitutional Court of Colombia, Decision T-025/04 and Decision T-025/04 22. Available (in Spanish) at [https://www.refworld.org/cases,COL\\_CC,54884c2f4.html](https://www.refworld.org/cases,COL_CC,54884c2f4.html).

<sup>5</sup> Supreme Court of Justice of the Republic of El Salvador, Amparo 411-2017. Available (in Spanish) at <https://www.refworld.org/es/docid/5b4f72e54.html>.

obligations regarding prevention measures, humanitarian assistance, protection and durable solutions.

- Bringing judges closer to the experience of comparing the way internal displacement is addressed in similar contexts, such as Colombia, El Salvador and Africa, with a special emphasis on the judicial role in securing the rights of internally displaced persons.
- Helping judges perform their essential function with a basis on a rights approach, as well as differentiated approaches applicable to groups in situations of historical discrimination.
- Guiding judges during the determination of human rights violations of internally displaced persons and their comprehensive reparation, as well as related responsibilities.
- Promoting the compliance with the obligations assumed by the judiciary authorities in terms of human rights in favour of internally displaced persons or persons at risk of internal displacement.

In this sense, we at the UNHCR and the International Committee of the Red Cross (ICRC) acknowledge the laudable efforts of the Supreme Court of Justice of the Nation (SCJN, by its Spanish acronym) to include a handbook on internal displacement, and we believe that this project is fundamental to helping judges perform their duty of monitoring and guaranteeing the rights of people affected by or at risk of internal displacement.

The coordination area wishes to express our most sincere thanks to the authors for their qualified contributions, ensuring that we have a handbook with the most relevant international standards on the matter, as well as their experience necessary for the correct application of said standards to judicial work in Mexico. Finally, we want to thank SCJN for trusting UNHCR and ICRC to carry out the academic coordination of this work, and for their valuable feedback on its content.

**Giovanni Lepri**

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of the United Nations High Commissioner for Refugees (UNHCR)*

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# The bases for protecting internally displaced persons

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The opinions expressed in this article are solely those of the author and do not represent the opinion or stance of the Resident Coordinator Office (RCO) in any way. The author confirms that every effort has been made to comply with her duty of continued discretion with respect to activities performed as an OCR employee.

**The protection fundamentals for internally displaced persons.** I. Introduction: Legal Framework Applicable to Internal Displacement; II. International Rules and Standards; III. Inter-American Rules and Standards; IV. The African Experience - Kampala Convention; V. National Rules and Instruments.

## I. Introduction: Legal Framework Applicable to Internal Displacement

To determine the legal framework applicable to internal displacement, it is important to remember the following: internally displaced persons have not crossed an internationally recognised border and, therefore, it is their own State's primary responsibility to protect and guarantee their human rights. In this light, the whole existing legal framework to protect the rights of individuals under Mexican jurisdiction is also applicable to internally displaced persons, especially in relation to international human rights law.

Therefore, some recognised rights in international human rights law (IHRL) are particularly important to address the situation of internal displacement. Namely, the right to freedom of movement and residence, equality and non-discrimination, the right to life, the right to integrity and the prohibition of torture and other cruel, inhumane and humiliating treatments, the right to physical and mental health, housing, education, employment, association, family unit, best interests of children, participation in political life, among others.

However, in case of armed conflict, the *lex specialis* is the international humanitarian law (IHL). This is the regulatory body that regulates international

armed conflicts (IAC)<sup>1</sup> and non-international armed conflicts (NIAC),<sup>2</sup> and that restricts, for humanitarian reasons, the right of the parties in conflict to freely choose the methods and means used in war. Likewise, it protects individuals and property affected, or that may be affected, by the conflict.<sup>3</sup>

The IHL includes an explicit prohibition of forced displacement; in NIACs, there is a general prohibition,<sup>4</sup> while in IACs, the prohibition of deporting or forcibly transferring people to move is only expected in case of occupied territory.<sup>5</sup> In both cases, the requirement of providing security to civilian population, or for imperative military reasons, is set forth as an exception. When even so, displacement occurs, the IHL requires the protection and assistance of persons.<sup>6</sup>

The significance of both branches of international law has been recognised and taken up in the Guiding Principles on Internal Displacement. They establish that all 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 the displacement of persons.<sup>7</sup>

Despite the fact that internally displaced persons have protections in international law, they often face specific challenges in order to exercise their

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<sup>1</sup> Cf. Common to the Geneva Conventions (GC), Art 2. When two or more States are in armed conflict. Available at “The Geneva Conventions of 1949 and their Additional Protocols | International Committee of the Red Cross” (icrc.org).

<sup>2</sup> Cf. ICRC, Commentary to Common Art. 3 of the GC, pars. 394 and 423. Prolonged armed conflicts between government armed forces and the armed forces of one or more groups, or between those armed groups, arising within the territory of a State. It must reach a minimum level of intensity and the parties involved in the conflict must have a minimum level of organisation. Available (in Spanish) at <https://www.icrc.org/es/publication/convenio-del-convenio-de-ginebra-i-y-articulo-3>.

<sup>3</sup> See Swinarski, *Introducción al Derecho Internacional Humanitario*.

<sup>4</sup> Customary IHL Database ICRC, Art. 17 of PAII and rule 129(B).

<sup>5</sup> *Ibid.*, Art 49 of IVGC, rule 129(A).

<sup>6</sup> *Id.*

<sup>7</sup> Guiding Principles on Internal Displacement, Principle 5.



rights and find themselves in a situation of particular vulnerability. This context requires adoption of standards and specific measures to alleviate existing challenges to assist and protect them.

This chapter focuses on rules and standards related to human rights and international humanitarian law that specifically address the situation of internal displacement. It starts presenting the instruments that have been internationally developed, namely the Guiding Principles on Internal Displacement, which today is the most significant instrument on the matter at the international level. Subsequently, the chapter addresses regional progress in the matter, briefly retelling the existing jurisprudence in the Inter-American Human Rights System and briefly explaining the African experience, especially the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa: Kampala Convention. The chapter also addresses the regulatory development that exists on internal displacement at the national level. Along these lines, it is worth mentioning that, so far, a specialised legal framework for internal displacement has not been approved at the federal level. However, there are general regulations that can provide assistance and protection to displaced persons, both at federal and state levels; these regulations are briefly mentioned. Finally, the three states of the Republic (Chiapas, Guerrero, and Sinaloa) that have moved forward to the development and publication of specialised legal frameworks are mentioned.

International, national and regional rules and standards, both at federal and state levels, are fundamental to the proper care and protection of displaced persons because they allow them to address the specific challenges they face. This is so as they enable, among other things, to clearly identify the responsibilities of the authorities, the need for an adequate budget and the recognition of the rights of internally displaced persons.

## II. International Rules and Standards

Internationally, there is not a binding legal instrument that specifically regulates the phenomenon of internal displacement. Nevertheless, it is important to remember that the legal framework of the State where the displaced persons are is applicable because it concerns individuals that have not crossed an internationally recognised border; this framework includes both national and international legislation. Therefore, displaced persons are entitled to all the recognised rights in IHRL. In addition, in cases of armed conflicts, it is also applicable what has been established in IHL.

This section focuses on the Guiding Principles on Internal Displacement (Guiding Principles) as the main international instrument for the protection and assistance of internally displaced persons.

### 1. Guiding Principles

This section thoroughly revises this fundamental instrument. It addresses the history of its emergence and its legal nature, the importance and influence it had in drafting specialised legislation and policies on the matter, at both regional and national levels. Finally, it analyses its content and structure, emphasizing the different phases of internal displacement.

#### A. *Historical Context*

The Guiding Principles are included as part of the report presented to the now Human Rights Council by Francis M. Deng, after being appointed as the first representative on the issue of internally displaced persons in 1992 by the Secretary-General of the United Nations.<sup>8</sup> His position involved studying the causes and consequences of internal displacement, the statute of internally displaced persons in international law, the degree of protection that existing

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<sup>8</sup> See United Nations Commission on Human Rights, Resolution 1992/73.

institutional frameworks grant to them, and how to improve their protection and assistance.<sup>9</sup>

In the information gathering and analysis, he examined international human rights law, humanitarian law and, by analogy, refugee law. He concluded that, even though the current law covers many aspects of particular importance for displaced persons, there are significant areas in which the laws do not have enough basis for their protection and assistance.<sup>10</sup> In addition, he acknowledged that such provisions are scattered in a wide range of international instruments, “which make them too diffused and unfocused to be effective in providing adequate protection and assistance for the internally displaced.”<sup>11</sup>

In response to the information gathering and analysis, and to remedy deficiencies in the existing law, the then Commission on Human Rights and the General Assembly asked the Representative of the Secretary-General to prepare an appropriate framework for the protection and assistance of internally displaced persons.<sup>12</sup> Accordingly, and in continued collaboration with the team of experts that had prepared the information gathering and analysis, the drafting of the Guiding Principles was undertaken, which he added as an annex to his 1998 report.

According to Mr. Deng’s report, the Guiding Principles are consistent with international regulations; therefore, they reflect and code the rules and standards that are directly applicable to the internally displaced persons and which were spread in different international instruments.<sup>13</sup> In addition, these clarify ambiguities and gaps identified in international law for the protection

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<sup>9</sup> See Human Rights Commission, Report of the Secretary General's Representative, Mr. Francis M. Deng, issued pursuant to Resolution 1997/39, par. 2. Available at “Guiding Principles on Internal Displacement E/CN.4/1998/53/Add.2. 11/2/1998” (unhcr.org).

<sup>10</sup> *Ibid.*, par. 7

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Ibid.*, par. 9.

and specific assistance to displaced persons.<sup>14</sup> They also have a preventive function, seeking to guide and raise awareness to every actor involved in the treatment and response to the phenomenon of internal displacement.<sup>15</sup>

### *B. Legal Nature*

Currently, the Guiding Principles are the essential international instrument to address internal displacement, since they compile and code rules and standards included in IHRL, IHL and, in parallel, in international refugee law; they adapt them to the specific needs of internally displaced persons in the different phases of internal displacement and determine the rights and guarantees for their protection.

The principles are not a binding instrument, by themselves; however, they are based on rules and standards of international law which are mandatory. In this context, the Guiding Principles are part of the well-known soft law, and their legal basis lies in applicable and relevant guarantees for displaced persons in the obligations of binding or hard law.<sup>16</sup>

### *C. The Significance of the Guiding Principles and their Influence on the Creation of Legislation and Legal Frameworks Specialised in Internal Displacement*

Over time, the Guiding Principles have become the most significant document for the protection of internally displaced persons due to their high level of international acceptance. In 2005, the States of the United Nations acknowledged that the Guiding Principles are an “important international framework for the protection of internally displaced persons.”<sup>17</sup> Moreover, the

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<sup>14</sup> *Id.*

<sup>15</sup> *Ibid.*, par. 10.

<sup>16</sup> Cf. Kálin, “Internal Displacement,” in *The Oxford Handbook of International Refugee Law*, p. 851.

<sup>17</sup> UN, General Assembly, Resolution 60/1, par. 132. Available at “A/RES/60/1 2005 World Summit Outcome” (un.org).

United Nations System uses them as the regulatory basis of its operational frameworks.<sup>18</sup>

Regionally, the Guiding Principles have been fundamental to the African System of Human Rights and the Inter-American System. Therefore, in its preamble, the Kampala Convention explicitly acknowledges the Guiding Principles as “an important international framework for the protection of internally displaced persons.” Similarly, the Inter-American Court of Human Rights (IACHR) has considered the Guiding Principles as particularly relevant guidelines for creating and defining the content and scope of Article 22 of the American Convention on Human Rights (ACHR), since they are “based on international human rights law and international humanitarian law.”<sup>19</sup>

At the national level, the Guiding Principles have been the basis for creating legal frameworks and public policies specialised in the subject matter. The global database of the Global Protection Cluster states that 26 countries have adopted specific legislation as regards internal displacement, that 60 countries have public policies on the subject matter, and that 20 countries are developing legislation or public policies related to displacement.<sup>20</sup> According to Walter Kálin, such legislation and policies are completely or partially consistent with the Guiding Principles.<sup>21</sup> According to a recent study, on average, the countries that have created specific legislation to protect displaced persons as set forth in the Guiding Principles have proven to be efficient, since they have seen a significant reduction of the number of displaced persons.<sup>22</sup> Therefore, Cardona-

<sup>18</sup> Cf. Kálin, *op. cit.*, p. 852.

<sup>19</sup> IACHR, *Moiwana Community v. Suriname*, par. 111; *Chitay Nech et al. v. Guatemala*, par. 140; *Ituango Massacres v. Colombia*, par. 209.

<sup>20</sup> See Global Protection Cluster, *Global Database on Laws and Policies on Internal Displacement*. Available at “Ongoing Normative Developments I Global Protection Cluster.”

<sup>21</sup> Cf. Kálin, *op. cit.*, p. 852.

<sup>22</sup> Cf. Cardona-Fox, “Exile within Borders: A Global Look at Commitment to the International Regime to Protect Internally Displaced Persons,” 68. in Kálin, p. 852.

Fox states that “the evidence suggests that a regime based on ‘soft law’ has increasingly made a difference in national policies and practices.”<sup>23</sup>

Finally, the significance of the Guiding Principles has also been recognised in national courts. Such is the case of the Constitutional Court of Colombia, which in its 2004 Decision T-025 recognised them as part of the international regulatory body that must be considered when interpreting individual rights in the constitution in the context of internal displacement.

The decision recognised a huge gap between what was set forth in the law and in practice, and it declared an “unconstitutional state of affairs.” This is a situation that, according to the Colombian jurisprudence, is created due to a continued violation of fundamental rights of many people, where the origin of such situation is not attributable to only one authority but to structural factors.<sup>24</sup> Therefore, it adopted many measures, with a differentiated approach, in order to govern the rights of displaced persons. It developed tracking indicators, and a Tracking Bench inside the court was created.<sup>25</sup>

In this regard, the Constitution Bench of the Supreme Court of Justice of El Salvador made use of the Guiding Principles in the Amparo Ruling 411-2017 on 13 July, 2018; in it, it recognised that, even though there are not specialised treaties on this matter, there are declaratory rules like the Guiding Principles.<sup>26</sup> Such ruling recognised, for the first time, that in El Salvador there is a phenomenon of forced displacement of persons that originated in the context of violence and crime.

Such court ordered, among other measures, to recognise the victims of violence

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<sup>23</sup> *Id.*

<sup>24</sup> See Constitutional Court of Colombia, Decision T-025/04. Available (in Spanish) at “Colombian Constitutional Court, Decision T-025 of 2004.”

<sup>25</sup> *Id.*

<sup>26</sup> See Constitution Bench of the Supreme Court of Justice, Amparo Ruling 411-2017, 13, p. 24. Available (in Spanish) at “Refworld | El Salvador: Sentencia sobre desplazamiento forzado. (Amparo 411-2017).”

and forced displacement, designing and implementing public policies and action protocols focused on preventing forced displacement, providing protection measures for displaced persons, and respecting, nationally and internationally, cooperation agreements to ensure the protection of victims and witnesses. In compliance with this ruling, on 9 January, 2020, El Salvador passed the Ley Especial para la Prevención y Protección Integral de Personas en Condición de Desplazamiento Forzado Interno (Special Law for the Comprehensive Care and Protection of People in a situation of Forced Internal Displacement).<sup>27</sup>

#### *D. Content and Structure of the Guiding Principles*

Generally, it is worth mentioning that the Guiding Principles do not grant a special legal statute like the one that refugees have; instead, they recognise that they are entitled to enjoy every right, particularly the ones that are more relevant to them.

However, the structure of the Guiding Principles recognises the different phases of internal displacement, identifying at each stage the specific state obligations and rights of displaced persons as follows:

##### *a. Introduction: Scope and Purpose*

The Guiding Principles:

- Address the specific needs of displaced persons; define rights and guarantees for their protection and assistance (par. 1).
- Reflect and agree with international regulations. They provide guidance (par. 3).
- Must be published and applied at the international level (par. 4).
- Define internally displaced persons (IDPs) as follows: persons or groups of persons who have been forced or obliged to flee or leave

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<sup>27</sup> *Id.*

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 recognised State border (par. 2).

## b. General Principles

- Equality and non-discrimination (Principle 1).
- Observation by all authorities, groups and persons. They shall not be interpreted as restricting, modifying or impairing the provisions of any international instrument or national law. They shall not affect the right to request and obtain asylum in another country (Principle 2).
- National authorities have the primary duty and responsibility to provide protection and assistance to IDPs within their jurisdiction. They shall not be persecuted or punished for requesting asylum (Principle 3).
- IDPs are entitled to protection and specific assistance required by their condition and to treatment which takes into account their special needs (Principle 4).

## c. Protection from Displacements

- Obligation to fulfil responsibilities of international law, in all circumstances, to avoid conditions that could lead to displacement of persons - Principle 5.
- Prohibition of arbitrary displacements, including:
  - \* those based on policies of apartheid, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
  - \* situations of armed conflict, the security of the civilians involved or imperative military reasons so demand;



- \* large-scale development projects, which are not justified by compelling and overriding public interests;
- \* disasters, unless the safety and health of those affected requires their evacuation; and
- \* when it is used as a collective punishment.

Displacement shall last no longer than required by the circumstances - Principle 6.

- All alternatives should be explored to avoid displacement. Where no alternatives exist, all measures shall be taken to minimise displacement and its adverse effects, such as proper accommodation and safety - Principle 7.
- Right to life, dignity and security - Principle 8.
- Protection of people who have special attachment to their lands - Principle 9.
- Right to life - Principle 10.
- Dignity, physical, mental or moral integrity - Principle 11.
- Liberty and security of person - Principle 12.
- Prohibition of recruiting children and adolescents to take part in hostilities; protection against discriminatory practices of recruitment and prohibition of cruel, inhuman or degrading practices for not complying with the recruitment - Principle 13.
- Liberty of movement and freedom to choose his or her residence - Principle 14.
- Right to seek safety in other parts of the country, to leave their country and to seek asylum in another country, and right to be protected against forcible return - Principle 15.
- Knowing the fate and whereabouts of missing relatives - Principle 16.
- Respect of family life - Principle 17.
- Right to an adequate standard of living - Principle 18.
- Injured or disabled people will receive the necessary medical services. Special attention will be given to the health needs of

women, including access to medical care, particularly, reproductive health and counselling to victims of sexual abuse - Principle 19.

- Recognition of legal capacity - Principle 20.
- Arbitrary deprivation of property and possessions - Principle 21.
- Equal enjoyment of rights like freedom of thought, conscience or religion, work rights, the right to associate freely, and the right to participate in community affairs, political rights, and the right to communicate in a language they understand - Principle 22.
- Right to education - Principle 23.

#### d. Humanitarian Assistance

- Humanitarian assistance with the principles of humanity, impartiality and without discrimination. The assistance of IDPs shall not be diverted - Principle 24.
- Primary obligation of the States. International humanitarian organisations and other agencies have the right to offer their services. Giving and facilitating humanitarian assistance and granting quick and smooth access to IDPs- Principle 25.
- Respect and protection of the people who give humanitarian assistance, their means of transportation and supplies. They will not be targets of attacks or other acts of violence - Principle 26.
- International organisations and appropriate authorities must adhere to the standards and codes of conduct - Principle 27.

#### e. Long-lasting Solutions: Return, Resettlement and Reintegration

- Establishing conditions and means that allow displaced persons to return voluntarily, in safety and with dignity to their homes, place of habitual residence or to resettle voluntarily in another part of the country; facilitating the reintegration of IDPs and special efforts to

ensure the whole participation of IDPs in planning and management  
- Principle 28.

- Non-discrimination towards IDPs who have returned or resettled based on their displacement condition. Offering assistance for the recovery of property or possessions, or giving the appropriate compensation or other type of just reparation - Principle 29.
- Granting international organisations and appropriate authorities with rapid and unimpeded access to IDPs to assist in their return or resettlement and reintegration - Principle 30.

## 2. Other International Developments: Pinheiro Principles and Basic Principles, Guidelines on Eviction and Displacement

Specific instruments have been developed to address the inherent problems displaced persons face, such as the those concerning property and possessions. This is how the Principles on Housing and Property Restitution for Refugees and Displaced Persons came into existence, also known as the Pinheiro Principles. They follow the Guiding Principles by systematizing the rights contained in international law on the right to housing, land and property restitution, which is one of the main problems often faced by internally displaced persons and refugees.

These principles establish the State's responsibility of creating legal, procedural and institutional mechanisms so that the displaced persons can have access to claims and restitution procedures, consultation, participation in decision making, recording and documentation of housing, land and property, as well as compensation.<sup>28</sup> This is relevant because it addresses one of the most important

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<sup>28</sup> See Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council of the United Nations, Principles on Housing and Property Restitution for Refugees and Displaced Persons, 57<sup>th</sup> Session Period.

needs that displaced persons have because, in many cases, they are forced to leave their houses and possessions and, due to their vulnerability, they face systemic problems trying to recover them; for example, lack of records, lack of access to justice, etc.

Other instruments that were created to deal specifically with internal displacement issues are the Basic Principles and Guidelines on Eviction and Displacement Generated by Development. The Special Rapporteur developed them based on adequate housing, as a component of the right to an appropriate standard of living. These principles contain general obligations of the States and subsequently develop the stages of eviction and displacement by setting up principles for the period before, during and after eviction, as well as cases of forced displacement.<sup>29</sup> The obligations include thoroughly exploring alternatives to eviction, providing information, making complete inquiries, ensuring they do not leave people homeless and ensuring fair compensation. Furthermore, they establish that at least access to essential services should be guaranteed, such as drinking water and sanitation, housing, appropriate clothing, medical services, means of support, access to necessary resources, no separation and education of children and adolescents.<sup>30</sup>

Besides, it is also relevant to consider the Framework on Durable Solutions for Internally Displaced Persons, developed by the Rapporteur Walter Kalin based on the Human Rights of Internally Displaced Persons, including: (i) existing durable solutions; (ii) the guiding principles for the search of durable solutions; (iii) the way in which a right-based process be organised to find a durable

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<sup>29</sup> See Basic Principles and Guidelines on Eviction and Displacement Generated by Development, Annex I of the Special Rapporteur Report based on adequate housing, as component of the right to an adequate standard of living, A/HR/4/18, A/HRC/4/18. Available at “A/HRC/4/18 07-10631” (ohchr.org).

<sup>30</sup> *Id.*

solution; and (iv) the applicable criteria to determine up to what extent a durable solution has been achieved.<sup>31</sup>

Finally, it is also important to mention the Sendai Framework for Disaster Risk Reduction —2015-2030—, which was adopted at the Third UN World Conference held in Sendai, Japan on 18 March, 2015. This document recognised the displacement created by disasters, many exacerbated by climate change.<sup>32</sup> There was also a recognition of the need to promote: (i) cross-border cooperation to facilitate policies and planning to increase resilience and reduce the risk of disasters, including the risk of epidemics and displacements;<sup>33</sup> and (ii) the making of periodic practices of preparation, response and recovery in case of disaster to ensure a quick and efficient response to disasters and related displacements, including access to shelters and food and non-food relief, according to local needs.<sup>34</sup>

### III. Inter-American Rules and Standards

Inter-American Rules and Standards are especially important to the Mexican legal system because the Supreme Court of Justice of the Nation (SCJN) determined that jurisprudence issued by the Inter-American Court of Human Rights (IACHR) is binding for all jurisdictional bodies as long as said landmark benefits people to a greater degree.<sup>35</sup> In the case of the IACHR, it is important to mention that the complete jurisprudence related to cases of internal displacement can be found in the Journal of Jurisprudence.<sup>36</sup>

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<sup>31</sup> See Secretary General's Report on the Human Rights of Internally Displaced Persons, Framework on Durable Solutions for Internally Displaced Persons, A/HRC/13/21/Add.4. Available at "Microsoft Word - 1010052.doc" ([inform-durablesolutions-idp.org](http://inform-durablesolutions-idp.org)).

<sup>32</sup> See UN, Sendai Framework for Disaster Risk Reduction 2015-2030, par. 4. Available at [https://www.preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf).

<sup>33</sup> *Ibid.*, 28.d.

<sup>34</sup> *Ibid.*, 33.g.

<sup>35</sup> SCJN, Contradicción de tesis 293/2011. Available (in Spanish) at "Suprema Corte de Justicia de la Nación" ([scjn.gob.mx](http://scjn.gob.mx)).

<sup>36</sup> IACHR, "Personas en Situación de Desplazamiento", in *Cuadernillo de Jurisprudencia*, No. 3.

## 1. Rules and Standards developed by the IACHR

The right to free movement and residence can be found in Article 22.1 of the American Convention on Human Rights (ACHR). It recognises that “every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.” This Article has been interpreted by the IACHR in an evolutionary manner considering that it includes the right to not be forcefully displaced.<sup>37</sup>

The IACHR has established that the right to free movement and residence can be violated by formal restrictions to movement, but also by *de facto* conditions that prevent people from moving freely. Those conditions could occur when a person is victim of threats and harassment, and the State does not provide the necessary guarantees to move and live freely in a given territory, even when the threats and harassment are from non-state actors.<sup>38</sup> Likewise, lack of effective investigation of violent acts can promote or perpetuate exile and forced displacement.<sup>39</sup>

The Inter-American System of Human Rights emphasized that internal displacement is a state of *de facto* vulnerability with regard to the rest of the population. This is due to the wide range of rights affected and because such situations place people at risk of displacement. The system states so considering the special vulnerability and defencelessness in which displaced population generally finds itself.<sup>40</sup> This vulnerability condition is usually reinforced or

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Available (in Spanish) at <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuademillo3.pdf>.

<sup>37</sup> IACHR, *Mapiripán Massacre v. Colombia*, par. 188; *Ituango Massacres v. Colombia*, par. 207 and *African Communities Displaced from the Basin of the Cacarica River (Operation Genesis) v. Colombia*, par. 219.

<sup>38</sup> IACHR, *Yarce y otras vs. Colombia*, par. 215.

<sup>39</sup> *Ibid.*, 218.

<sup>40</sup> IACHR, *Mapiripán Massacre v. Colombia... quot.*, par. 177.

stressed in some situations, such as being from rural areas, being a woman, the existence of a security crisis, etc.<sup>41</sup>

Additionally, there has been an emphasis on internal displacement having various harmful effects, such as loss of land and housing, discrimination, loss of home, unemployment, worsening of living conditions, increase in illnesses and mortality, loss of access to property of co-owners, food insecurity and social separation, severe psychological effects, as well as impoverishment and rapid worsening of living conditions.<sup>42</sup> The IACHR has also emphasized that internal displacement represents a constant violation of human rights,<sup>43</sup> a situation that lasts until people can return to their places of origin voluntarily with dignity and safety, or they are resettled willingly in other parts of the country.<sup>44</sup>

Following the Guiding Principles, the IACHR recognises four main obligations for the States regarding internal displacement. In all of these stages, the importance of ensuring the participation of displaced persons has been emphasised:<sup>45</sup> (i) preventing displacement; (ii) protecting and giving assistance to displaced persons during displacement; (iii) providing humanitarian assistance; and (iv) facilitating the safe return, resettlement and reintegration of internally displaced persons.

In the case of Mexico, the IACHR resolved the *Alvarado Espinoza* case in which the Mexican State did not guarantee the right to movement and residence and the right to family protection, thus harming three families who were forced into displacement due to the forced disappearance of certain family members,

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<sup>41</sup> IACHR, *Ituango Massacres v. Colombia... quot.*, par. 212.

<sup>42</sup> IACHR, *Mapiripán Massacre v. Colombia... quot.*, par. 175.

<sup>43</sup> IACHR, *Moiwana Community v. Suriname... quot.*, par. 108.

<sup>44</sup> IACHR, *Chitay Nech et al. v. Guatemala... quot.*, par. 149; Afro-Descendant Communities Displaced from the Cacarica River Basin (*Operation Genesis*) *v. Colombia... quot.*, pars. 220 and 320-324.

<sup>45</sup> IACHR, *Carvajal Carvajal et al. v. Colombia*, par. 190.

threats, harassment, death of a family member, as well as lack of guarantee of a safe return.<sup>46</sup>

By resolving that case, the IACHR established that the displacement was mostly due to the lack of effective protection by the State. It was obvious that the authorities were aware of the threats and that the context was one of risk in the region due to the fact that family members were carrying out searches to clarify forced disappearances, filing complaints, pointing out the participation of authorities of the army and they were actively participating in the investigations.<sup>47</sup> Additionally, it considered the fact that, although the State had adopted some measures, these were not adequate to the needs of the family members.<sup>48</sup>

Finally, the IACHR mentioned that the protection of displaced persons' rights entails not only prevention measures but also the necessary conditions to facilitate the voluntary, safe and appropriate return to the place of habitual residence or voluntary resettlement in other parts of the country. This is how it was concluded that no measures were taken to accomplish the above.<sup>49</sup>

## 2. Rules and Standards Developed by the IACHR

Most of the standards on internal displacement created by the IACHR are in their precautionary measures. According to the authors, Mariana Peguero and Laura Rubio, there are similarities between the precautionary measures issued from 1996 to mid-2018; and they highlight the following:<sup>50</sup> (i) ensuring safe and appropriate return; (ii) displaced persons' participation in the adoption of measures; (iii) providing humanitarian assistance according to the Guiding Principles; (iv)

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<sup>46</sup> IACHR, *Alvarado Espinoza et al. v. Mexico*, par. 283.

<sup>47</sup> *Ibid.*, par. 275.

<sup>48</sup> *Ibid.*, par. 277.

<sup>49</sup> *Ibid.*, par. 279.

<sup>50</sup> See Peguero Moreno and Rubio Díaz Leal, "El desplazamiento interno forzado en México: respuestas del Estado y litigio estratégico", in *La práctica del Derecho Mexicano*.



creating systems to protect displaced human rights defenders; (v) applying for an extension to the deportation from internally displaced camps; and (vi) providing appropriate security at camps for internally displaced persons.<sup>51</sup>

Among the most recent and new standards are the precautionary measures given to several communities in Guatemala due to forced evictions that generated internal displacement, among other issues. The Inter-American Commission on Human Rights (IACHR) developed specific standards, including: (i) carrying them out in compliance with human rights rules and the principles of exception, legality, proportionality and suitability, with the legitimate purpose of promoting social welfare; (ii) following the strictest procedure, including a real opportunity to consult with affected people; (iii) providing reasonable and timely notification before the expected date of eviction; (iv) providing resources and legal assistance, and establishing a contingency plan, resettlement process and housing alternatives beforehand.<sup>52</sup>

The precautionary measures given<sup>53</sup> highlight the importance of satisfying the most basic needs of displaced persons, as well as the relevance of issuing culturally appropriate measures. For example, measures aimed at improving the conditions considering that the collective social cohesion could be affected in terms of the cultural identity of indigenous communities, which generates a break in social ties, the weakening and fragmentation of the community, and in the most severe cases, the total loss or severe deterioration of ethical and cultural identity.<sup>54</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> IACHR, Press Conference, IACHR, UN Experts Express Concern over Forced Evictions and Internal Displacement in Guatemala.

<sup>53</sup> IACHR, Laguna Larga Community, (MC 412/17); indigenous families of the Chaab'il Ch'och' Community (MC 860/17); the Maya Q'eqchi "Nueva Semuy Chacchilla" Community (MC 872-17); and the Maya Q'ueqchi "La Cumbre Sa'kuxhá" Community (MC 44/18).

<sup>54</sup> IACHR, Precautionary Measure No. 860-17, Indigenous families of the Chaab'il Ch'och' Community with respect to Guatemala, par. 27.

### 3. Precautionary Measures v. Mexico on Internal Displacement

In the case of Mexico, IACHR issued precautionary measures to Tzotzil communities in Chiapas in 2018 and 2021, both for displacement caused by a situation of risk due to aggressions, harassment and threats due to the presence of armed persons in the area:

- Tzotzil indigenous communities of Chalchihuitán and Chenalhó, Chiapas, 2018.<sup>55</sup> Armed groups caused the displacement of 5,000 Tzotzil indigenous people from 10 communities in the context of an agrarian conflict. Even though the State took measures to reinforce security and address the displacement, such as measures regarding food, health and clothing, it was not possible to prove that the risk posed by armed groups had been mitigated.<sup>56</sup>
- Tzotzil indigenous families from twelve communities in Aldama, Chiapas<sup>57</sup> in 2021. Those who had been displaced at different moments and for different periods of time.<sup>58</sup> IACHR considered that, despite the implementation of various protection measures for these people, such as providing humanitarian care, these have not mitigated the risk situation. This is despite the fact there is a non-aggression agreement between Aldama and Chenalhó, for which the Undersecretary of the Interior, the Governor of the state of Chiapas, the Municipal President of Aldama and the Mayor of Chenalhó were

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<sup>55</sup> IACHR, Resolution 15/2018, Precautionary Measure No. 882-17, Tzotzil indigenous communities of Chalchihuitán and Chenalhó regarding Mexico.

<sup>56</sup> *Id.*

<sup>57</sup> Communities of Koko' (Coco), Tabak (Tabac), Cotsilnam (San Pedro Cotzilnam), Stselej Potop, Xuxchen (Xuxch'en), Puente, Yoctontik, Sepelton and the municipal seat of Aldama, also known as Magdalena de la Paz. See IACHR, Resolution 35/2021, Precautionary Measure No. 284-18, Tzotzil indigenous families from twelve identified communities of Aldama, Chiapas, regarding Mexico, par. 1

<sup>58</sup> *Ibid.*, Resolution 35/2021, Precautionary Measure No. 284-18, Tzotzil indigenous families from twelve identified communities of Aldama, Chiapas, regarding Mexico.

present at the signing.<sup>59</sup> IACHR mentioned the need to resolve the underlying factors behind the displacement experienced by the communities, such as territorial and political conflicts, the presence of organised crime and armed groups, through investigation, punishment, reparation and justice processes.<sup>60</sup>

In both precautionary measures, IACHR asked for the adoption of security measures needed<sup>61</sup> to protect the life and personal integrity of the beneficiaries and, specifically, to guarantee their safety within their communities and during their displacements with a view to preventing threats, harassment, intimidation or acts of armed violence.<sup>62</sup>

Through its monitoring function, IACHR registered the internal displacement situation in Mexico in 2015 and recommended that the State: (i) conduct a countrywide diagnostic assessment of internal displacement in Mexico and adopt a national policy and measures to address the issue in accordance with international standards on the matter, particularly the Guiding Principles; (ii) adopt specific legislation at the federal and state levels, and (iii) ensure that, at the federal level, there is an institution in charge of protecting displaced persons.<sup>63</sup>

Finally, in its role of advisor to States on human rights issues, IACHR prepared a practical guide on guidelines for the formulation of public policies on internal displacement, in which it didactically compiles recommendations to address this situation.<sup>64</sup> In addition, this document considers the *Internal Displacement*

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<sup>59</sup> *Ibid.*, par. 6.

<sup>60</sup> *Ibid.*, par. 47.

<sup>61</sup> In Precautionary Measure No. 35/2021, “and culturally pertinent” is added.

<sup>62</sup> Precautionary Measure No. 284-18,...quot., par. 55 and Precautionary Measure No. 882-17,...quot., par. 37.

<sup>63</sup> IACHR, *The Human Rights Situation in Mexico*, OEA/Ser.LN/II, Doc. 44/15, Recommendations 57 to 59.

<sup>64</sup> IACHR, *Practical Guide: Guidelines for the Formulation of Public Policies on Internal Displacement*, OEA/Ser.LN/II, Doc. 101/18. Available at [www.oas.org/en/iachr/reports/pdfs/Guide-InternalDisplacement.pdf](http://www.oas.org/en/iachr/reports/pdfs/Guide-InternalDisplacement.pdf).

in the *Northern Triangle of Central America* report, in which the commission also made specific recommendations on this issue that could be useful.<sup>65</sup>

#### IV. The African experience: Kampala Convention

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala Convention, is the first regional treaty on the protection of internally displaced persons to involve an entire continent.<sup>66</sup> It was adopted on 23 October, 2009 and entered into force in 2012. Currently, 31 of 55 African Union States have ratified the Kampala Convention and 40 have signed it.<sup>67</sup>

While the Kampala Convention is based on the rights of displaced persons, which are already largely recognised in the Guiding Principles, it is written to include State obligations and, in a novel way, other actors', such as international humanitarian and other organisations (Article 6); armed groups (Article 7); the African Union (Article 8).<sup>68</sup> In this way, the Kampala Convention adopts the Guiding Principles structure by including the following: (i) a general part with definitions, objectives and obligations; (ii) protection from internal displacement; (iii) obligations relating to protection and

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<sup>65</sup> IACHR, *Internal Displacement in the Northern Triangle of Central America: Public Policy Guidelines*. Available at "Internal Displacement in the Northern Triangle of Central America: Public Policy Guidelines" - Guatemala | ReliefWeb.

<sup>66</sup> UNHCR, *Convención de la Unión Africana para la Protección y Asistencia de los Desplazados Internos en África (Convención de Kampala)*, Breve resumen de la Convención realizado por el ACNUR y Unión Interparlamentaria (UIP). Available (in Spanish) at "Breve resumen de la Convención realizado por ACNUR y Unión Interparlamentaria (UIP)", 2010 (oas.org).

<sup>67</sup> African Union, *List of countries which have signed, ratified/acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*. Available at "36846-sl-AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA (KAMPALA CONVENTION).pdf" (au.int).

<sup>68</sup> Kalin, *op. cit.*, p. 852 and 853.

assistance; (iv) obligations relating to protection during displacement; and (v) identification of durable solutions.

The Kampala Convention is the first regional treaty that admits the need to adopt specific measures regarding disasters, including climate change (Article 5.4). It considers both people who move directly due to these reasons, as well as those who do so ahead of time to avoid the effects of such disasters. Among other innovative aspects, it imposes the obligation to incorporate the obligations under the Convention into domestic law, by enacting or amending legislation on the protection of and assistance to internally displaced persons in conformity with its obligations under international law (Article 3.2.a).

The definition of internal displacement adopted in the Kampala Convention is identical to the one in the Guiding Principles (Article 1.k). However, when it mentions the causes, but not limited to, which are admitted for arbitrary displacement, the Kampala Convention goes beyond the Guiding Principles by recognising situations specific to the African reality. These include displacement as a result of harmful practices, caused by generalized violence or violations of IHL, and used as method of warfare (Article 4.4).

Regarding prevention, the Kampala Convention establishes early warning systems and threats reduction in risk areas as measures to prevent and mitigate the effects of displacement due to disasters (Article 4.2). Whereas, with regard to protection and assistance, it recognises the importance of taking into account the needs of host communities in strategies and policies on internal displacement to be adopted (Article 3.2.c).

The Convention also acknowledges the need to have a particular approach for persons with special needs, including separated and unaccompanied children and adolescents, expectant mothers, mothers with young children, and persons with disabilities, among others (Article 9.2.c). Among these approaches, it admits the need of special measures to provide for the reproductive and sexual health of displaced women, as well as the need to provide appropriate

psychosocial support for victims of sexual and other related abuses (Article 9.2.d).

In addition, it imposes the obligation to provide basic services to the fullest extent practicable and with the least possible delay (Article 9.2.b). It states the obligation of consulting IDPs so that they can participate in decisions relating to their assistance and protection, as well as on their alternatives for achieving durable solutions. To do this, it is essential to provide information so that they can make informed decisions (Article 9.2.k).

It also establishes a specific protection for people with special attachment to, and dependency, on their lands due to their particular culture and spiritual values, except for compelling and overriding public interests (Article 4.5). Moreover, it is established that States shall take appropriate measures, whenever possible, to restore the lands of these communities (Article 11.5).

Finally, it obliges States to ensure individual responsibility for acts of arbitrary displacement or complicity in such acts by State actors (Article 3.1.g), non-State actors, multinational companies or private military or security companies (Article 3.1.h), and non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement (Article 3.1.i).

## V. Domestic Regulations and Instruments

Internally displaced persons remain under Mexican State jurisdiction; therefore, they should benefit from the application of the legal framework from a general perspective. These are regulations that, although not specifically referring to displaced persons, are useful for providing them with assistance and protection.

To date, Mexico does not have a specialised legal framework on internal displacement at the national level. However, there are regulations that are particularly relevant to displaced persons in some documents. The most significant ones are listed below.

## 1. Political Constitution of the United Mexican States (CPEUM)

Article 11 of CPEUM (by its Spanish acronym) establishes the right to freedom of movement and residence by stating that every person is “entitled to enter the Republic, to leave same, to travel through its territory and to change residence, without the need of a letter of security, passport, safe conduct or other similar requirements.” *Contrario sensu*, this right includes the right not to be forcibly displaced.

When human rights are concerned, it is essential to remember that, ever since the constitutional reform on this matter, “the provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favour of the broader protection of people at all times.”<sup>69</sup> In this regard, SCJN resolved by means of Thesis Contradiction 293/2011 two main aspects for the protection and guarantee of human rights in Mexico. It stated the following:

- There is a recognition of human rights as a whole, which are derived from both the Constitution and the international treaties to which the Mexican State is a party. Thus, “human rights, without distinction, constitute the control parameter of due constitutionality, according to which the validity of all regulations and acts of authority integrating the legal system must be analysed” (own translation.)<sup>70</sup>
- That “the IACHR criteria are binding regardless of whether the Mexican State has been a party to the litigation before that court, since they constitute an extension of the international treaties that it

<sup>69</sup> See CPEUM, Art. 1, par. 2.

<sup>70</sup> SCJN, Contradicción de tesis 293/2011, “SCJN determines that human rights regulations contained in international treaties have constitutional scope”.

interprets, given that said criteria determine the content of human rights provided for therein” (own translation.)<sup>71</sup>

This is particularly relevant because there are fundamental instruments, such as the Guiding Principles, based precisely on international obligations to which Mexico is a party, in addition to the solid jurisprudence of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. This is so despite the lack of a binding international instrument that specifically addresses the situation of internal displacement at the international or regional level in the Americas, as stated in the introduction. These instruments provide a sufficient legal framework to address displacement and related issues.

## 2. General Victims’ Law

The General Victims’ Law (Ley General de Víctimas, LGV, by its Spanish acronym) was passed in 2013 and aimed at recognising and guaranteeing the rights of victims of offences and human rights violations, especially the rights to assistance, protection, attention, truth, justice, comprehensive reparation, due diligence and all others enshrined in this law, the Constitution, international human rights treaties to which the Mexican State is a party and other human rights instruments.<sup>72</sup> It establishes the Executive Commission for Attention to Victims (Comisión Ejecutiva de Atención a Víctimas, CEAV, by its Spanish acronym) as the operating body in coordination with governmental authorities at the federal, state and local levels so that victims receive proper reparation and their needs are duly addressed.<sup>73</sup>

Displaced persons could seek protection in accordance with LGV. The document clearly stated that “the Executive Commission for Attention to Victims has the obligation to guarantee victims’ access to all of their rights,

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<sup>71</sup> *Id.*

<sup>72</sup> LGV, Art. 2.

<sup>73</sup> *Cf. Peguero Moreno et al., op. cit.*, p. 99.



which includes victims of internal displacement” (own translation.)<sup>74</sup> The Commission recognised that “the situation of internal displacement must be considered an autonomous victimising event that needs to be treated with a differentiated and specialised approach” (own translation.)<sup>75</sup>

Although law does not provide a definition of internal displacement, it does recognise that displaced persons are in a situation of vulnerability and are one of the groups most exposed to the risk of having their rights violated. Due to this situation, special and protection guarantees must be applied with a differentiated and specialised approach, Article 5. Furthermore, the situation of vulnerability must be assessed in order to determine the priority of assistance, provision of services and implementation of actions, Articles 5 and 28.

LGV expressly sets forth certain rights for internally displaced persons. In emergency situations, it provides for the right to receive provisional, timely and prompt assistance from the help resources of the Executive Commission or the victims’ commissions of the federal entities, to meet their needs regarding food, personal hygiene, supplies management, emergency medical and psychological care, emergency transportation and temporary accommodation in decent and safe conditions (Article 8).

It also recognises the rights of accommodation and food in safe and decent conditions, which must be provided for the time needed to ensure that the victim not only overcomes the emergency conditions, but also achieves a durable solution and can freely return to their home in safe and decent conditions (Article 38). In addition, LGV explicitly recognises the right of displaced persons to have access to education with a cross-cutting,

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<sup>74</sup> CEAV, *Acuerdo del Pleno, por el que se reconoce que la situación focalizada de desplazamiento interno por actos de violencia debe ser, primero, reconocida por la CEAV como un hecho victimizante adicional al que originalmente haya motivado la solicitud de inscripción de una persona en el Registro Nacional de Víctimas y, segundo, atendida con un enfoque diferencial y especializado*, sixth recital. Available (in Spanish) at [Acta 43\\_dosvotos\\_acuerdo\\_Nota.pdf](#) (ceav.gob.mx).

<sup>75</sup> *Ibid.*, Acuerdo único.

differentiated, gender and social inclusion approach, and with a rights perspective, seeking to guarantee exemption from all types of academic costs (Article 47).

Another relevant aspect of LGV is that it considers the fact that displaced persons are not always in their federal entity of origin. Consequently, it establishes that CEAV and executive commissions, within the scope of their competencies, will guarantee their due registration, attention and reparation (Article 79). In this regard, the agreement sets forth that CEAV may intervene in cases that are within the original competencies of the executive commissions for attention to victims of federal states, in cases in which the intervention of authorities from diverse government levels in different federal entities is required or when the victimising event has occurred in two or more entities.<sup>76</sup>

In order to access LGV protection mechanisms, displaced persons must be registered as victims. In this regard, Article 101 of LGV sets the process for the assessment of the information collected, which is governed by the principle of good faith, considering the single form with the documentation accompanying the form. That article establishes that assessment is not necessary when there are convictions by jurisdictional authorities, recommendations, conciliations or precautionary measures by the National Human Rights Commission (NHRC) or the recognition of the status of victim by a public prosecutor's office.

For its part, Article 110 sets the authorities entitled to recognise the status of victim, among them are the judges, public human rights protection agencies, international organisations, the Public Prosecutor's Office and the CEAV itself. In this way, the Tenth Collegiate Criminal Court for the First Circuit determined that, from the reading of numeral 110, section VII of LGV, it is stated that CEAV is an institution "that, by itself, can grant the status of victim to a person or group of people who request to be granted such status", a

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<sup>76</sup> *Ibid.*, fourth recital.

capacity also described as “neither autonomous nor discretionary, since it is expressly delimited in LGV” (own translation.)<sup>77</sup>

The Collegiate Court established that, when a displaced person requests the recognition of the status of victim, the CEAV must:<sup>78</sup>

- Assess the information collected in the Single Victim Registration Form (*Formato Único de Registro de Víctimas*);
- Assess the referred information attached thereto;
- Request the information deemed necessary from any of the local or municipal law enforcement authorities, which are required to provide said information.

It is worth noting that, pursuant to the resolution above, CEAV is an autonomous body for the determination of the status of victim. Displaced persons must be registered as direct victims of human rights violations, including the right to freedom of movement and residence, in the National Registration of Victims (RENAVI, by its Spanish acronym), from the moment that the harm or undermining of rights is proven, regardless of whether the persons have initiated any administrative or judicial procedure.<sup>79</sup>

### 3. Other explicit references to internal displacement in federal laws

There are other federal laws that specifically refer to displaced persons, such as the Ley de Asistencia Social (Social Assistance Law), in which article 4 states that “every individual and families who, due to their physical, mental, legal,

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<sup>77</sup> CMDPDH, *Décimo Tribunal Colegiado en Materia Penal del Primer Circuito determina la facultad de la CEAV para realizar el reconocimiento y registro de víctimas de desplazamiento interno forzado*. Available (in Spanish) at “Décimo Tribunal Colegiado en Materia Penal del Primer Circuito determina la facultad de la CEAV para realizar el reconocimiento y registro de víctimas de desplazamiento interno forzado” | Mexican Commission for the Defence and Promotion of Human Rights (cmdpdh.org).

<sup>78</sup> *Id.*

<sup>79</sup> *Cf. Peguero Moreno et al., op. cit.*, p. 102.

economic or social conditions require specialised services for their protection and full integration into wellbeing have the right to receive social assistance” (own translation.) Within the priority social assistance groups, displaced indigenous people are specifically mentioned.

On the other hand, Article 89 of the General Law on the Rights of Children and Adolescents states that special measures to guarantee the protection of children and adolescents in the context of human mobility must be taken into account. Additionally, Article 9.XI of the Ley General de Educación (General Education Law) establishes that the education authorities must promote measures to facilitate and guarantee the inclusion and permanence of children and adolescents who “have been repatriated to our country, return voluntarily or face situations of displacement or internal migration” in public educational services (own translation.)

Finally, it is worth noting that the Programa Nacional de Derechos Humanos 2020-2024 (2020-2024 National Human Rights Programme) is the first national public policy document to recognise internal displacement as one of the human rights crises that the country is undergoing.<sup>80</sup> In this regard, it recognises that displacement entails more than just moving, as displaced persons face greater difficulties when it comes to exercising their human rights, and are forced to abandon their community ties and protection networks.<sup>81</sup> In this sense, the following priority strategies to address this situation are set out:

- Share information on the phenomenon of internal displacement to raise awareness among the population, avoid discrimination and

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<sup>80</sup> *Diario Oficial de la Federación*, Programa Nacional de Derechos Humanos 2020-2024, par. 6.2. Available (in Spanish) at [https://www.gob.mx/cms/uploads/attachment/file/666833/DOF-Diario\\_Oficial\\_de\\_la\\_Federacion-PNDH\\_2020-2024\\_Programa.pdf](https://www.gob.mx/cms/uploads/attachment/file/666833/DOF-Diario_Oficial_de_la_Federacion-PNDH_2020-2024_Programa.pdf).

<sup>81</sup> *Id.*

stigmatisation contexts, and prevent violations of the rights of people in this situation.<sup>82</sup>

- Promote a regulatory framework on forced internal displacement that recognises the issue, provides victims with comprehensive attention, offers durable solutions, and provides for a registration of displaced persons.<sup>83</sup>
- Implement special comprehensive attention measures for the return, reception, integration or voluntary relocation of people in a situation of forced internal displacement, under safe and decent conditions.<sup>84</sup>
- Perform a risk analysis from a differentiated, gender and specialised approach to promptly identify, prevent and address the causes of forced internal displacement.<sup>85</sup>
- Guarantee the implementation of mechanisms for the participation of people in a situation of forced internal displacement in the processes of prevention, attention and comprehensive reparation.<sup>86</sup>
- Make efforts to diagnose the situation of forced internal displacement in order to understand, prevent and comprehensively address the issue.<sup>87</sup>
- Promote training and awareness actions aimed at public servants, within the scope of their powers, in terms of forced internal displacement.<sup>88</sup>

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<sup>82</sup> *Ibid.*, par. 1.6.3.

<sup>83</sup> *Ibid.*, par. 1.7.5.

<sup>84</sup> *Ibid.*, par. 2.2.3.

<sup>85</sup> *Ibid.*, par. 2.3.2.

<sup>86</sup> *Ibid.*, par. 4.5.3.

<sup>87</sup> *Ibid.*, par. 4.6.5.

<sup>88</sup> *Ibid.*, par. 5.2.4.

#### 4. State laws specialised in internal displacement in Chiapas, Guerrero and Sinaloa

At the state level, it is worth mentioning that, so far, three states have developed legal frameworks specialised in internal displacement matters:

- Chiapas, with the Ley para la Prevención y Atención del Desplazamiento Interno del Estado de Chiapas (Law on the Prevention of and Response to Internal Displacement in the State of Chiapas, Law of Chiapas), passed on 22 February, 2012;
- Guerrero, with the Ley número 487 para Prevenir y Atender el Desplazamiento Interno en el estado de Guerrero (Law No. 487 to Prevent and Address Internal Displacement in the State of Guerrero, Law of Guerrero), passed on 22 July, 2014; and
- Sinaloa, with the Ley para Prevenir, Atender y Reparar Integralmente el Desplazamiento Forzado Interno en el estado de Sinaloa (Law to Comprehensively Prevent, Address and Repair Forced Internal Displacement in the State of Sinaloa, Law of Sinaloa), passed on 21 August, 2020.

In these laws, the items covered below are emphasised.

##### *1. Definition of Internal Displacement*

The definitions of the Chiapas<sup>89</sup> and Guerrero<sup>90</sup> laws on internal displacement are written in accordance with international standards, since they include the definition contained in the Guiding Principles. They also establish that the laws are applicable to displaced persons who have not crossed the territorial state borders.

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<sup>89</sup> See Law of Chiapas, Art. 3.

<sup>90</sup> See Law of Guerrero, Art. 2.V.

Regarding the Law of Sinaloa, it only recognises situations of violence as a cause of internal displacement —either as a result of or to avoid these situations.<sup>91</sup>

Both the Chiapas and Guerrero laws contain a list of practices by which displacement is considered to be arbitrary. The definition established in the Law of Chiapas is taken from the Guiding Principles word for word,<sup>92</sup> while the Law of Guerrero adds “generalised violence” as a cause and does not include practices whose purpose or result is a change to the ethnic, political, racial, religious, or social characteristics of the affected population.<sup>93</sup> The Law of Sinaloa does not contain a definition of arbitrary displacement as it only recognises situations of violence as a cause of internal displacement, as mentioned above.

## *2. Prevention of Displacement*

The three state laws provide for the need to adopt measures and establish policies for the prevention of internal displacement<sup>94</sup> and it is envisioned that, if it occurs, it should not last longer than necessary.<sup>95</sup> Both the Chiapas and Guerrero laws establish that displacement must be the last alternative<sup>96</sup> and that precautionary measures be taken, and solutions be offered as soon as possible.<sup>97</sup>

## *3. Protection during Displacements*

The three laws recognise a broad list of rights for displaced persons, including the right to: non-discrimination;<sup>98</sup> a differentiated approach and special measures for people in vulnerable situations, such as indigenous people, children and

<sup>91</sup> See Law of Sinaloa, Art. 2.

<sup>92</sup> See Law of Chiapas, Art. 25.

<sup>93</sup> See Art. 3 of Law of Guerrero.

<sup>94</sup> See Law of Chiapas, Art. 17; Law of Guerrero, Art. 6; Law of Sinaloa, Art. 46.

<sup>95</sup> See Law of Chiapas, Art. 26; Law of Guerrero, Art. 32; Law of Sinaloa, Art. 39.

<sup>96</sup> See Law of Chiapas, Art. 27; Law of Guerrero, Art. 32.

<sup>97</sup> See Law of Chiapas, Art. 26; Law of Guerrero, Art. 31.

<sup>98</sup> See Law of Chiapas, Art. 5; Law of Guerrero, Art. 5; Law of Sinaloa, Art. 7.

adolescents, pregnant women, people with disabilities, among others;<sup>99</sup> respect for their liberty, security, dignity and integrity;<sup>100</sup> freedom of movement,<sup>101</sup> identity and recognition as a person before the law;<sup>102</sup> protection of property;<sup>103</sup> be consulted and participate in decisions that affect them, and receive information;<sup>104</sup> satisfactory living conditions, including health and hygiene, security, food, water, housing, clothing, compulsory basic education;<sup>105</sup> work;<sup>106</sup> peaceful assembly or association;<sup>107</sup> family unity;<sup>108</sup> access to justice and effective remedy and, whenever appropriate, reparation.<sup>109</sup>

#### 4. *Humanitarian Assistance*

All three laws clearly establish that the State *is* primarily responsible for providing humanitarian assistance<sup>110</sup> and that, correspondingly, the international community can provide humanitarian assistance.<sup>111</sup> Moreover, they set the need to grant and facilitate the quick and smooth access of the population to humanitarian aid.<sup>112</sup>

#### 5. *Durable Solutions*

The aforementioned laws recognise the three durable solutions set forth in the Guiding Principles: (i) return voluntarily, in safety and with dignity, to their homes or places of habitual residence; (ii) resettle voluntarily in another part of

<sup>99</sup> See Law of Chiapas, Art. 6; Law of Guerrero, Art. 6; Law of Sinaloa, Art. 8.

<sup>100</sup> See Law of Chiapas, Art. 8; Law of Guerrero, Art. 10.

<sup>101</sup> See Law of Chiapas, Art. 9; Law of Guerrero, Art. 11; Law of Sinaloa, Art. 12.

<sup>102</sup> See Law of Chiapas, Art. 11; Law of Guerrero, Art. 13.

<sup>103</sup> See Law of Chiapas, Art. 12; Law of Guerrero, Art. 10; Law of Sinaloa, Art. 24.

<sup>104</sup> See Law of Chiapas, Art. 15; Law of Guerrero, Art. 18; Law of Sinaloa, Art. 19.

<sup>105</sup> See Law of Chiapas, Art. 10 and 11; Ley de Guerrero, Art. 12; Ley de Sinaloa, Art. 13.

<sup>106</sup> See Law of Chiapas, Art. 13; Law of Guerrero, Art. 21.

<sup>107</sup> See Law of Chiapas, Art. 13; Law of Guerrero, Art. 15.

<sup>108</sup> See Law of Chiapas, Art. 14; Law of Guerrero, Art. 17.

<sup>109</sup> See Law of Chiapas, Art. 16; Law of Guerrero, Art. 19.

<sup>110</sup> See Law of Chiapas, Art. 31; Law of Guerrero, Art. 45; Law of Sinaloa, Art. 18.

<sup>111</sup> See Law of Chiapas, Art. 31; Law of Guerrero, Art. 45; Law of Sinaloa, Art. 15.

<sup>112</sup> See Law of Chiapas, Art. 34; Law of Guerrero, Art. 48; Law of Sinaloa, Art. 17.



the country, and (iii) integrate locally.<sup>113</sup>

Some interesting points foreseen in the durable solutions phase are non-discrimination due to displacement,<sup>114</sup> participation of persons in the processes that affect them,<sup>115</sup> and support for the recovery of properties or possessions abandoned or taken away from them when they were displaced.<sup>116</sup>

The three laws also establish that, once a durable solution is reached, persons will no longer be considered displaced, provided that their needs for protection and assistance have been addressed and all of their rights have been granted.<sup>117</sup> To determine the foregoing, the Guerrero and Chiapas laws establish criteria to determine the overcoming of the displaced status, including those related to security, decent living conditions, housing restitution mechanisms, documentation, family reunification, and access to justice.<sup>118</sup> It is worth mentioning that the Law of Guerrero imposes the obligation to promote actions aiming at creating conditions of economic and social sustainability for the displaced population.<sup>119</sup>

## 6. *Authorities and Registration*

The three laws state the specific authorities to address the phenomenon of internal displacement,<sup>120</sup> which work in coordination with other authorities in order to guarantee the necessary assistance and protection to displaced persons. They also include the participation of displaced persons, civil society

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<sup>113</sup> See Law of Chiapas, Art. 36; Law of Guerrero, Art. 51; Law of Sinaloa, Art. 5.1.

<sup>114</sup> See Law of Chiapas, Art. 38; Law of Guerrero, Art. 55.

<sup>115</sup> See Law of Chiapas, Art. 36; Law of Guerrero, Art. 18; Law of Sinaloa, Art. 19.

<sup>116</sup> See Law of Chiapas, Art. 39; Law of Guerrero, Art. 56.

<sup>117</sup> See Law of Chiapas, Art. 40; Law of Guerrero, Art. 57; Law of Sinaloa, Art. 27.

<sup>118</sup> See Law of Chiapas, Art. 41; Law of Guerrero, Art. 58.

<sup>119</sup> See Law of Guerrero, Art. 54.

<sup>120</sup> In Guerrero, the Directorate-General for Monitoring, Control and Assessment of Human Rights Affairs (Law of Guerrero, Art. 23); in Chiapas, the State Council for Comprehensive Attention to Displacement (Law of Chiapas, Art. 20); in Sinaloa, the Intersectoral Commission (Law of Sinaloa, Art. 45).

organisations, state commissions for human rights and international bodies. As part of the authorities' responsibilities, all three laws establish the development of state plans to address internal displacement,<sup>121</sup> allocate enough human and material resources,<sup>122</sup> and create state records of the displaced population.<sup>123</sup>

### 7. Criminalisation<sup>124</sup>

Internal displacement has been criminalised in the states of Guerrero,<sup>125</sup> Sinaloa<sup>126</sup> and Sonora.<sup>127</sup> The three laws establish prison sentences<sup>128</sup> and aggravating circumstances when comments are made against children and adolescents, human rights defenders or journalists in the case of Sinaloa, and against groups in vulnerable situations in the case of Guerrero. In all three, it is established that displacement will not be understood as population movement carried out by authorities for security reasons.

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<sup>121</sup> Programa para la atención y protección de Personas Desplazadas (Law of Sinaloa, ch. V); Programa Estatal para la Prevención y Atención del Desplazamiento Interno (Law of Guerrero, ch. IV); and Programa Estatal para la Prevención y Atención del Desplazamiento Interno (Law of Chiapas, ch. III).

<sup>122</sup> See Law of Chiapas, 20 XI; Law of Guerrero, ch. VI; Law of Sinaloa, Art. 40.

<sup>123</sup> See Law of Chiapas, 20 X; Law of Guerrero, Art. 33; Law of Sinaloa, ch. III.

<sup>124</sup> For more detailed information on this topic, see chapter IX on criminalisation of arbitrary displacement.

<sup>125</sup> Código Penal para el estado libre y soberano de Guerrero, Art. 220 Bis.

<sup>126</sup> Código Penal del estado de Sinaloa, Art. 175 Bis.

<sup>127</sup> Código Penal del estado de Sonora, Art. 241-A.

<sup>128</sup> From 6 to 12 years in Guerrero and Sinaloa, and from 2 to 8 years in Sonora.

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## Main Concepts and Approaches to Internal Displacement

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**Main Concepts and Approaches to Internal Displacement.** I. Introduction; II. Defining internally displaced persons: the Guiding Principles definition; III. Causes of internal displacement according to the Guiding Principles; IV. Arbitrary displacement; V. Internally displaced persons as a category worthy of special attention; VI. Conclusions.

## I. Introduction

In the early 90s, it was estimated that almost twenty-four million people worldwide, mostly women and children, had been uprooted from their homes as a consequence of persecution, violence, internal armed conflicts, community violence, and the impact of natural disasters, and they were staying within the borders of their countries of origin. The first efforts of the international community to address the hardships faced by internally displaced persons (IDPs) must be considered in the wider context of post-cold war, in which the long-repressed ethnic and religious conflicts had broken out violently in many parts of the world, forcing thousands of people to abandon their homes to save their lives.<sup>1</sup>

As IDPs were within the borders of their own States, their reality and necessities eluded the scope of the definition and regulation on refugees adopted towards the end of the Second World War, leaving the issue of

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<sup>1</sup> UN, Commission on Human Rights, *Comprehensive study of the Representative of the Secretary-General on the human rights issues related to internally displaced persons*, E/CN.4/1993/35. Available at <https://www.refworld.org/pdfid/45377b620.pdf?msclid=6f7990c3aa0611ecaa7b78ef7d9ef6cf>.

meeting their protection and assistance needs unresolved. The reason why internal displacement was not included within the scope of the Convention Relating to the Status of Refugees<sup>2</sup> reflects the effort to frame refugees as having two constitutive properties: persons that are outside their own State and lacked its protection.<sup>3</sup> In practice, IDPs did not have access to the same legal protection as refugees, although they often fled from the same conflicts and even found themselves in a more vulnerable situation in terms of violence due to their proximity to conflicts.<sup>4</sup>

In the early 90s, the need to develop international rules that agreed on a framework for protecting and assisting IDPs arose as a direct consequence of the outbreak of many conflicts and violent tensions that caused the displacement of tens of millions of people inside their own countries. In 1992, the decision to appoint a Secretary General's Representative for internal displacement made by the then UN Human Rights Commission was a key step in the efforts to further the consolidation of a legal tool to address the protection challenges posed by this type of displacement. After years of intense research, law practice and diplomacy, the efforts of the Commission, the Special Representative and the team of legal experts that collaborated on the analysis of legal frameworks and alternatives for the consolidation of a framework of principles to address the protection of IDPs resulted in the adoption of the Guiding Principles on Internal Displacement (from now on, the Guiding Principles).<sup>5</sup>

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<sup>2</sup> See UN, General Assembly, Convention Relating to the Status of Refugees. Available at <https://www.refworld.org/docid/3be01b964.html>.

<sup>3</sup> Cf. Orchard, "The Contested Origins of Internal Displacement," in *International Journal of Refugee Law*. Available at <https://academic.oup.com/ijrl/article-abstract/28/2/210/2223311>.

<sup>4</sup> Ferris, "Internally displaced persons: A neglected issue on the international agenda", in *New Routes* 4/2008, 2008. Available at [https://reliefweb.int/sites/reliefweb.int/files/resources/8515962AEF080C1F4925754C0004B18E-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/8515962AEF080C1F4925754C0004B18E-Full_Report.pdf).

<sup>5</sup> UN, Human Rights Commission, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2. Available at <https://www.refworld.org/docid/3d4f95e11.html>.

Their input in the consolidation of a protection and solutions framework for internal displacement remains crucial more than twenty years after its adoption. The Guiding Principles, 30 in number, capture the specific meaning that the general guarantees of international human rights law (IHRL) and international humanitarian law (IHL) adopt for this population. In addition, these principles cover the phases of internal displacement: the phase prior to displacement, the situation during displacement, and the phase of return or resettlement and reintegration. The Guiding Principles expressly restate the right not to be arbitrarily displaced, they describe in detail the rights to which displaced persons are entitled,<sup>6</sup> and redefine the concept of sovereignty as a form of national responsibility towards vulnerable populations, while acknowledging the role provided for the international community when governments did not have the capacity or willingness to protect their uprooted populations.<sup>7</sup>

Although not a legally binding instrument like a treaty, the Guiding Principles restate the regulations of IHRL and IHL which *are* binding and gained international acceptance and authority in the task of determining the content of State protection duties towards internally displaced populations.

This chapter presents one of the main Guiding Principles contributions to the consolidation of a reference framework for the protection of IDPs: the concept of *internally displaced persons*, including the analysis of the causes of displacement encompassed in such conceptualisation.

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<sup>6</sup> Kálin, “The Guiding Principles on Internal Displacement as international minimum standard and protection tool,” in *Refugee Survey Quarterly*, p. 27-36. Available at <https://www.jstor.org/stable/45053999>.

<sup>7</sup> Cohen, “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting”, in *Global Governance*, p. 459-480. Available at [https://www.brookings.edu/wp-content/uploads/2016/06/cohenr\\_20041001.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/cohenr_20041001.pdf).

## II. Defining Internally Displaced Persons: the Guiding Principles Definition

Although a rooted term in the language of human rights and humanitarian action, the conceptualisation of the term *internally displaced persons* is still extensively discussed, even more than two decades after the adoption of the Guiding Principles. There are still discussions in certain spheres on the usage of this term to refer only to uprooted persons due to situations of conflict, violence and persecution, i.e., people who, were they to cross an international border, would be considered refugees. Many of the statistical reports on IDPs published worldwide contribute to this understanding in some way, since they focus on the situation of displacement due to conflict and violence. Other perspectives and standpoints concerning the definition of internally displaced persons adopt a wider approach to *internal displacement* that encompasses not only those who flee violence, conflicts and persecution, but also millions of people uprooted because of the impact of natural disasters and development projects.

This article will examine the concept of internal displacement as included in the text of the Guiding Principles, analysing the elements mentioned in the definition of IDPs. Firstly, matters of definition and various points of view on its application will be discussed. Secondly, the nature and causes of internal displacement considered in the definition will be explored. The analysis of the concept of *internally displaced persons* is expected to provide justice operators with greater clarity about this concept and the personal and situational scope of application of the Guiding Principles, as a guide aimed at informing the State's response in terms of protection and solutions.

The Guiding Principles define IDPs as follows:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised

violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.<sup>8</sup>

Two key and distinctive elements of the definition of IDPs in the Guiding Principles clearly emerge. The first is the involuntary nature of the displacement. The definition is clear in this respect when it states that IDPs have been forced or obliged to flee. The involuntary or forced nature of the displacement sets IDPs apart from those who abandon their homes due to a personal choice, despite the fact that they could have stayed in the place where they were living in safe conditions. Even if they plan or make arrangements to leave their homes, it is worth considering that not every displaced person decides to just leave overnight; the decision to move often entails some degree of planning. What is certain is the fact that such decision does not respond to a voluntary choice, and mainly obeys the need to flee the impact of situations that represent a threat to the person or group of persons.

Since it expressly refers to the possibility that the person or group of persons may have been “obliged” to leave their homes or place of habitual residence, the definition in the Guiding Principles does not consider situations in which displacement is imposed on the population. Such is the case of displacements that do not respond to an event or a spontaneous or individual decision to move so as to safeguard the person’s rights, but that such displacements are the result of an organised and systematic policy used by actors, including, in some cases, the State itself.

The second distinctive element that emerges from the definition is the fact that such movement or displacement occurs within State borders and does not involve crossing an international border. This second element allows for clearly distinguishing the situation of IDPs from the situation of refugees, who, by definition, are outside their country of nationality or habitual residence.

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<sup>8</sup> United Nations (UN), Human Rights Commission, “Preamble”, in Guiding Principles... quot.



Despite this distinction, it is a fact that both groups often face quite similar risks and needs.<sup>9</sup>

The definition of *internally displaced persons* that was eventually incorporated into the Guiding Principles does not require, for its application, massive situations or great numbers of forcibly displaced people. The definition, when it refers to “persons or groups of persons”, reflects the reality of displacement, in the sense that displaced persons can flee both in small groups or even individually, just like in the context of massive displacements that include significant numbers of people, families or even communities forced to leave. The definition embraced by the international community does not set any requirement or condition related to the number of people that must be affected in order to consider a situation of internal displacement as such.

Another aspect of the definition worth mentioning is the recognition that people can become displaced even before suffering the effects of situations considered causes of displacement. Internal displacement can arise as a direct consequence of a victimising event that affected the persons who fled their homes. In addition, displacement can occur even when no victimising event has taken place, as a measure aimed at preventing the effects of the situations causing forced displacement. The definition included in the Guiding Principles 1998 states that displaced persons were forced to flee their homes “as a result of or in order to avoid the effects” of the causes presented below in the definition, which will be analysed more closely later on. Every cause listed in the definition has the capacity of disturbing the regular functioning of affected communities and risking people’s wellbeing and human rights. The way the Guiding Principles define IDPs does not require the person or group of persons to have experienced or suffered the effects of such events: it is enough for the person to have moved in order to be safe from them. The words “as a result of or in order to avoid the

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<sup>9</sup> See Global Protection Cluster Working Group, “Part I. Foundations of IDP Protection,” in *Handbook for the Protection of Internally Displaced Persons*. Available at <https://www.refworld.org/docid/4790cbc02.html>.

effects of” recognise that people may become internally displaced either after suffering the effects of coercive factors or in anticipation of such effects.<sup>10</sup>

The Guiding Principles definition of *internally displaced persons* does not require the person or group of persons affected by such situation to be citizens of the country concerned; therefore, it also considers persons obliged to flee or leave their homes or their habitual place of residence. In this sense, the citizens of a country, refugees, stateless persons or even other categories of persons who are not citizens but have their habitual residence in the country concerned may be affected by situations of internal displacement.<sup>11</sup> The notion of *habitual residence* is not conditioned by any legal formality, as it could be for foreigners, who may need some permit or authorization for their stay, or for citizens or foreigners who may require some formality related to the establishment of their place of residence in a certain place. Therefore, habitual residence is determined objectively, in terms of the presence of the person or group of people during a certain period, and subjectively, with respect to their “intention to stay or reside” in a particular place.

As regards the concept of the place of habitual residence, it is important to take into account the considerations set out in the international recommendations and the Handbook of the International Expert Group on Refugee and Internally Displaced Persons Statistics (EGRIS) because they state that, according to the international definition, the place of habitual residence is where the person lived at the time of the initial displacement, that is to say, their place of habitual residence before displacement. Habitual residence is defined as the place where the person lives and has stayed during some time or where they have the intention to stay during a certain period. In the case of pastors and nomads, the concept of place of habitual residence should be replaced by the space of

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<sup>10</sup> See Kálin, *Guiding Principles on Internal Displacement. Annotations*. Available at [https://www.brookings.edu/wp-content/uploads/2016/06/spring\\_guiding\\_principles.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/spring_guiding_principles.pdf).

<sup>11</sup> Brookings-Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*. Available at <https://www.refworld.orjydocid/4900944a2.html>.

*habitual living* or area in which they make a living or graze their animals. In the case of displacement of nomads, habitual residence comprises traditional lands where it is no longer possible to enter due to the event or phenomenon generating the displacement.<sup>12</sup>

### III. The Causes of Internal Displacement in the Guiding Principles

In the second paragraph, the Guiding Principles include, not limited to, a list of causes and situations, effects of which, or their mere threat, could cause internal displacement. The list is key to understand and analyse the definition of *internally displaced persons*; however, we need to be warned: there is no information in the Guiding Principles or complementary resolutions stating the restrictive nature of the listed causes. These causes are examples and they do not rule out the possibility of considering other situations effects of which, or their mere occurrence, could lead to internal displacement. Considering that internal displacement is not necessarily limited to the causes listed on paragraph 2, the definition in the Guiding Principles uses the expression “in particular,” trying to avoid the possibility of considering other situations that could lead to the involuntary movement of people within the territory of the country of habitual residence as causes of displacement.<sup>13</sup>

Considering their illustrative nature, it is useful to take a look at the causes listed in the Guiding Principles:

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<sup>12</sup> Expert Group on Refugee and IDP Statistics (EGRIS), *International Recommendations on Internally Displaced Persons Statistics* (IRIS). Available at <https://www.unhcr.org/statistics/unhcrstats/600188974/international-recommendations-internally-displaced-persons-statistics-iris.html>.

<sup>13</sup> For example, the Kampala Convention adopts an innovative approach by formulating responses adjusted to the specific characteristics of the displacement in Africa. So, in addition to the causes outlined in the Guiding Principles, there are others, such as racial discrimination and equal practices; forced relocation of population incompatible with IHL; conflicts and generalised violence; forced evacuations related to disasters when they are not justified by safety or health purposes; violations of human rights, such as gender-based violence and other harmful acts and inhumane or humiliating treatment; and any other “act, event, factor or phenomenon with the severity compared to the foregoing and that it is not justified considering international law.”

- armed conflict
- situations of generalised violence
- violations of human rights
- natural or human-made disasters

Of the four causes considered in the definition, three —armed conflict, generalised violence, and violation of human rights— refer to situations historically related to refugees' displacement. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), the number of displaced persons within their own countries due to armed conflicts, generalised violence or violations of human rights continued to grow in 2020, and it reached a historical record of more than forty-eight million IDPs by the end of that year. The data generated by UNHCR's statistical report, which focused on the state of people affected by internal displacement due to three of the four causes listed in the definition of the Guiding Principle (armed conflict, generalised violence and violations of human rights,) reveal that in one decade the number of IDPs tripled around the world, from about fifteen million by the end of 2010 to more than forty-eight million 10 years later.<sup>14</sup>

The outbreak of new conflicts or tensions, or the worsening of the existing ones is still a key factor affecting the figures and realities of internal displacement caused by conflict, violence or violation of human rights. By the end of the decade, the countries with most net increases in internal displacement were mainly in Africa, where more and more people were forced to flee due to conflict and violence. The East and Horn of Africa and the Great Lakes region witnessed a new massive internal displacement mainly due to the outbreak of conflict in the Tigray region, Ethiopia, while in West and Central Africa there were also significant increases in the number of people affected by internal displacement caused by the rise in violence in the Sahel and in the Chad Lake

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<sup>14</sup> UNHCR, *Global Trends: Forced Displacement in 2020*. Available at <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>.

basin. In many of these cases, the interaction of conflict and violence with the impact of climate change becomes more tangible.<sup>15</sup>

Regarding the displacement causes, as mentioned before, it is important to highlight that the language used in the Guiding Principles, at least in relation to the three causes mentioned above (armed conflict, generalised violence and violations of human rights), is a language regularly used in the determination of the refugee status. These three causes or events mentioned are presented in a similar wording in the regional definition of *refugee* that can be found in the 1984 Cartagena Declaration on Refugees.<sup>16</sup> It suggests that, in addition to the definition of *refugee* of the 1951 Convention, people who have fled their countries because their life, safety or freedom has been threatened by generalised violence, internal conflict or violation of human rights should also be considered refugees.

In contrast with the regional definition of refugee of the Cartagena Declaration and, in general, with the concept of refugee, the definition of *internally displaced person* of the Guiding Principles considers IDPs as people who have been forced to flee their homes as a result of or to avoid the effects of disasters. Including the concept of disasters in the Guiding Principles was not easy. In the 90s, there was slight consensus on whether people who could become displaced due to disasters should be included in the definition. Those who opposed argued that only persons feeling persecution and violence should be considered IDPs, in other words, persons who would qualify as refugees if they crossed a border.<sup>17</sup> The pressure of many States, the Academy and the civil

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<sup>15</sup> *Id.*

<sup>16</sup> Regional Refugee Instruments and Related Issues, Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems. Available at [https://www.oas.org/dil/1984\\_cartagena\\_declaration\\_on\\_refugees.pdf](https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf).

“The definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

<sup>17</sup> See Cohen, “An Institutional Gap for Disasters IDPs” in *Forced Migration Review*, p. 58-59.

society played a key role in the inclusion of disasters in the definition of IDPs. By 1990, the first evaluation report of the Intergovernmental Panel on Climate Change (IPCC) had warned that one of the main consequences of climate change would be in human immigration.<sup>18</sup> It is true that, in most cases, the displacement of men, women and children occurs within the territory of their own nationality or habitual residence.

Let us analyse more deeply the causes listed in the definition of *internally displaced* persons of the Guiding Principles.

## 1. Armed Conflict

The last two decades have witnessed significant changes in the number and complexity of armed conflict worldwide. As mentioned at the beginning of this chapter, the levels of displacement due to armed conflicts have increased significantly, mainly in terms of number of IDPs. Most displaced persons due to armed conflict remain in the territory of their own States of habitual residence. It is increasingly common to see extended displacement cases and displacement has become increasingly urban and dispersed. The truth is that more and more IDPs settle in urban areas instead of in camps or settlements.<sup>19</sup>

Although armed conflicts are one of the main causes of forced displacement, the definition of the term *armed conflict* is still ambiguous and controversial. International law does not systematically address the group of challenges that armed conflict sets out as regards displacement, internally and through

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Available at <https://www.fmreview.org/statelessness>.

<sup>18</sup> In 1988, the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) created the Intergovernmental Panel on Climate Change (IPCC) to analyse the scientific, technical and socioeconomic information relevant to understand the scientific elements related to climate change of anthropogenic origin, as well as the possible consequences, risks and possibilities of mitigation and adaptation.

<sup>19</sup> Bradley, *The Impact of Armed Conflict on Displacement*, Institutí Barcelona d'Estudis Internacionals. Available at [https://www.researchgate.net/profile/Miriam-Bradley/publication/327976746\\_The\\_Impact\\_of\\_Armed\\_Conflict\\_on\\_Displacement/links/5bb111e192851ca9ed3213b2/The-Impact-of-Armed-Conflict-on-Displacement.pdf](https://www.researchgate.net/profile/Miriam-Bradley/publication/327976746_The_Impact_of_Armed_Conflict_on_Displacement/links/5bb111e192851ca9ed3213b2/The-Impact-of-Armed-Conflict-on-Displacement.pdf).

international borders, and the fact is that there are many relevant regulations about displacement due to armed conflict in various legal instruments. Despite sharing the goal of providing protection against abuses, IHL, International Refugee Law, and IHRL have developed an approach towards displacement due to armed conflict from specific sources, institutions and purposes. Even though the focus on the complementarity of these branches of international law have contributed to widen the spectrum of protection, it has conditioned the development of a holistic approach on the subject matter.<sup>20</sup>

To simplify the task of considering the term *armed conflict* at the time of analysing the causes of internal displacement, a first approach to the concept is determined by the implementation of IHL regulations. In this sense, *armed conflict* is a triggering term that activates the rules of IHL, the special regulating applicable body in these situations. Therefore, the term *armed conflict* has important legal effects in relation to the protection of the rights of people involved in or affected by armed conflicts.

IHL makes a difference between two types of armed conflicts, namely:

- International armed conflicts, opposing two or more States.
- Non-international armed conflicts, between governmental forces and non-governmental armed groups or between such groups only.<sup>21</sup>

From IHL's perspective, these are the existing types of armed conflicts. However, it is important to highlight that a violent situation could grow into a

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<sup>20</sup> Chetail, "Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law," in *The Oxford Handbook of International Law in Armed Conflict*. Available at <https://academic.oup.com/edited-volume/43487>.

<sup>21</sup> See International Committee of the Red Cross (ICRC), "How is the term 'Armed Conflict' defined in International Humanitarian Law?" Available at <https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm>

type of armed conflict or other type of conflict, according to the acts that could develop in a certain moment and context.<sup>22</sup>

Regarding the characteristics of international armed conflict, Article 2 of the 1949 Geneva Conventions provides that:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance.

According to the relevant provisions of IHL, an international armed conflict occurs when the “High Contracting Parties” (States Parties of the Geneva Conventions) fight, that is to say, “when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation.” The existence of an international armed conflict does not require a formal declaration of war or recognition of the situation by the parties involved: it depends on what actually happens on the ground. International law does not determine the applicability of IHL in relation to the formal or technical concept of the existence of a declaration of war and it has tended towards more factual criteria. The determination of an international armed conflict is based on factual conditions and may even occur although one of the belligerents may not recognise the Government its opponent.<sup>23</sup>

Besides, the Updated Commentary of the 1949 Geneva Conventions recognise that the difference arising between two States should not necessarily or only imply the intervention of its armed forces, since the unilateral use of armed forces by one State against the other is also enough to consider it an

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<sup>22</sup> See *Id.*

<sup>23</sup> See *Id.*



international armed conflict, even when the other State does not or cannot use the armed forces. Moreover, the use of the armed forces not against the armed forces of the enemy, but against the enemy's territory, the civil population or civil goods, is an international armed conflict. "The question of 'who' is involved in the armed opposition between States should not significantly affect the classification of the situation as an international armed conflict. When a State resorts to means and methods of warfare against another State, that situation qualifies as an international armed conflict, irrespective of the organ within that State that has resorted to such means and methods."<sup>24</sup>

As regards the issue of occupation, it is important to highlight that Article 2 of the Geneva Conventions sets forth that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance."<sup>25</sup> Article 42 of the Hague Regulations of 1907 states that "a territory is considered occupied when it is actually placed under the authority of the foreign armed forces." The idea of *occupation* requires the occupant to have effective territorial control, substituting the authority of the territorial State for their own, without the consent of the Government.<sup>26</sup> On that matter, the updated commentaries of the 1949 Geneva Conventions state three elements that determined occupation: the unauthorised presence of foreign forces, the ability of foreign forces to exert authority over the territory in question as regards the replacement of the local sovereign and the resulting inability of the latter to exert their authority over the territory. Together, these elements form the "effective control test," that is used to determine if a situation could be considered as occupation.<sup>27</sup>

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<sup>24</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, pars. 223, 224 and 228. Available at <https://www.icrc.org/en/publication/426803-updated-commentary-geneva-conventions-august-12-1949-volume-i-2016>.

<sup>25</sup> *Ibid.*, par. 193.

<sup>26</sup> *Ibid.*, par. 303 and 304.

<sup>27</sup> See *Id.*

Apart from the regular armed conflicts between the States, the Protocol I Additional expands the definition of *international armed conflict* to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”,<sup>28</sup> including those called wars of national liberation.<sup>29</sup> Including explicit references to the struggle against colonial domination and racist regimes shows concerns that stimulated international discussions when Protocol I Additional was negotiated, as well as a response to the desire, mainly from developing countries, for legitimization of those involved in liberation struggles. However, it is a fact that the Protocol I Additional has not been applied in virtually any of these situations, in which case the key question identified by the provision is whether a movement is struggling in exercising the right to self-determination; a key point to be determined by reference to general international law.<sup>30</sup>

The conceptualization of *international armed conflict* has also been analysed by *ad hoc* international criminal courts to pass judgement on international crimes. In this regard, it should be noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of *international armed conflict*. In its decision in the *Tadic* case, the Court ruled on this concept by stating that “armed conflict exists when armed force is used

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<sup>28</sup> *Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*. Available at <https://www.refworld.org/docid/3ae6b36b4.html>.

“This Protocol, supplementing the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations provided for in Article 2 common to said Conventions.

Situations referred to in the preceding paragraph include armed conflicts in which peoples fight against colonial domination and foreign occupation and against racist regimes, in exercising the peoples' right to self-determination, enshrining the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.”

<sup>29</sup> See OCR “What is the Definition of ‘Armed Conflict’ according to...” *quot.*

<sup>30</sup> See Akande, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, in *Journal of International Criminal Justice*. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038217](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038217).

between States.”<sup>31</sup> The advanced definition of ICTY has since then been adopted in the decisions of other international bodies.

The provisions of IHL, its doctrinal interpretation and even valuable international decisions have been effective in characterizing international armed conflicts based on the fact that a State uses armed force against another, which allow the Geneva Conventions application. Stating that there is an international armed conflict whenever States use arms or force suggests that the threshold for such a conflict is not particularly high, considering that almost any use of armed force by one State against another will put it into effect.

In contrast, determining what is meant by non-international armed conflict poses a more complex challenge. It will not always be easy to determine when a situation of violence arising within a State territory can be classified as a non-international armed conflict. When a situation of violence is merely considered as one of internal tensions or riots, IHL considers that the threshold of armed conflict is not reached for the purposes of its application to that particular context.<sup>32</sup> In this sense, the key issue will be to determine, in the specific case, if the threshold has been ultimately reached to consider a situation of internal violence in a given location an actual non-international armed conflict.

In this task, it is useful to refer to and examine two rules that derive from IHL: Article 3 common to Geneva Conventions of 1949 and Article 1 of Protocol Additional II.

In this regard, common Article 3 of Geneva Conventions applies in cases of “non-international armed conflict arising in the territory of one of the High Contracting Parties [...]. It may be an armed conflict involving one or more

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<sup>31</sup> ICTY, *Prosecutor v. Dusko Tadic aka “Dude”* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), par. 70. Available at <https://www.refworld.org/cases,ICTY,47fdb520.html>

<sup>32</sup> *Cf. Protocol II Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 1, par. 2.* Available at <https://www.icrc.org/es/doc/resources/documents/misc/protocolo-ii.htm>.

non-governmental armed groups. Depending on the situation, there may be hostilities between governmental armed forces and non-governmental armed groups or between those groups only”.<sup>33</sup> Unfortunately, Article 3 common to four Geneva Conventions of 1949 does not specify the concept of *non-international armed conflict*, and only refers to the fact that the Article shall apply to a “non-international armed conflict.” Once again, developments in international criminal law can help us. In the *Tadic* case, the ICTY Appeals Chamber referred to a non-international armed conflict as a situation of “prolonged armed violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>34</sup> The threshold that sets the ICTY's decision is also adopted in Article 8(2)(f) of the Statute of the International Criminal Court. In addition, the Statute of the Court indicates that a non-international armed conflict excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other similar situations.” This is previously reflected in Protocol Additional II to the Geneva Conventions.<sup>35</sup>

For a non-international armed conflict to be considered under the terms of common Article 3, there must be a conflict between a State and a non-State armed group or, alternatively, it may be a conflict arising between non-state armed groups. Thus, international courts jurisprudence has developed an approach based on two key elements to determine a non-international armed conflict: violence intensity and parties' organization.<sup>36</sup> Regarding the *organization* criteria, it is stated that non-state armed forces must be organised, i.e., “they must be under a certain command structure and have the capacity to sustain military operations. Even though it is not expected that non-state armed group has the same organization level as state armed forces, at least, it must

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<sup>33</sup> ICRC, What is the Definition of ‘Armed Conflict’ according to...? *quot.*, p. 3

<sup>34</sup> ICTY, *op. cit.*, par. 70.

<sup>35</sup> *Protocol Additional II to the Geneva Conventions of 1949, quot.*, Art. 1, par. 2.

<sup>36</sup> See ICTY, *op. cit.*, pars. 561-568; See also ICTY, *The Prosecutor v. Fatmir Limaj*, par. 84.

have some level of hierarchy or discipline” (own translation.)<sup>37</sup> ICTY has noted that factors showing the organization of a non-State armed group include that: there is a command structure, as well as rules and disciplinary mechanisms within the group; there are headquarters; the group controls certain territory; the group can have access to arms and military material, recruits and training; it can plan, coordinate and conduct military operations; it can outline a unified military strategy, as well as communicate, negotiate and conclude agreements through a unified voice.<sup>38</sup>

On the other hand, hostilities must reach a minimum level of intensity. For example, this may happen when these are collective in nature or when the government has to resort to military force against insurgents, instead of resorting only to police force.<sup>39</sup> Again, international courts jurisprudence provides indicative factors that can be used to assess violence intensity, such as severity of attacks and whether there has been an increase in armed confrontations, its spread across territory and over time; government forces mobilization and weapon distribution among the parties of the conflict, as well as whether the conflict has been noticed by the United Nations Security Council and whether resolutions have been adopted regarding that issue. Other aspects considered include the number of civilians displaced from combat zones; the types of weapons used, the blockade or siege of cities and their bombing; the number of troops and units deployed; the occupation of territory, towns and cities; the existence of agreement on cessation of hostilities; and possible attempts to negotiate and implement this kind of agreements.<sup>40</sup>

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<sup>37</sup> RCO, *Commentary to the First Geneva Convention... quot.*, par. 429.

<sup>38</sup> See *Ibid.*, pars. 427-430. See also, ICTY, *Haradinaj case* (first instance decision), par. 60; ICTY, *Boskoski and Tarčulovski case* (first instance decision), par. 199-203; and *Limaj case* (first instance decision), par. 94-134. Some of these elements have also been applied by the International Criminal Court (ICC): See *Lubanga case* (first instance decision), par. 537; *Katanga case* (first instance decision), par. 1186; and *Bemba case* (first instance decision), par. 134-136.

<sup>39</sup> See RCO, “What is the Definition of ‘Armed Conflict’ according to...?” *quot.*

<sup>40</sup> Cf. ICRC, *Commentary to the First Geneva Convention... quot.*, pars. 431 and 432. See also ICTY, *Boskoski and Tarčulovski case* (first instance decision), par. 177 (footnotes with references to ICTY

A narrower definition of *non-international armed conflict* was adopted for the specific purposes of Protocol Additional II. This instrument applies to armed conflicts “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>41</sup>

In this regard, it is important to note that the threshold for the Protocol Additional II application to consider non-international armed conflicts is higher than that of common Article 3. It is clear that Protocol Additional II does not apply to situations of internal disturbances and tensions, such as isolated and sporadic acts of violence. However, it limits its application to conflicts taking place in one party’s territory “between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.”<sup>42</sup>

The strictest threshold set by Protocol Additional II is presented in several ways. First, it excludes conflicts that arise only between non-state armed groups and exclusively applies if government forces are involved in the armed conflict. Second, there is the requirement that the organised armed group exercise control over the territory. Apparently, the formulation is designed to cover situations where a non-state group has the ability to challenge the government authority in relation to an area of the territory. The requirement for control over territory is connected to the ability to conduct sustained and coordinated

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case law have been deleted); *Haradinaj case* (first instance decision), pars. 49 and 90-99; and *Limaj case* (first instance decision), pars. 90 and 135-170. Some of these elements have also been applied by the ICC: See *Lubanga case* (first instance decision), par. 538; *Katanga case* (first instance decision), par. 1187; and *Bemba case* (first instance decision), par. 137-141.

<sup>41</sup> ICRC, What is the Definition of ‘Armed Conflict’ according to...? *quot.*

<sup>42</sup> *Protocol II Additional to the Geneva Conventions of 1949, quot.*, Art. 1, par 1.

military operations and, evidently, does not require the actual conduct of such operations, but merely the ability to do so.

In armed conflicts, displacement is often caused by violations of or risk of violations of IHL or human rights. Indeed, if parties involved in armed conflicts, whether international or non-international, adhered to existing rules regarding protection and avoidance of attacking the civilian population or those that no longer participate in hostilities, most of the people displaced by the violence of such situations would be able to remain in their homes. But in fact, rules are often not observed, and the parties involved in armed conflicts frequently fail to comply with their obligations. Many of the provisions of IHL reaffirm basic issues, such as prohibiting attacks on civilians and their property, starving civilian population as a method of warfare, taking reprisals, using civilians as human shields, destroying objects essential to their survival, and obstructing relief supplies and assistance necessary for the survival of the civilian population. Non-compliance determines the risks and threats that force people to leave their homes.

Despite the legally binding nature of IHL, state and non-state actors often fail to comply with its rules, which puts the civilian population at imminent risk in which displacement is often the only alternative for surviving.

## 2. Generalised violence

As stated in the previous section, not every violence situation in a given context is equivalent to, or suggests the existence of, an armed conflict.

Violence is a long-standing problem in human societies and is often used as a tool of oppression against sectors of society or minority groups. Violence, which is always a determining factor in considering the status of the rule of law and human rights in a given context, invariably jeopardises basic rights, property, and often results in the loss of human life. There are many reasons for the occurrence and increase of violence in various contexts. Greed, political or religious pressures, social or ethnic tensions and socioeconomic insecurity are often presented as recurring causes of violent activities.

Violence is a common global problem; however, the acts and intensity of violence may differ from place to place. For example, in some regions, disturbances and intra-community violence based on ethnic or religious tensions are a common type of collective violence. In others, the growing control, activity and actions of criminal groups can lead to high levels of violence affecting the civilian population. Responsible authorities try to detect and stop violence before it starts, but are often unable to do so, resulting in disruptions, imbalances and risks to society, including the possible existence of displacement situations.

Despite being a term included in the definition of internally displaced persons adopted by the Guiding Principles and in the regional definition of refugee in Cartagena Declaration on Refugees 1984, the reality is that *generalised violence* is not a technical term, nor does it have a precise or defined meaning in international law. It is recommended that this lack of specific or technical definition be covered by adopting a casuistic approach in the application of this term, in order to extend its scope to situations characterised by violence that is indiscriminate and/or sufficiently widespread to the point of affecting large groups of people or entire populations. At this point, the reference to IHRL should be used to determine if a situation of generalised violence prevails, through the identification of factual indicators related to the number and type of security incidents as well as to the general level of violence in the country and its effect on the civilian population.<sup>43</sup>

Generalised violence situations imply massive violations and serious risks to human rights exercise. Generalised violence is established through the geographic dispersion or intensity of violence, or through their combination. In this regard, it is possible to characterise a generalised violence situation by considering certain key parameters:

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<sup>43</sup> See UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*. Available at <https://www.refworld.org/docid/583595ff4.html>



- Reports, indicators and information available on incidents of security and violence in a given context, including the information available on the evolution of the rates of certain specific crimes, like homicides, injuries, sexual violence, kidnappings, extortions, and the number of victims in the territory or parts of the territory, or the existence of reliable research or reports on the dynamics and impact of violence on the civilian population.
- The suffering of the population caused by violence, and the consideration of particularly atrocious manifestations of violence, such as massacres; use of torture; cruel, inhuman and degrading treatment; summary executions; kidnappings; disappearances of persons. The impact that the different forms of violence may have in creating fear among the civilian population.
- The consideration and analysis of the specific impact that violence may have on sectors or groups in situations of greater vulnerability, including the specific situation of sexual and gender-based violence against women and girls, or the specific forms of violence against children and adolescents, including, for example, the risk of recruiting from gangs or criminal groups, or other actors perpetrating violence.
- The capacity and real urge of the State to provide protection against the different forms of violence in a given context, including access to justice and effective protection mechanisms. In many contexts of displacement, the impact of violence is intensified by the limited capacity of the State to prevent or respond to violence, and by the limitations of certain groups face in accessing justice or other protection mechanisms.

In this regard, it is appropriate to mention that the Inter-American Commission on Human Rights (IACHR) has tested a series of indicators to describe situations of generalised violence, which include:

- The number of violent incidents and victims is very high.
- The existing violence causes a great suffering among population.
- Violence manifests itself in the most atrocious forms, such as massacres; torture; mutilation; cruel, inhuman and degrading treatment; summary executions; kidnappings and disappearances of people.
- The acts of violence are often intended to cause fear and ultimately to create a situation in which people are left with no choice other than fleeing the affected area.
- Violence can come from state and non-state actors, and, when it comes from state actors, or from others acting upon instigation or with the consent of state authorities, the perpetrators enjoy impunity.
- When violence comes from non-state actors, authorities are not able to effectively control them.
- The level and extent of violence is such that the normal functioning of society is seriously impaired.<sup>44</sup>

Despite the lack of a specific definition, an agreed-upon key element is the consideration that situations of generalised violence encompass violence carried out by both state and non-state actors. The issue here is the situation of the ground, and the risks of violence in a given context.<sup>45</sup> Considering that non-state actors are responsible for situations of generalised violence is of vital importance

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<sup>44</sup> Cf. IACHR, “Armed conflict in Colombia and its impact on women” in *Violence and Discrimination against Women in the Armed Conflict in Colombia*, p. 11; IACHR, “Citizen Security and Human Rights” and “Justice Administration” in *Report on the Situation of Human Rights in Jamaica*, p. 7 and 28; and IACHR, *Report on the Situation of Human Rights in the Republic of Guatemala*, especially sections “Introduction” and “Conclusions and Recommendations.”

<sup>45</sup> See ICRC, *Commentary to the First Geneva Convention...* quot.

in the context of the Americas, where the control, activity and increased violence exerted by criminal organizations, like *maras*, gangs, cartels, have led to situations of internal displacement in several countries of the region.

After having overcome decades of political instability, civil wars and refugee crises, a new reality of displacement and complex challenges is emerging in the countries of northern Central America (El Salvador, Guatemala and Honduras) and in Mexico, where violence exerted by criminal organizations has become an alarming and growing factor in forced displacement. The numbers and figures available to these countries<sup>46</sup> are added to the personal stories of family members and friends about recent situations of displacement that affect different social strata. Nowadays, displacement is part of the challenges of the region and requires an urgent approach that must start from the recognition of the impact that the control, activity and increasing power of criminal organisations has on civilian population, including the greater risk of forced displacement and growing power of criminal organizations.<sup>47</sup>

Violence exerted by criminal organizations has become an intrinsic part of daily life in some countries of the region. IACHR affirms that situations of generalised violence have become one of the main drivers of internal displacement of individuals, families, and entire communities in the countries of northern Central America.<sup>48</sup> Entire communities often find themselves under the control of *maras*, gangs or cartels and their mechanisms of social control. This violence affects men, women and children equally. Many of the victims are young people that criminal organizations want to recruit to reassert their

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<sup>46</sup> It is estimated that more than three hundred and eighteen thousand people are internally displaced in El Salvador and Honduras, based on official studies carried out in those countries (<https://data2.unhcr.org/es/situations/cam>), although the number might be even higher given the time that has elapsed from the moment these studies were performed, and the new dynamics of violence and displacement observed at the field level.

<sup>47</sup> See Cantor, “The New Wave: Forced Displacement Caused by Organised Crime in Central America and Mexico”, in *Refugee Survey Quarterly*, p. 34-68. Available at <https://doi.org/10.1093/rsq/hdu008>.

<sup>48</sup> IACHR, *Internal Displacement in the Northern Triangle of Central America. Public Policy Guidelines*. Available at <http://www.oas.org/en/iachr/reports/pdfs/InternalDisplacement.pdf>.

control over the community and to be able to carry out their criminal activities. Extortion, robbery, murder, prostitution, kidnapping, human trafficking, drug and arms trafficking, and the appropriation and exploitation of land and property are common practices of criminal organizations to raise funds and exercise control over their respective territories.

Individuals, local businesses, buses and taxis, as well as professionals and small producers, may be subject to “extortions” and threats of violence if they refuse to comply with these demands. The use of sexual and gender-based violence against women and girls, as well as violence against people of diverse gender identity or sexual orientation, is also a violence mechanism applied by criminal organizations to discipline and control the population in the territories where they operate. Violence against people or institutions perceived to be in a position of dispute over the control of criminal organizations, such as the work of journalists, human rights defenders, social or religious leaders, and youth leaders, is also part of the reality of violence in regions under the control of organised crime.

The recognition of criminal organizations, *maras*, gangs, and cartels as agents capable of generating situations of violence and forced displacement through their actions, both within and across international borders, is a widely recognised theme in the literature and developed at the global and regional levels on displacement.<sup>49</sup> These violent organizations, whether they are *maras*, gangs or cartels, though motivated by personal gain rather than political ideology, have much in common with other armed groups: they seek to exercise almost absolute control over territory and the lives of those who live in those territories. They demand loyalty from their members and do not hesitate to resolve their differences involving direct or indirect members of their environment. They engage in conflict both with the State, with government security forces and with other criminal organizations. In many contexts, their numbers and organizational

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<sup>49</sup> See UNHCR, *Guidance Note on Refugee Claims relating to Victims of Organised Gangs*. Available at <https://www.refworld.org/docid/4bb21fa02.html>; IACHR, Hearing on Internal Displacement and Human Rights in the Americas, 167 Period of sessions.

capacity exceed those of government security forces. Their actions are increasingly transnational in nature.<sup>50</sup> The actions of criminal organizations are significant enough to generate situations characterised by violence occurring indiscriminately and/or broadly enough to the point of affecting large groups of people or entire populations in a community.

### 3. Violation of Human Rights

The situation marked by human rights violations is included in the definition of the Guiding Principles as another of the several causes that lead to situations of internal displacement. It should be noted that the situational element of *human rights violations* traditionally addressed in the context of displacement does not have an agreed-upon definition in any instrument of international law.<sup>51</sup>

In the UN sphere, the term *notorious or flagrant violations of human rights* was first used in 1967 by the former Commission on Human Rights in the adoption of one of its resolutions. However, a terminology definition was not reached at that point. It was in 1993 when the Sub-Commission on Prevention of Discrimination and Protection of Minorities presents a working document to the UN Commission on Human Rights on the definition of gross and large-scale violations of human rights.<sup>52</sup> The document also states that one of the most difficult problems is distinguishing between individual and large-scale

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<sup>50</sup> Ferris, “Gangs, Violence and Displacement in Central America”, *Brookings-LSE: News and Press Release*. Available at <https://www.brookings.edu/blojyup-front/2013/11/07/gangs-violence-and-displacement-in-central-america/>.

<sup>51</sup> Geneva Academy, *What amounts to a “serious violation of international human rights law”? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*. Available at [https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law\\_Academy%20Briefing%20No%206.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf)

<sup>52</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Definition of gross and large-scale violations of human rights as an international crime. Working paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Commission decision 1992/109, E/CN.4/Sub.2/1993/10/Corr. 1*. Available at <https://digitallibrary.un.org/record/169733#record-files-collapse-header>.

violations of human rights. Although the definition of individual cases does not present challenges, it is not possible to state criteria to define large-scale violations when they are made up of individual cases. The document outlines the challenges posed by the impossibility of determining how many individual cases of human rights violations is necessary to verify in a given context in order to affirm the existence of a pattern of human rights violations.

In its conclusions, the document submitted to the Commission on Human Rights states that genocide, forced disappearances and the like are large-scale human rights violations and that, although torture or arbitrary or prolonged detention may constitute an individual case, in practice, if unpunished, they are usually considered repeated or systematic practices, which can be translated as a situation of large-scale violation of human rights. The differences between these concepts remain blurred, despite efforts to make this matter clear. However, there are two approaches that will provide elements to consider when situations of human rights violations may be taking place that potentially constitute the situational event or cause that generates situations of forced displacement, among other effects. One approach is marked by the type of right violated, and the other is determined by the magnitude of human rights violations that occur in a given context.

To sum up, it is possible to affirm that the concept of *human rights violations* is much broader and includes violations of social, economic, and cultural rights, as well as civil and political rights. In terms of criteria, in order to determine that a situation of human rights violation is a cause of displacement, an analysis of a wide range of human rights violations must be carried out, which includes the following:

- the nature of the human rights obligations at stake
- the status of victims in certain situations
- the impact of violations<sup>53</sup>

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<sup>53</sup> See *Protocol II Additional to the Geneva Conventions of 1949... quot.*

When considering several situations of human rights violations in the analysis of the situational panorama or cause established in the definition of the Guiding Principles, it is important to point out that violations are not required, in any way, to be “generalised”, “systematic” or “severe” to set the cause of human rights violations contained in the Guiding Principles.

As stated at the beginning of this chapter, the violation of human rights is mentioned as a situational cause or event that would lead to the recognition of refugee status of people who move across international borders under the 1984 Cartagena Declaration on Refugees. In this sense, the developments in regard to the application of the extended or regional definition of a *refugee person* are also useful for the conceptualization of the violation of human rights as a cause of internal displacement.

In this sense, the considerations included in the framework of the International Conference on Central American Refugees (CIREFCA, by its Spanish acronym), which brought together experts from the Inter-American System of Human Rights to propose guidelines on the interpretation and application of the Cartagena Declaration on Refugees, are relevant.<sup>54</sup> Within the framework of CIREFCA, the existence of a panorama of large-scale human rights violations is considered, under the terms of the Cartagena Declaration, where “violations are carried out on a large scale and affect the human rights and fundamental freedoms as defined in the Universal Declaration of Human Rights and other relevant instruments.” In particular, the denial of civil, political, economic, social, and cultural rights in a serious and systematic way, as well as those that

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<sup>54</sup> The International Conference on Central American Refugees, known by its Spanish acronym CIREFCA, was celebrated in May 1989, culminating the attempts made in the previous decade to resolve the regional crisis of refugees, displaced persons, and returnees in Central America, where approximately two million people were uprooted by the civil conflicts of the region. The purpose of CIREFCA was to seek a lasting solution to the problems of refugees, returnees and displaced persons within the framework of the social and economic development of the region. In the humanitarian sphere, the CIREFCA represented the culmination of a series of earlier efforts to extend protection to refugees, beginning with the 1984 Cartagena Declaration. More information about CIREFCA at <https://www.unhcr.org/research/evalreports/3bd410804/review-of-the-cirefca-process.html>.

are the object of Resolution 1503, can be considered large-scale violations of human rights.<sup>55</sup> Despite it has been more than thirty years since its celebration, it is important to highlight the innovative contribution of the CIREFCA to the consideration of situations of human rights violations, in the sense that the formulation would cover not only violations of civil and political rights, but also economic and social rights. The contributions regarding the Cartagena Declaration and the issue of the violation of human rights present two valid approaches, which are not mutually exclusive, to consider the application of the situational element of large-scale violation of human rights in the expanded or regional definition of *refugee*: i) there is a very large number of violations of human rights, and ii) such violations are of a particularly serious nature.<sup>56</sup>

UNHCR, on the other hand, has reiterated the importance of the interpretative orientation that the aforementioned jurisprudence of the Inter-American Court presents on “large-scale violations of human rights.” Likewise, it highlights that the verification of situations of this nature is related to the degree or magnitude of the reported violations; for example, in contexts where it is difficult to accurately identify the victims due to the scope of the human rights violations perpetrated against groups of people or entire communities. It has also underlined the particular circumstance that arises when the effects of violations go beyond the real or direct victims and affect other segments of the population or even the society itself, which justifies the claim of the existence of a human rights situation as a cause or situational event that generates forced displacement.<sup>57</sup>

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<sup>55</sup> CIREFCA, *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*. Available at <https://www.refworld.org/docid/4370ca8b4.html>.

<sup>56</sup> Fortin, “Doctrinal review of the broader refugee definition contained in the Cartagena Declaration”, in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees 1984-2004*, p. 273-306. Available at <https://www.acnur.org/fileadmin/Documentos/archivo/3868.pdf>.

<sup>57</sup> UNHCR, *Expert roundtable. Interpretation of the extended refugee definition contained in the 1984 Cartagena Declaration on Refugees. Montevideo, Uruguay 15 and 16 October, 2013. Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena*



It is worth noting that the incorporation of the *violation of human rights* in the internal displacement definition does not determine its application or consideration to the fact that such violations of human rights are serious, severe or systematic. This formulation establishes a more flexible scope when determining the application of the grounds. In this sense, violations of human rights due to actions or omissions by State authorities can be considered a cause of internal displacement, either if violations stem from a behaviour that directly fails to fulfil the duties of preventing, guaranteeing, protecting or respecting human rights, or if violations imply that the State abstains or does not conduct actions in the face of a situation where it must have acted upon to protect human rights. The violation of rights by State omission is then established when, despite being aware of a reasonably foreseeable risk situation that can give rise to violation of rights and forced displacement, the State did not conduct the required measures to prevent it. The violation of rights by omission can also be found in the absence of adequate investigation into the causes of forced internal displacement, which implies a violation of the duty to guarantee the right of displaced persons to access justice.<sup>58</sup>

The occurrence of situations that risk the validity of the population's human rights (either because of the nature of the threatened rights, or the scale or magnitude of violations of rights that affect the population) is established in a cause that can create situations of internal displacement. This cause is addressed by the definition provided for by the Guiding Principles. The elements of planning and organization by the perpetrator of such violations, either state or non-state, could be clues when considering the cause, even though it is not a requirement. For non-state perpetrators, the State responsibility is compromised when authorities do not want to or cannot protect their citizens since they do not prevent, investigate, judge and sanction

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*Declaration.* Available at <https://www.refworld.org/docid/53c52e7d4.html>.

<sup>58</sup> See National Human Rights Commission, Special Report on Forced Internal Displacement (FID) in Mexico. Available at <https://forodfi.cndh.org.mx/content/doc/Informes/Special-Report-Displacement.pdf>.

those violations. In this context, forced displacement can, by itself, correspond to a situation of human rights violation or can give rise to other serious violations of them.

#### 4. Disasters

Most displaced persons remain inside the borders of their own State territory due to the effects of disasters. Various reports state that, worldwide, most of displaced persons due to natural disasters remain as internally displaced persons. In other words, most displacements in contexts of disaster occur inside countries. In the period of 2009-2019, the Internal Displacement Monitoring Centre (IDMC) registered an average of 22.7 millions of newly displaced persons due to disasters every year, which represents almost three times the number of displaced persons due to conflict and violence in the same period.<sup>59</sup>

In this sense, it must be clear that persons that move inside the territory of their own State as a result of climate change and disasters are included in the scope of the definition of *internal displaced persons* stipulated in the Guiding Principles. The IDP definition addressed by these principles ensures equal treatment for internally displaced persons, whether they were affected by armed conflicts, generalised violence, human rights violations or natural disasters. The universally recognised IDP definition clearly considers the particular situation of displaced persons due to disasters.

Despite the clarity that exists as regards the fact that uprooted people due to natural disasters are included in the scope of protection of the Guiding Principles,<sup>60</sup> from different spheres it has been attempted to oppose to the term

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<sup>59</sup> See Platform on Disaster Displacement, *Internal Displacement in the Context of Disasters and the Adverse Effects of Climate Change. Submission to the High-Level Panel on Internal Displacement by the Envoy of the Chair of the Platform on Disaster Displacement*. Available at [https://www.un.org/internal-displacement-panel/sites/www.un.org.internal-displacement-panel/files/27052020\\_hlp\\_submission\\_screen\\_compressed.pdf](https://www.un.org/internal-displacement-panel/sites/www.un.org.internal-displacement-panel/files/27052020_hlp_submission_screen_compressed.pdf).

<sup>60</sup> There is not any element to question the inclusion of people that flee, are evacuated or uprooted from their homes or habitual place of residence as a consequence of the effects of natural disasters in

*internally displaced persons* to refer to displaced persons due to the effects of natural disasters. Governments and even humanitarian agencies have challenged the usage of the notion of internal displaced persons to refer to uprooted people due to natural disasters. A common argument to this type of perspectives is that this term must be exclusively used to refer to displaced persons due to conflicts. In the experience of different natural disasters of great magnitude that occurred in the last years, it has been possible to identify that States have opted to refer to displaced persons as *homeless people*, *refugees*, *evacuated people* or just as *disaster victims* before using the more appropriate term *internal displaced persons*.<sup>61</sup>

Acknowledging disasters as a cause of internal displacement means acknowledging displaced persons due to the effects of such disasters as internally displaced persons and their inclusion in the scope of protection of the Guiding Principles, in the sense that these determine a set of standards that would guide State actions to ensure compliance with obligations as regards IDPs on human rights. The majority of internally displaced persons due to the effects of disasters are often citizens or habitual residents of the State in whose territory they are and, therefore, they still have the right to receive full protection of their rights under national and international laws on human

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the scope of the definition of internally displaced persons and to benefit from the legal protection framework that is established by the Guiding Principles. Besides having been clearly reflected in the Guiding Principles, the topic has been subject to specific indications by the General Assembly and the United Nations Human Rights Council. In 2007, the Human Rights Council reemphasised to the Representative of the Secretary-General as regards human rights of internally displaced persons that he or she must “continue (...) his efforts to promote the protection of human rights of internally displaced persons in the context of natural disasters.” In addition, a 2009 resolution by the UN General Assembly reaffirmed that natural disasters are one of the main causes of internal displacement worldwide. However, different spheres have opposed to the application of the Guiding Principles to displaced persons due to natural disasters. See UN, Human Rights Council, Resolution 6/32. Mandate of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, A/HRC/RES/6/32; UN, General Assembly, Protection of and assistance to internally displaced persons, A/C.3/64/L.34/Rev.1.

<sup>61</sup> As an example, in the United States, different reports by the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security make use of, in their different reports on Katrina Huracan, the word *evacuated persons* to refer to people that were forced to leave their homes.

rights, which are binding to such State. The situation of displacement does not strip such people of their entitlement to their rights, nor it allows for any unfavourable distinction as regards their exercise.

Such is the case of internally displaced persons due to armed conflicts, generalised violence or violation of human rights, where the primary responsibility of guaranteeing protection of rights and security of IDPs lies in the Governments of the States in whose territory they are present.

The application of the Guiding Principles in cases of internal displacement of persons due to disasters has also been widely recognised by the States in supranational spheres. The Resolution AG/RES 2417 (XXXVIII-O/08) by the Organization of American States (2008) clearly addresses the situation of displaced persons due to natural disasters by requiring the States that “in the care they provide to internally displaced persons in natural and man-made disasters, to protect their human rights through a comprehensive approach to disaster relief and reconstruction.”<sup>62</sup>

Just as it was established by the United Nations Office for Disaster Risk Reduction (UNDRR), a disaster can be defined as a serious interruption of a community or society functioning that provokes a great number of deaths, losses and material, economic or ambient impacts that exceed the capacity of the affected community or society to deal with the situation through the usage of their own resources. In the context of the Nansen Initiative, the term “disasters” refers to interruptions caused by or linked to hydrometeorological and climate phenomena, and natural hazards, including hazards related to man-made global warming and geophysical hazards.<sup>63</sup> While sudden-onset disasters are linked to

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<sup>62</sup> Organization of American States, General Assembly, Internally Displaced Persons, AG/RES. 2417 (XXXVIII-O/08). Available at [https://www.oas.org/dil/AGRES\\_2417.doc](https://www.oas.org/dil/AGRES_2417.doc).

<sup>63</sup> Nansen Initiative, *Agenda for protection of cross-border displaced persons in the context of disasters and climate change. Final draft*. Available at <https://www.newsadmin.ch/newsd/message/attachments/41254.pdf>.

The Nansen Initiative is an advisory process, led by the States, whose aim is to identify efficient

hydrometeorological hazards such as floodings, windstorms or landslides, as well as to geophysical hazards, like earthquakes, tsunamis or volcanic eruptions, slow-onset disasters are related to drought, sea-level rise and environmental degradation processes, such as desertification and salinization.

In this sense, it is worth noting that *displacement due to disasters* is understood as situations in which people are obliged to abandon their homes or habitual places of residence as a result of a disaster or to avoid the impact of a sudden event and an expected natural hazard.<sup>64</sup> Such displacement results from the fact that affected people are exposed to a natural hazard in a situation in which they are generally too vulnerable and do not have the resilience to face or resist the impacts of that hazard. It is crucial to acknowledge that displacement due to disasters is inherently multi-causal and occurs within a spectrum of scenes in which natural hazards are combined with other factors to give rise to disaster situations.

The dynamic of displacement, as well as the measures to deal with these situations, varies widely according to the scene that may present, including sudden disasters, slow-onset disasters, multiple-threat disasters and disasters in conflict situations. Internal displacement caused by disaster situations is commonly seen as a transient phenomenon, particularly when compared to displacement due to conflict. However, it is common that displacement due to disasters extends when it is not possible for affected people and communities to return, and when the measures to relocate or locally include internally displaced persons are limited or non-existent. In contexts of disasters, IDPs share many of the same protection and assistance needs with persons that internally move due

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practices and to build consensus as regards key principles and elements in order to respond to the protection and assistance needs of displaced persons through borders in the context of disasters, which includes the adverse effects of climate change. The Nansen Initiative is based upon the promise of Swiss and Norwegian governments, supported by many other countries, to cooperate with interested States and other interested parties, and it was launched in October, 2012.

<sup>64</sup> UNHCR, *Key Concepts on Climate Change and Disaster Displacement*. Available at <https://www.refworld.org/docid/594399824.html>.

to situations of conflict or violence, including the need of durable solutions. At the same time, preventing displacement due to disasters gives rise to great opportunities due to the familiar or cyclic nature, or the possibility to anticipate the occurrence of many natural hazards. The appropriate consideration of uprooted persons due to disaster effects as internally displaced persons is a key step in reaffirming their rights and protection, and the strengthening of the actors that must take a role and functions for their protection and tracing of solutions.

#### IV. Arbitrary Displacement

The Guiding Principles point out the right of every person not to be arbitrarily displaced and, in Principle 6, they present a non-exhaustive list of situations in which displacement is prohibited for being arbitrary; among others, they include displacements:

- Based on policies of *apartheid*, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population.
- In situations of armed conflict, unless the security of the civilian population involved or imperative military reasons so demand.
- In cases of large-scale development projects, which are not justified by compelling and overriding public interests.
- In cases of disasters, unless the safety and health of those affected requires their evacuation.
- When they are used as a collective punishment.<sup>65</sup>

The aforementioned principle also states that, in those cases in which displacement is unavoidable, certain guarantees must be established so as to be legitimate.

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<sup>65</sup> Cf. UN, Commission on Human Rights, Guiding Principles... *quot.*, Principle 6.

Even though chapter ten of this manual will address with greater detail the matter of arbitrary displacement, some considerations will be briefly mentioned below. These are related to arbitrary evictions, given the context in the region and considering that prohibition of arbitrary evictions includes arbitrary displacement.<sup>66</sup>

Forced eviction is “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.”<sup>67</sup> The prohibition of forced evictions does not apply to evictions conducted according to the law and provisions of human rights international treaties. In addition, it is worth remembering that: i) an administrative or legal resolution by itself does not necessarily translate into a justified eviction; ii) they do not necessarily mean using physical force; and iii) protection from evictions is not linked to property rights; therefore, it includes informal settlements.<sup>68</sup>

Forced evictions, directly or indirectly, violate human rights, such as the right to life, integrity, personal security, the right to an adequate standard of living, circulation and residency, health, education, employment, an effective remedy, etc. Such violations can be attributed to the way in which evictions are decided upon, the way they are planned, and the way they are conducted and their results.<sup>69</sup>

According to the aforementioned elements, and to the *Basic Principles and Guidelines on Development-based Evictions and Displacement*, States must guarantee that evictions are carried out only in exceptional circumstances and

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<sup>66</sup> UN, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Basic Principles and Guidelines on Development-based Evictions and Displacement. Annex I of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, par. 19. Available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines_en.pdf).

<sup>67</sup> OHCHR, *Forced Evictions, Fact Sheet* no. 25/Rev. 1, p. 3. Available at <https://www.ohchr.org/sites/default/files/Documents/Publications/FS25.Rev.1.pdf>.

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

<sup>69</sup> *Cf. ibid.*, p. 6.

with full justification, due to their adverse effects on a great quantity of human rights. Therefore, such principles point out that any eviction must:

- Be authorised under the law.
- Be conducted according to international law related to human rights.
- Be conducted only in order to promote general wellbeing.
- Be reasonable and proportional.
- Be regulated in such a way that guarantees full and fair compensation and rehabilitation.
- Be conducted according to these guidelines.

The protection provided by these procedural requirements applies to all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under national law.<sup>70</sup>

In order to expand on the previous information, the Committee on Economic, Social and Cultural Rights (CESCR) has considered that the procedure protections that must be granted in evictions are:

- A genuine opportunity for consultation with affected people.
- Appropriate and reasonable notification to all affected people before the expected day of eviction.
- Information about the eviction proposal.
- Presence of authorities during eviction.
- Identification of all the people who will carry out the eviction.
- Not be carried out under bad weather conditions or during the night, unless all the affected people agree on this.
- Possibility to appeal and access to justice.

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<sup>70</sup> UN, OHCHR, *Basic Principles and Guidelines on Development-based Evictions and Displacement...* *quot.*, par. 21. Available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines_en.pdf).



- Legal assistance.<sup>71</sup>

Finally, for a better legal protection against forced evictions, it is important to take measures aimed at “conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land.”<sup>72</sup>

## V. Internally Displaced Persons as a Category of Particular Attention

After analysing the definition of *internally displaced persons*, it is important to note that this definition is descriptive and not legal in nature, because it only describes or conceptualises the situation of fact of an uprooted person in their own country of residence. The verification that a person or group of people are included in the extent of the definition of *internally displaced persons* does not grant a legal statute nor specific rights, as it happens with refugees.<sup>73</sup>

By staying in their country of origin or habitual residence, IDPs keep all their rights and guarantees, as any citizen or habitual resident in their country, and do not require recognition of a special statute of protection. The fact that we emphasised the IDPs' situations and the effort to give them greater protection does not imply that there is a differentiation or benefit compared to other groups. In fact, people advocate for IDPs to have the same rights as the rest of the population in their country, and to receive attention to the vulnerability and challenges they face because of displacement. Internal displacement also entails specific risks and challenges as regards access and exercise of rights. It is

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<sup>71</sup> See Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4; *report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: basic principles and guidelines on development-based evictions and displacement* (A/HRC/4/18, annex I); Commission on Human Rights Resolution 1993/77, “Forced evictions.”

<sup>72</sup> UN, OHCHR, *Basic Principles and Guidelines on Development-based Evictions and Displacement...* *quot.* par. 25. Available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines_en.pdf).

<sup>73</sup> See Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons*.

important to understand those risks and to address them to protect and guarantee IDPs' rights, as these people have been required to leave their homes and often cannot return due to the risks they would face in their places of origin, that the authorities of the State do not have the ability or will to protect.

Once the idea of a differentiated statute for IDPs has been rejected, there are still questioning about whether they should be object of attention and whether they should be considered as a specific category of concern. An objection to the consideration of internally displaced persons as a group that requires special attention for the protection of their rights arises from the concern that singling out this group would benefit them and lead them to discrimination against the other sectors. There are objections to the identification of IDPs as a group especially vulnerable that requires special attention for the protection of their rights.

However, there are many persuasive arguments to confirm the importance of identifying displaced persons as a differentiated group with needs that deserve specific attention. To begin, we can note the fact that, in many cases, these people are victims of a deliberate policy aimed at forcing them to move. Minorities have been particularly vulnerable to this practice that often affects minorities in contexts of political, social, ethical or religious tensions that already faced limitations and challenges in the exercise of their rights.

In the scope of international law and based on the provisions that provide IHRL, IHL and international criminal law, the right to not be arbitrarily displaced is recognised.<sup>74</sup> This situation determines that the fact that a person has been internally displaced means a deliberate abuse of rights. Moreover, once an internal displacement occurs, there are many circumstances that determine that the person or group of people face situations and high levels of vulnerability. People affected by internal displacement from the beginning are deprived of the basic shelter and protection that a home offers. Displaced from their homes and

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<sup>74</sup> See Morel, Stavropoulou and Durieux, "The history and status of the right not to be displaced," on *Forced Migration Review*. Available at <https://www.fmreview.org/preventing/morel-et-al>.

places of habitual residence, traditional livelihoods and means to generate income, and forced to leave their properties, except for just a few, IDPs are suddenly deprived of their means of survival. They are, at the same time, separated from their family and community support networks. Displacement leads to “massive loss not only of commodities such as the home, income, land or other forms of property, but also of less tangible symbolic goods, such as cultural heritage, friendship, and a sense of belonging to a particular place.” The “pernicious effects on individuals, families and communities” are huge and they include “impoverishment, social isolation, exclusion from health, welfare and education provision, the breakdown of social relationships and support structures, and the undermining of authority structures and social roles”.<sup>75</sup>

In the case of children and teenagers, displacement not only disrupt education and typical development, but also generates family separation and, therefore, results in greater risks of abuse and exploitation. IDPs' situation could even be worse when they have to face stigma or when they are perceived as suspicious or unfriendly in the areas they flee to. It is true that IDPs are especially vulnerable to acts of violence and violation of human rights, including detention, forced recruitment and sexual or gender-based violence.

In summary, it is difficult to deny that IDPs have certain protection needs different from the general population, and that they require special attention. What somehow distinguishes IDPs are their unique needs and greater vulnerabilities that arise as a result of forced displacement, including the need and challenges to have a durable solution. The objective fact of being an internally displaced person implies particular needs and exposes the affected people to additional risks that justify greater attention for the protections of their rights. The key to understand this approach is based on the concept of vulnerability, as well as the principle of equality. Finally, to ensure IDPs could

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<sup>75</sup> Castles and Van Hear, *Developing DFID's Policy Approach to Refugees and Internally Displaced Persons, Volume 1: Consultancy Report and Policy Recommendations*. Available at [https://www.compas.ox.ac.uk/wp-content/uploads/ER-2005-Refugees\\_Policy\\_Dfid1.pdf](https://www.compas.ox.ac.uk/wp-content/uploads/ER-2005-Refugees_Policy_Dfid1.pdf).

enjoy their human rights as the others requires paying attention to and addressing the specific needs and risks they face due to internal displacement.<sup>76</sup> The Constitutional Court of Colombia has stated that “from the legal point of view, the concept of displacement is not a right or power but an idea that describes a changing lactic situation, from which the enforceability of rights and guarantees for the affected person and their household arises” (own translation.)<sup>77</sup>

## VI. Conclusions

The State's decision and measures aimed at recognising and addressing internal displacement situations set out in their territory represent a key step towards the confirmation of rule of Law, democracy and protection of human rights. Recognising the existing displacement cases is an essential step towards the efforts to protect rights, overcome vulnerabilities and address the tracing of durable solutions for IDPs.

After more than twenty years of their adoption, the Guiding Principles on Internal Displacement still represent an essential input in the consolidation of a protection and solution framework for internal displacement through the formulation of a specific meaning that general guarantees of the human rights and humanitarian law adopt for the population and the overcoming of the vulnerabilities and risks that arise from displacement. The Guiding Principles are still key guidelines for the identification of internal displacement and the development of approaches aimed at ensuring the protection and tracing of solutions for the affected people.

The appropriate conceptualization and understanding of the term *internally*

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<sup>76</sup> See Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, on *Refugee Survey Quarterly*, p. 9-26. Available at <https://doc.rero.ch/record/299905/files/hdi049.pdf>.

<sup>77</sup> Constitutional Court of Colombia, Decision C-372-09. Available (in Spanish) at <https://www.corteconstitucional.gov.co/RELATORIA/2009/C-372-09.htm>.

*displaced persons* and the situations that generate internal displacement by the authorities in charge of designing and influencing prevention, care and solutions policies, and protecting IDPs' rights is crucial to the efforts to respond to internal displacement. In this sense, the attempts to promote the appropriate understanding of the idea of internally displaced persons and the recognition of this population as a group that needs special attention in relation with the efforts to involve the State and other participants to foster the overcoming of vulnerabilities that limit or compromise the access and exercise of fundamental human rights of IDPs.

The definition of *internally displaced person* of the Guiding Principles establishes accurate causes through which people could be forced to leave their homes and move within the territory of their State of habitual residence. Armed conflicts, generalised violence, violations of human rights and disasters as situations with real or potential effects that could lead to internal displacement should be taken into account from an open and flexible approach considering conceptual definitions or structures set up for each of these situational causes or events, as well as the real situation in the field and the ability to have an impact on the decision made by people or groups of people to leave their homes as an strategy of survival and self-protection. We also have to consider that displacement is not always the result of a spontaneous decision of the affected people, and many times, it is the response to systematic plans and policies aimed at forcing the uprooting and displacement of sections of the population.

A wide interpretation of the causes of displacement listed on the definition of *internally displaced persons* is necessary, but we also require flexibility as regards the consideration of other situations not listed on the definition that could also lead to internal displacement; therefore, they deserve the same level of attention as the displacement generated by conflict, violence or disasters. Displacement imposed within the framework of development projects or even protection of the environment, or displacement generated by the worsening of intracommunity tensions within the framework of disputes about land or other

scarce resources, such as water or pastures, and the one caused by the convergence of safety, economic and climate challenges are situations that progressively create cases of internal displacement that should be addressed from the perspective and practical application of the provisions and recommendations of the Guiding Principles. As it was analysed throughout this document, the causes listed that the definition of the Guiding Principles sets out should not be considered limited, their dynamic interpretation should be promoted, not only as regards the causes deliberately listed, but also the other situations that have the ability to produce internal displacement.

Finally, it is important to restate the existence of strong arguments that justify the consideration of internally displaced persons not as beneficiaries of a specific legal statute, but as people within their country that, due to the vulnerability they face, require special attention to overcome such vulnerability and the exercise of their rights. To ensure IDPs could enjoy their human rights as the other members of society requires paying attention to and addressing the specific needs and risks they face due to internal displacement. This approach is totally compatible with the principle of equality and other fundamental principles about the protection of human rights.

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## Rights of internally displaced persons and protection risks

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**Rights of internally displaced persons and protection risks.** I. Introduction; II. Equality and non-discrimination; III. Circulation and residence; IV Personal integrity; V Family protection, unity and reunification; VI. Right to an adequate standard of living; VII. Health; VIII. Education; IX. Livelihood, labour and social security; X. Housing, land and property; XI. Person before the law and documentation access; XII. Political participation and right to vote; XIII. Access to justice and effective legal recourse; XIV Participation of displaced persons and representation in decision-making.

## I. Introduction

Internally displaced persons must enjoy all the rights recognised in the Constitution and in international treaties, as any citizen or resident in the country, under conditions of equality and without discrimination.

However, displaced persons often face protection gaps as well as various kinds of obstacles. This is mainly due to the lack of a legal framework that provides a comprehensive response to internal displacement phenomenon and protects displaced persons because of the vulnerability situation caused by this phenomenon and its impacts. For this reason, internally displaced persons face different challenges in effectively accessing their rights.

In this regard, the Inter-American Court of Human Rights (IACHR) has understood internal displacement as a multiple and continuing violation of



human rights.<sup>1</sup> It has also pointed out that this “can be understood as an individual *de facto* situation of lack of protection with regard to the rest of those who are in similar situations” of vulnerability.<sup>2</sup> This is due to the phenomenon complexity, as well as to the wide range of human rights that it affects or puts at risk, and to the circumstances of special weakness, vulnerability and defencelessness in which displaced persons generally face as subjects of human rights.

The IACHR has also pointed out that, although freedom of movement and residence is not formally limited, this freedom is limited by a serious *de facto* restriction. This can be caused, for example, by threats and harassment that have caused the population flight, or when the State has not provided the conditions and means that would allow community members to return voluntarily, safely and with dignity.<sup>3</sup>

In this regard, according to the American Convention on Human Rights (ACHR), forced displacement situation “places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defenselessness, including those *vis-à-vis* actions and practices of private third parties.”<sup>4</sup>

Regarding human rights, States have specific obligations to respect, protect and guarantee them. In order to comply with these obligations, regarding fundamental rights of the internally displaced population, the authorities must: on the one hand, refrain from acting in such a way that directly or indirectly affects this population group rights; and, on the other hand, they must act with positive actions aimed at removing any obstacle that prevents access to rights.

With regards to the first aspect, considering comparative law and as an

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<sup>1</sup> See IACHR, *Massacres of Río Negro v. Guatemala*.

<sup>2</sup> See IACHR, “*Mapiripán Massacre*” v. *Colombia*, par. 177.

<sup>3</sup> See IACHR, *Chitay Nech et al. v. Guatemala; Moiwana Community v. Suriname*.

<sup>4</sup> IACHR, “*Mapiripán Massacre*” v. *Colombia...* quot., par. 177.

example, we can mention the Constitutional Court of Colombia in the important Decision T-025, 2004. This court indicated that the minimum level of satisfaction of internally displaced persons' fundamental rights states that, in no case, may the authorities act in such a way that they end up ignoring, jeopardising or threatening the essential core of the fundamental constitutional rights of internally displaced persons.<sup>5</sup>

Regarding the second aspect, the Supreme Court of Justice of the Republic of El Salvador when ruling on amparo 411-2017 noted that the competent authorities' omissions contributed to the fact that the situation of defencelessness and vulnerability of the victims of violence was prolonged over time, and that their rights continued to be violated by criminal groups.<sup>6</sup> These omissions consisted of the failure to adapt the legal system to the context of internal displacement and to design a security policy and action protocols for the protection of victims.

It should be noted that both courts have played a decisive role in provoking institutional responses in favour of internally displaced population, based on promoting respect for and guaranteeing the rights of a population that faces such a vulnerable situation.<sup>7</sup>

Therefore, it is important to emphasise the fundamental role that administrators of justice must play in safeguarding full respect for all people' rights, including internally displaced persons. And, even though Mexico does not yet have national specific legislation on the protection and assistance of internally displaced persons, this should not be an obstacle to the application of protection

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<sup>5</sup> Constitutional Court of Colombia, Decision T-025/04 22, Available (in Spanish) at [https://www.refworld.org/cases,COL\\_CC,54884c2f4.html](https://www.refworld.org/cases,COL_CC,54884c2f4.html).

<sup>6</sup> Supreme Court of Justice of the Republic of El Salvador, Amparo 411-2017. Available (in Spanish) at <https://www.refworld.org/es/docid/5b4f72e54.html>.

<sup>7</sup> For more information, see Decision T-025/04 22... *quot.*, and amparo 411-2017... *quot.* (no. 5 and no. 6).

instruments included in the current general legal system, as well as in international human rights law (IHRL) and international humanitarian law (IHL).

In order to guarantee full respect for all the rights, under equal conditions and without discrimination.

The following are the most relevant rights related to the protection of internally displaced persons and their assistance.

## II. Equality and Non-discrimination

There are certain human rights that cannot be lost under any circumstances, such as the principle of equality and non-discrimination. This principle is recognised in Article 1, No. 1 of ACHR, which states:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.<sup>8</sup>

In Article 24, it is also mentioned that “All persons are equal before law. Consequently, they are entitled, without discrimination, to equal protection of the law.”<sup>9</sup>

At local level, the Political Constitution of the United Mexican States, CPEUM or Political Constitution, in Article 1 also recognises this principle in the following way: “In the United Mexican States, all individuals shall be entitled to the Human Rights granted by this Constitution and the international treaties

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<sup>8</sup> ACHR, Art. 1, No. 1.

<sup>9</sup> ACHR, Art. 1, No. 24.

signed by the Mexican State, as well as to the guarantees for the protection of these rights”,<sup>10</sup> and prohibits:

any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people.<sup>11</sup>

Even though the above provisions do not explicitly mention the prohibition of discrimination as a consequence of internal displacement, this can be included in a broad interpretation of discrimination prohibition based on “any other form”, or “any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people”, such as discrimination based on the condition of internal displacement.

This is also in line with the Guiding Principles on Internal Displacement, Guiding Principles, in which the first principle indicates 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 that “they shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”<sup>12</sup>

These Guiding Principles also address the principle of equality and non-discrimination in the section on durable solutions. It states that internally displaced persons “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.” It also establishes that these people “shall have the right to participate fully and

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<sup>10</sup> CPEUM, Art. 1, par. 1.

<sup>11</sup> *Ibid.*, par. 5.

<sup>12</sup> Guiding Principles on Internal Displacement, Principle 1.

equally in public affairs at all levels and have equal access to public services.”<sup>13</sup>

This last aspect will also be developed more specifically in Chapter IX *on durable solutions* in this manual.

To further protect this right, the Supreme Court of Justice of the Nation (SCJN, by its Spanish acronym), has interpreted that the prohibition of discrimination contained in Article Iº, No. 1, of the ACHR extends to the domestic law of the States Parties. Thus, they “have the obligation not to introduce discriminatory regulations into their legal systems and to eliminate regulations of a discriminatory nature, to combat such practices and to establish norms and other measures that recognise and ensure effective equality before the law for all persons” (own translation.)<sup>14</sup>

For its part, IACHR has reaffirmed that because of the unbreakable tie between the *erga omnes* obligations to respect and guarantee human rights and the principle of equality and non-discrimination, which has the nature of *jus cogens*, [...] States must abstain from carrying out actions that in any way, directly or indirectly, create situations of *de jure* or *de facto* discrimination, and they must also take positive steps to revert or change existing discriminatory situations in their societies, to the detriment of a given group of persons.<sup>15</sup>

It should be noted that discrimination can be both direct and indirect. SCJN has highlighted that discrimination not only occurs when rules and practices evidently involve a prohibited factor of discrimination, i.e., discrimination by intent or direct discrimination; but it also notes that discrimination by result or indirect discrimination may occur when the rules and practices are apparently neutral. But the result of its “content or application constitutes a disproportionate impact on people or groups in a historical disadvantage situation just because of that disadvantage, without an objective and reasonable

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<sup>13</sup> *Ibid.*, Principle 29.

<sup>14</sup> Tesis de jurisprudencia 49/2016, First Chamber.

<sup>15</sup> Cf. IACHR, “Mapiripán Massacre” v. Colombia... *di.* par. 178.

justification. This means that a law that, in theory, seems neutral, could have discriminatory effects for a certain group of people” (own translation.) The determination of discrimination by result requires a study on the existence of structural discrimination, and how it underpins normative production and interpretation.<sup>16</sup>

Thus, according to SCJN, discussions on equality and non-discrimination tend to address three aspects:

- The need to adopt reasonable accommodations to achieve substantive and not merely formal equality between people.
- The adoption of special or affirmative measures, usually called “affirmative actions.”
- The analysis of normative acts and precepts that directly or indirectly (by result), or tacitly, are discriminatory.<sup>17</sup>

Regarding the third aspect, when a person alleges discrimination against them, they must provide a parameter or comparison term to demonstrate differential treatment. The purpose of this is to avoid the existence of rules that, when applied to situations of de facto equality, lead to any of these effects in their application:

- A breach of this equality by generating discriminatory treatment in analogous situations.
- Similar effects on people in different situations.

Thus, cases of discrimination, as a consequence of differential regulatory treatment, require an analysis that is divided into two successive and non-

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<sup>16</sup> See Tesis aislada VII/2016 (10a.), in full session, *Discriminación por objeto y por resultado. Su diferencia.*

<sup>17</sup> See Tesis de jurisprudencia 1a./J. 44/2018 (10a.), First Chamber, *Derechos fundamentales a la igualdad y a la no discriminación. Metodología para el estudio de casos que involucren la posible existencia de un tratamiento normativo diferenciado.*

simultaneous stages: (i) in the first one, there is a review to determine whether the situations to be compared can indeed be contrasted or whether, on the contrary, there are significant differences that prevent a comparison between them because they do not really involve differential treatment; (ii) in the second stage, it is studied whether the distinctions in treatment are admissible or legitimate, which requires an objective and reasonable justification through a thorough examination as appropriate.<sup>18</sup>

This is of substantial importance to internally displaced persons since, while they should enjoy equal rights as citizens or residents, in practice they may often suffer discrimination in the implementation of legal and public policy frameworks. The latter often do not consider specific vulnerability situations arising from the factual situation of displaced persons, as well as the differentiated impacts of forced displacement.

Similarly, internally displaced persons arrive at communities where they may be subjected to discrimination and marginalization as a direct result of their displacement.

It can be concluded that, in order to ensure the right to equality and non-discrimination for displaced persons, the authorities must refrain from introducing or eliminating discriminatory provisions, and must analyse the particular conditions and specific needs of the vulnerable situation of displaced persons in order to implement positive measures.

Regarding the positive measures or affirmative actions, SCJN has stated the following:

In order to achieve parity of opportunity in the actual and effective enjoyment and exercise of the human rights of all persons, in some cases, it is necessary to remove and/or reduce social, political, cultural, economic or any other

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<sup>18</sup> *Id.*

obstacles that prevent certain vulnerable social groups from enjoying and exercising such rights. Therefore, violation of this principle arises when there is structural discrimination against a social group or its individual members, and the authority does not take the necessary action to correct and/or reverse this situation; furthermore, its violation may also be reflected in omissions, disproportionate application of the law or in an adverse and disproportionate effect of certain normative content against a relevant social group or its members, with the difference that, with regard to formal equality, the elements for verifying the violation will depend on the characteristics of the group itself and the proven existence of structural and/or systematic discrimination.<sup>19</sup>

In the Mexican legal system, most of the national legislation in force does not provide specific powers to fully serve the internally displaced population. It is therefore of particular importance that the principle of equality and non-discrimination be analysed by justice workers under the need to remove any discriminatory legal and de facto obstacles to the protection of internally displaced persons and to enable them to effectively exercise their rights.

In the light of the foregoing, when resolving a case involving internally displaced persons, it is essential for the justice system to analyse in a comparative manner the following: the specific context and the impact or disadvantage generated in comparison with non-displaced persons or communities in terms of indirect discrimination. As far as direct discrimination is concerned, the justice system will have to analyse the objective justification and whether the legislation pursued a necessary,<sup>20</sup> proportional and reasonable purpose.

Similarly, justice workers should promote affirmative action by the authorities in favour of internally displaced persons, translated as “reasonable,

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<sup>19</sup> Tesis de jurisprudencia 1a./J. 126/2017 (10a.), First Chamber, *Derecho humano a la igualdad jurídica. Diferencias entre sus modalidades conceptuales*.

<sup>20</sup> See Tesis de jurisprudencia 1a./J. 100/2017 (10a.), First Chamber, *Discriminación indirecta o por resultados. Elementos que la configuran*.



proportional and objective distinctions” (own translation.)<sup>21</sup> In this regard, the IACHR has noted:

In terms of the American Convention, the differentiated situation in which displaced persons find themselves obliges the States to grant the displaced preferential treatment and to adopt positive measures to reverse the effects of this situation of vulnerability and defenselessness, including *vis-à-vis* acts and practices of individual third parties.<sup>22</sup>

Likewise, with regard to comparative law, the Constitutional Court of Colombia indicated:

On account of the multiplicity of constitutional rights which are affected by displacement, and in attention to the aforementioned circumstances of special weakness, vulnerability and defenselessness that surround displaced persons, (...) these persons have, in general terms, the right to receive an urgent preferential treatment by the State (...), and it must be characterised, first and foremost, by prompt attention to needs, since “otherwise the violation of fundamental rights would be allowed to continue, and in many situations, to become worse” (own translation.)<sup>23</sup>

In this way, it will also be essential for the judiciary to protect this important right and to encourage the discontinuation of some discriminatory provisions; or, where appropriate, to request the competent authorities to carry out the necessary legislative and public policy measures for the protection of the rights of internally displaced persons on an equal basis and without discrimination.

On the other hand, it is important to encourage authorities to take into account both the internally displaced population and the host communities; otherwise,

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<sup>21</sup> IACHR, Advisory Opinion OC-4/84; *Yatama case v. Nicaragua*.

<sup>22</sup> IACHR, “*Mapiripán Massacre*” *v. Colombia... quot.*, par. 179.

<sup>23</sup> Constitutional Court of Colombia, Decision T-025/04... *quot.*

there could be stigma and discrimination of internally displaced persons.<sup>24</sup>

Regarding the latter, where displacement specific responses are needed, care must be taken to avoid the creation of parallel systems that may result in differences in treatment. This is because, for example, surrounding communities might perceive the presence of IDPs as a threat to their scarce resources, leading to discrimination and exclusion. Protection and assistance programmes should be encouraged instead to promote peaceful coexistence and ensure that the livelihood strategies intended for IDPs and host communities are sustainable.<sup>25</sup>

Finally, it is important to avoid discrimination among internally displaced persons as well. To this end, it is necessary to identify specific protection risks that several people may face in a particularly vulnerable situation, such as women, children and adolescents, older persons, persons with disabilities, ethnic minorities and the LGTBIQ+ community. This is done in order to take solid measures to prevent and eliminate risks and inequalities, as well as to strengthen the capacities of these groups, and to consider their specific problems and concerns when providing a response by means of full and effective participation, thus ensuring their representation in all formal decision-making spaces.<sup>26</sup>

### III. Movement and Residence

The International Covenant on Civil and Political Rights (ICCPR) recognises in its Article 12 that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence” and the right to “leave any country, including his own.” The ICCPR also states that this right may not be subject to restrictions except when stipulated by

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<sup>24</sup> See Global Protection Cluster, *Handbook for the Protection of Internally Displaced Persons*, p. 305. Available at <https://www.unhcr.org/protection/idps/50f94dcc9/handbook-protection-internally-displaced-persons-global-protection-cluster.html>.

<sup>25</sup> *Cf. ibid.*, p. 243 and 313.

<sup>26</sup> *Cf. ibid.*, p. 13.

law, that is, in the following cases: when these restrictions are part of a law of general application, and such law is not arbitrary or irrational; when the restrictions are necessary to protect national security, public order, public health or morals or the rights and freedoms of others; and when these restrictions are proportionate and consistent with the other rights recognised in the Covenant.<sup>27</sup>

The United Nations Commission on Human Rights in its General Comment No. 27 interpreted Article 12 of the Covenant, stating that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence,” and that, as for the legal aspect, in principle, citizens of a State are always lawfully within the territory of that State. With regard to foreign persons, the committee considered that it was an issue governed by domestic law; but that, even if an alien entered the State illegally, if their status has been regularised, they must be considered to be lawfully within the territory for the purposes of Article 12 of the Covenant.<sup>28</sup>

At the regional level, the ACHR recognises in Article 22 the right of movement and residence. It states that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence subject to restrictions provided by law” as part of Article 2.1, as well as the right of every person “to leave any country freely, including his own” as part of Article 2.2., among other circumstances listed below, providing for their restriction only in specific circumstances, such as “pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals,

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<sup>27</sup> V ICCPR, Art. 12.

<sup>28</sup> See UN, Commission on Human Rights, General Comment No. 27. Available at <https://www.refworld.org/pdfid/45139c394.pdf>.

public health, or the rights or freedoms of others,” or to apply restrictions of law in “designated zones for reasons of public interest.”<sup>29</sup>

At the domestic level, Article 11 of the Mexican Constitution provides that “every person has the right to enter and leave the country, to travel through its territory and to move house without the necessity of a letter of safe passage, passport, safe-conduct or any other similar requirement.”<sup>30</sup>

Likewise, the right to movement as developed in the jurisprudence of the IACHR is an “indispensable condition for the free development of a person,” (own translation)<sup>31</sup> and that the scope of the right implies a triple dimension: (i) the right to move within any country, (ii) the right to leave freely any country, including his own, and (iii) the obligation not to be forcibly displaced.<sup>32</sup>

Regarding the latter, the IACHR has established that Article 22.1 of the ACHR protects the right not to be forcibly displaced within a State Party, or not to have to forcibly leave the territory of the State where legally located.<sup>33</sup> The IACHR has also pointed out that the protection of displaced persons, including the right to movement, entails taking steps to ensure that they can return to their places of origin or resettle elsewhere without risk of violations of their rights, and that they are able to do this in a dignified, safe, and voluntary manner, and “their full participation in the planification and manner in which they should return or be reintegrated, should be guaranteed.”<sup>34</sup>

It should be noted that the principle of the voluntariness of movement or residence consists of the following conditions: (i) that the decision has been taken freely, without duress, compulsion or undue influence; (ii) that the

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<sup>29</sup> ACHR, Art. 222.

<sup>30</sup> CPEUM, Art. 11.

<sup>31</sup> IACHR, *Omeara Carrascal y otros vs. Colombia*, No. 274.

<sup>32</sup> Cf. IACHR, “*Mapiripán Massacre*” v. *Colombia...* quot., No. 188.

<sup>33</sup> Cf. IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, par. 186.

<sup>34</sup> IACHR, *Chitay Nech et al. v. Guatemala*, par. 149.

decision is based on accurate, objective information; (iii) that the decision is made expressly and individually (with women on equal footing with men).<sup>35</sup>

Furthermore, the IACHR has pointed out that the right of movement and residence may be violated in cases such as:

by restrictions *de facto*, if the State has not established the conditions or provided the means by which it can be exercised, for example, when a person is victim of threats and harassment, and the State does not provide the necessary guarantees for them to move and live freely in a given territory, even when the threats and harassment are from non-state actors.<sup>36</sup>

The SCJN has pronounced upon the right to freedom of movement or transit, indicating that it is an indispensable condition for the free development of the person, which has at least four dimensions:

(i) freedom of movement within the national territory; (ii) freedom to choose residence; (iii) freedom to leave any country, including their own; and (iv) right to enter their own country. In this way, Article 11 of the General Constitution recognises that every individual has the right of transit o enter the country, leave it, travel through its territory and change their residence.<sup>37</sup>

The Guiding Principles point out in principle 14 that “every internally displaced person has the right to liberty of movement and freedom to choose his or her residence” in addition to the right to free movement “in and out of camps or other settlements” that could be established to provide them with

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<sup>35</sup> Cf. Global Protection Cluster, *op. cit.*, p. 210.

<sup>36</sup> IACHR, *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guatemala*, par. 174; *Carvajal Carvajal et al. v. Colombia*, No. 215; *Yarce y otras vs. Colombia*, No. 215.

<sup>37</sup> Tesis 1a./J. 50/2021 (11a.), First Chamber, *Libertad de salir del país. It is part of the rights to freedom of transit, movement and residence, as a human right protected by Articles 11 of the general constitution, 22, paragraph 2, of the American Convention on Human Rights and 12, paragraph 2, of the International Covenant on Civil and Political Rights, and may be subject to permissible and proportional restrictions.*

humanitarian assistance.<sup>38</sup> This also includes Principle 15, which states that internally displaced persons have the right to “seek safety in another part of the country; leave their country; seek asylum in another country; and be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.”<sup>39</sup>

According to the foregoing, this right is particularly important in contexts of internal forced displacement and may be limited by a number of obstacles, such as: (i) practical barriers, for example, lack of safety and security, widespread violence, mines and unexploded explosive remnants of war, lack or loss of documents, discrimination, lack of infrastructure, etc.; (ii) legal or administrative restrictions; (iii) forced encampment; internally displaced persons must be able to reside in their chosen place, that is, their confinement in camps is permitted only in exceptional circumstances where it is absolutely necessary and their duration does not exceed that imposed by the circumstances, otherwise they would be faced with a violation of several human rights, including the right to freedom of movement; (iv) forced population movement (forced transfer of the population, as a rule, is prohibited); (v) and arbitrary arrest or detention.<sup>40</sup>

Regarding the right of movement, the IACHR has pointed out that, in order to determine State responsibility for a lack of prevention against the obligation not to forcibly displace, it is necessary to prove that the State was aware of a “real and immediate risk situation in relation to one or more specific persons and that the State, despite being aware of that risk, did not take any action to prevent it” (own translation.)<sup>41</sup>

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<sup>38</sup> See Guiding Principles on Forced Displacement, Principle 14.

<sup>39</sup> *Ibid*, Principle 15.

<sup>40</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 208 and 209.

<sup>41</sup> IACHR, *Yarce y otras vs. Colombia...* *quot.*, No. 222.

## 1. Seeking and being granted asylum in another country

The right to move freely in safe conditions includes the right to leave the country and seek asylum in another country. The right to seek and be granted asylum is recognised in several international instruments, such as the Universal Declaration of Human Rights, which states in Article 14.1, that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” At the international level, there is the 1951 Convention Relating to the Status of Refugees, among other instruments.

Additionally, at the regional level, the OHCHR includes in Article 22.7, as part of the right of movement and residence, the right of every person to “seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”<sup>42</sup>

The Guiding Principles mention in Principle 2.2 that such principles may not be interpreted in a manner that limits, modifies or impairs the provisions of any international human rights or humanitarian law instrument or the rights granted to the individual by domestic law; and that, in particular, they shall not affect the right to seek and be granted asylum in other countries. Moreover, as part of the rights to freedom of movement, Principle 15 indicates that internally displaced persons have the right to leave their country, as well as to apply for asylum in another. Finally, it is worth noting that, even when the authorities take the necessary measures to improve population’s security, all people preserve their right to leave the country and to apply for asylum in another.

## IV. Personal Integrity

Article 5 of the ACHR states the right to personal integrity, pointing out the right of every person “to have his physical, mental, and moral integrity

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<sup>42</sup> ACHR, Art. 22.7.

respected.”<sup>43</sup>

At the national level, Article 29 of CPEUM emphasises the prohibition of torture and the protection of personal integrity as rights that cannot be suspended or restricted in any situation under the nature of *jus cogens*, in line with the constitutional and conventional system.

The SCJN has also interpreted this right as follows:

Personal integrity is the legal right whose protection constitutes the main purpose and objective to prohibit torture, as well as other cruel, inhumane and humiliating treatment and sanctions, which is also provided for in Article 5 of the Universal Declaration of Human Rights, as well as in Article 7 of the International Covenant on Civil and Political Rights.<sup>44</sup>

On the protection of this right in forced displacement contexts, it is important to emphasise that internally displaced persons are forced to leave their homes to protect their lives and integrity from the risk and vulnerability they face as a direct or indirect consequence of the causes or circumstances of forced displacement.

The Constitutional Court of Colombia has stated that the right to personal integrity in contexts of internally forced displacement is threatened both by the risks that threaten the health of displaced persons, and by the high risk of attacks to which they are exposed because of their condition of dispossession.<sup>45</sup>

In this regard, the IACHR has pointed out that forced displacement implies a violation of the right to personal integrity in different forms, which occurs both because of the circumstances that lead to it and because of fear, distress,

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<sup>43</sup> *Ibid.*, Art. 5.1.

<sup>44</sup> Tesis 1a. CCV/2014 (10a.), First Chamber, amparo ruling in Review 703/2012, *Tortura. It constitutes a special and more serious category that imposes the obligation of strict scrutiny under national and international standards.*

<sup>45</sup> *Cf.* Constitutional Court of Colombia, Decision T-025/04... *quot.*, par. 8.



aggression and the damage caused. It also harms the population displaced by the effects of the phenomenon and the physical and mental conditions in which they live, which are often not in accordance with the required minimum standards; for example, the lack of access to basic services, which affects their physical, mental and moral integrity, as well as their family, social and labour relations.<sup>46</sup> Hence, the Court has derived violations of Article 5 of the ACHR, related to displacement in cases where there were specific effects additional to those caused by displacement.<sup>47</sup>

In this way, the IACHR determined the responsibility of Colombia in the case of *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis)* for the failure to respect their obligations to guarantee humanitarian assistance and a safe return. Within the framework of various rights, such as the protection of the right to personal integrity, the basic assistance measures provided by the State during the period of displacement were insufficient:

because the physical and mental conditions that those displaced had to face for almost four years were not in keeping with the minimum standards required in such cases. The overcrowding, the food, the supply and management of water, as well as the failure to adopt measures with regard to health care, reveal non-compliance with the State's obligation to provide protection following the displacement, with the direct result of the violation of the right to personal integrity of those who suffered the forced displacement.<sup>48</sup>

In the same way, the IACHR in the *Huango Massacres v. Colombia* established responsibility for the violation of the right to mental and moral integrity under

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<sup>46</sup> Cf. IACHR and German Agency for International Cooperation (GIZ), "Personas en situación de desplazamiento", in *Cuadernillo de Jurisprudencia*, No. 3, p. 19. Available (in Spanish) at <https://corteidh.or.cr/sitios/libros/todos/docs/cuadernillo3.pdf?msclkid=8c9c711aa70311ecb417dee5b718345b>; IACHR, *Pueblo Bello Massacre v. Colombia*, pars. 159 and 160.

<sup>47</sup> Cf. IACHR, *et al., People in... quot.*, p. 21; *Torce et al. v. Colombia... quot.*, par. 226.

<sup>48</sup> IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 323.

Article 5 on the right to personal integrity, and Article 21 on the right to property, both recognised in the ACHR. This recognition stems from the fact that a number of people experienced great emotional suffering from fear for their lives and that of their families; together with the loss of their belongings in a context of extreme violence, where their homes were destroyed and, therefore, they were forced to move when they lost their homes and belongings, in a situation of particularly serious suffering. “These acts of violence were designed to terrorize the population and force families to displace from the place where these acts were perpetrated by paramilitary groups, with the acquiescence and tolerance of State officials.”<sup>49</sup>

Given the extreme vulnerability of displaced persons and the various risks they face, the State has the obligation to ensure that this right is not violated by strengthening measures to provide protection to those persons at risk of displacement or those people already displaced. It should also provide them with assistance in accordance with the minimum required standards for them to access basic services, as well as their access if they opt for returning, local integration at the host site or relocation elsewhere.

For its part, the Guiding Principles indicate that every human being has the right to dignity and physical, mental or moral integrity. They state that displaced persons must be particularly protected against the following damages:

- Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault.
- Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children.
- Acts of violence intended to spread terror among internally displaced

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<sup>49</sup> IACHR, *Ituango Massacres v. Colombia*, pars. 271 and 272.

persons; and it stresses that threats and incitement to commit any of the foregoing acts shall be prohibited.<sup>50</sup>

On the other hand, two scenarios where this right can be violated must be particularly considered. Firstly, sometimes forced displacement also relates to the disappearance of relatives. In this case, the IACHR has stated that the violation of the right to mental and moral integrity of the victim's relatives is caused by the severe suffering from this situation, by ignoring the whereabouts of his or her relatives, and that it is increased by the failure to establish the full truth of the facts, and as an effect of partial impunity.<sup>51</sup> Secondly, because of the undermining of the right to personal integrity as a result of the suffering caused by the obstruction, despite the community's efforts to obtain justice,<sup>52</sup> truth and reparation.

Given the panorama presented, the Judicial Power of the Federation of Mexico has a fundamental role for the protection of this right. In hearing and handling cases where violations of the right to personal integrity are at risk to internally displaced persons, it may demand authorities to act immediately for their protection and security, as well as for their basic needs.

In the event that a case is processed through the amparo trial, it is noteworthy that the relevant law in Article 126 indicates that the suspension will be granted *sua sponte* and outright in the case of acts that pose the threat of deprivation of life, as well as other cases. It also includes acts prohibited by Article 22 of the Constitution, which states that "The penalties of mutilation and infamy, branding, flogging, beating torture of any kind, excessive fines, the confiscation of goods and any other unusual and transcendental penalties are prohibited."<sup>53</sup>

While there is no explicit mention of the suspension on the violation of the

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<sup>50</sup> See Guiding Principles on Internal Displacement, Principles 11.1 and 11.2.

<sup>51</sup> Cf. IACHR, *Pueblo Bello Massacre v. Colombia...* quot., par. 161.

<sup>52</sup> Cf. IACHR, *Moiwana Community v. Surinam...* quot., par. 93.

<sup>53</sup> Amparo Law, Art. 126, and CPEUM Art. 22.

right to personal integrity, it is important to note that the First Chamber of the SCJN has interpreted the concept of “torture” under Article 22 of the CPEUM as referring to “acts and omissions that seriously affect personal dignity and integrity” (own translation.)<sup>54</sup>

The role of the persons involved in the justice system is essential so that, when hearing a case on the amparo procedure alleging a violation of the right to personal integrity of internally displaced persons, they rule, in accordance with the facts of the case, the *sua sponte* and outright suspension of acts claimed according to Article 126 of the Amparo Law and Article 22 of the Political Constitution.

In this regard, the United Nations Human Rights Committee stressed that, in order to ensure the protection of any person who receives threats, the State must take the necessary measures to protect both life and personal integrity when there is an actual need for the protection of any person at risk.<sup>55</sup>

It also indicated the duty of the State:

[To] urgently and efficiently adopt special protection measures for vulnerable persons whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence, such as human rights defenders; journalists; witnesses to crime; victims of domestic violence; ethnic and religious minorities and indigenous peoples; displaced persons; lesbian, gay, bisexual, transgender and inter-sex (LGBTI) persons; asylum-seekers; refugees and stateless persons and, in certain situations; women and children, among others. Special measures that may include the allocation of permanent police

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<sup>54</sup> Tesis de jurisprudencia 55/2019 (10a.), First Chamber, *Suspensión de oficio y de plano en el juicio de amparo. It must be granted when an inmate claims from the prison authorities the omission to provide him or her with medical care, if it is noticed that this situation seriously compromises his or her dignity and personal integrity, to the degree of being equated with a torment.*

<sup>55</sup> See UN, Commission on Human Rights, General Comment No. 36, on Article 6 of the ICCPR on the right to life. Available (in Spanish) at [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_SP.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_SP.pdf).

protection, the issuance of restraining orders and protection orders against potential aggressors.<sup>56</sup>

For its part, the Inter-American Commission on Human Rights (IACHR) issued precautionary measures to guarantee the life and personal integrity of some members of the indigenous community El Manzano in Chihuahua, Mexico, considering that from the information presented, at *prima facie*, its members were in a serious and urgent situation because their lives and personal integrity would be at imminent risk, because benefited people would have faced a series of alleged acts of violence against them, on the occasion of the alleged presence of criminals in the area, who would try to exercise control over it and caused them to leave the place and move to nearby towns.<sup>57</sup>

It should be noted that the suspension of amparo must always be in a positive sense for the protection of internally displaced persons, and in accordance with the Amparo Law in Article 128. Protection orders or measures issued in terms of applicable law by an administrative or judicial authority to safeguard the security or integrity of a person shall not be suspended.

In conclusion, it is noted that under the protection of this right, the Inter-Agency Standing Committee (IASC) Guidelines also indicate that involuntary evacuations, transfers and relocations will only be allowed exceptionally and temporarily when necessary for the protection of affected persons against very serious and imminent threats to their lives, their physical integrity or health.<sup>58</sup>

## V. Family Protection, Unity and Reunification

Forced displacement causes fragmentation or separation of many families, thus violating their right to family unity and protection. Therefore, the Guiding

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<sup>56</sup> *Ibid.*, par. 27

<sup>57</sup> See IACHR, Resolution 15/2015, Precautionary Measure No. 106-15 1. See document (in Spanish) at <https://www.refworld.org/es/pdfid/5c1aa7ac4.pdf?msclkid=9caeebeda8a111ec83d741d3ed1cfc22>.

<sup>58</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 467.

Principles protect the right to family life. To give effect to this right, the will of the family members of internally displaced persons wishing to be together will be respected. It also indicates that families which are separated by displacement should be reunited as quickly as possible, and that all appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved.<sup>59</sup>

This protection also includes, *inter alia*, the right to know the fate and whereabouts of missing relatives; as well as the right to access the grave sites of their deceased relatives, among other rights.<sup>60</sup>

At regional level, the IACHR has highlighted household fragmentation resulting from forced displacement, which according to family protection recognised in Article 17 and Article 19 on the protection of the rights of children in accordance with ACHR, this fragmentation constitutes a failure by the State. That is, a failure to protect everyone against arbitrary or unlawful interferences with their family,<sup>61</sup> and that the State is obliged “to favor the development and strengthening of the familial nucleus and that the separation of the children from the family constitutes, under certain circumstances, a violation of their right to family. In this way, the child has the right to live with his/her family, called to satisfy their material, psychological, and emotional needs.”<sup>62</sup>

In the case of *Alvarado Espinoza et al. v. México*, the IACHR emphasised that in cases of forced displacement, by violating Article 17 of the ACHR and entailing household separation or fragmentation, this affects the integrity of the family, as well as the lives of each of the family members. This impact is the consequence of having to disperse outside their places of origin and

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<sup>59</sup> See Guiding Principles on Internal Displacement, Principle 17.

<sup>60</sup> *Ibid.*, Principle 16.

<sup>61</sup> Cf. IACHR, *et al.*, *op. cit.*, p. 19; *Chitay Nech et al. v. Guatemala...* *quot.*, pars. 161 and 163.

<sup>62</sup> IACHR, *Yarce y otras vs. Colombia*, *quot.*, par. 246.

disintegrate as a family, since the State had not provided safe conditions for their return or relocation.<sup>63</sup>

In this regard, to support family reunification efforts, authorities must be guided by respect for human rights, which includes the principle of family unity, and must do everything possible to prevent their separation. But, if it occurs, it is essential to enable the rapid tracing and reunification of separated family members, under any situation.<sup>64</sup>

Similarly, individuals separated from their families should be informed about relevant family tracing and reunification procedures and kept abreast of progress made. Also, their informed consent should be sought for the sharing of personal information and for reunification to take place.<sup>65</sup>

In comparative law, the Supreme Court of Justice of El Salvador notes that social and legal functions performed by the family within society require enhanced protection of the State, through legal instruments, public policies and, in general, its own actions. This implies: (i) a duty of abstention or non-interference by the State, and (ii) the existence of positive or lenient obligations to carry out everything within its reach to promote family protection and preservation of the family as the fundamental basis of society.<sup>66</sup>

With regard to displaced children and family reunification processes, it is necessary to consider the best interests of children recognised in Article 4 of the Constitution, based on which the role of the persons involved in justice will be to promote and monitor this enhanced and effective protection by their family, society and the State.

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<sup>63</sup> Cf. IACHR, *Alvarado Espinoza et al. v. México*, pars. 281 and 282.

<sup>64</sup> Cf. Global Protection Cluster, *op. cit.*, p. 219.

<sup>65</sup> *Id.*

<sup>66</sup> See Supreme Court of Justice of El Salvador, Amparo ruling 411-2017.13. Available (in Spanish) at <https://www.refworld.org/es/docid/5b4f72e54.html>.

It should be stressed that the principle of the best interests of children also arises from Article 3 of the Convention on the Rights of the Child, and it should be applied in a systematic manner in any action that affects a child and must permeate both actions of general character, such as assessments, planning or budget allocations, and actions affecting individual children.<sup>67</sup>

In situations of internal displacement, this principle requires a careful assessment of the best interests of the child at every phase of the displacement cycle, regarding any action that may affect the child, and requires special attention due to the particular risks that they may face.<sup>68</sup>

In the context of family unity, best interest determination procedures are to be established when considering durable solutions, alternative care arrangements, removal from family when a child's safety is in question and, in some cases, family reunification. These should be developed building on domestic child protection systems. They should ensure that decisions are taken by more than one person with relevant expertise and are based on a balancing of all relevant factors. Best interest determination procedures should ensure adequate child participation without discrimination. The views of the should be given due weight in accordance with age and maturity.<sup>69</sup>

Thus, children must not be separated from their parents against their will, unless such separation is deemed necessary for the best interests of the child and necessary procedural safeguards are complied with. In the event of separation, children must be provided with special protection and assistance, including appropriate care arrangements, taking into account the child's age, maturity and ethnic, religious, cultural and linguistic background. Alternative care arrangements must always be subject to periodic review.<sup>70</sup>

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<sup>67</sup> Cf Global Protection Cluster, *op. cit.*, p. 220.

<sup>68</sup> *Ibid.*, p. 13.

<sup>69</sup> *Ibid.*, p. 220.

<sup>70</sup> *Ibid.*, p. 227.



The SCJN has indicated that the State must not only safeguard the stability of children in their household, but also ensure that they can effectively enjoy their family relations.<sup>71</sup>

On the other hand, protection of the family is independent of other interdependent and important rights in situations of forced displacement, such as that of enabling a safe return. This does not prevent, according to the circumstances of the case, measures to enable the safe return from also being suitable for achieving family reunification.<sup>72</sup> Finally, the IACHR has indicated that the right to protection of the family involves, among other obligations, that of promoting as extensively as possible, the development and enhancement of the family unit.<sup>73</sup>

It is important to understand the concept of family for cases of forced displacement in a broad sense, and to define it from the functional point of view according to the context; and to understand that it goes beyond the household, to include relationships of social, emotional or material dependence, which, in certain cases, may include people who do not have blood ties.

In this regard, the Committee on the Rights of the Child in its General Comment No. 14 stated that the term “family” must be interpreted in a broad sense to include

biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.” Likewise, the right to non-separation is applicable “to any person holding custody rights,

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<sup>71</sup> See Tesis aislada de jurisprudencia 1a. CLXXXVI/2017 (10a.), First Chamber, Amparo in Review 644/2016. *Principio del mantenimiento del menor en su familia. Su contenido y alcance.*

<sup>72</sup> Cf. *Yarce y otras vs. Colombia...* quot., par. 248.

<sup>73</sup> Cf. *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia...* quot., par. 325.

legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.”<sup>74</sup>

For its part, the IACHR has mentioned:

the definition of family should not be restricted to the traditional idea of a couple and their children, as other relatives may also be entitled to the right to family life, such as uncles, cousins and grandparents, to list only a few possible members of the extended family, provided that they have close personal ties.

In addition, in many families the people in charge of the care and development of a child in a legal or customary manner are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes.<sup>75</sup>

Therefore, it is key to consider a broad idea of the concept of family, and to use appropriate and realistic criteria relating to documents and other evidence that may be required to demonstrate a family connection. Since, due to forced displacement, many people have often lost personal documents, and alternative methods may need to be developed to confirm family connections.<sup>76</sup>

## VI. Right to an Adequate Standard of Living

With regard to the protection of economic, social and cultural rights, Article 3 of the International Covenant on Economic, Social and Cultural Rights

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<sup>74</sup> Committee on the Rights of the Child, General Comment No. 14 *son the right of the child to have his or her best interests taken as a primary consideration* (Art. 3, par. 1), par. 59.

<sup>75</sup> IACHR, Advisory Opinion OC-21/14; Rights and guarantees of children in the context of migration and/or in international protection needs, par. 272.

<sup>76</sup> Cf. Global Protection Cluster, *op. cit.*, p. 217.

(ICESCR) provides that States must ensure the equal right of men and women to the enjoyment of such rights.<sup>77</sup>

In this regard, Article 11 of this instrument includes the right to an adequate standard of living. This right includes access to “adequate food, clothing and housing, and to the continuous improvement of living conditions.”<sup>78</sup>

On the interpretation of that right, the First Chamber of the Supreme Court has warned:

The current text of Article 4 of the Political Constitution of the United Mexican States shows, although not in these literal terms, a fundamental right of everyone to access an adequate or dignified standard of living [...] A distinctive feature of this right lies in the intimate relationship it has with other fundamental rights, such as the right to life, food, clothing, housing, education and health, since it is clear that in order for a person to be able to attain a certain level of welfare it is required that all their basic needs be adequately met. Thus, it is noted that the full realization of the fundamental right to an adequate or dignified standard of living depends in turn on the complete fulfilment of these rights typical of the field of basic needs of human beings.<sup>79</sup>

For its part, the Guiding Principles point out in Principle 18 that all displaced persons have the right to an adequate standard of living. Derived from this right, the principle states that, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: “essential food and potable water; basic shelter and housing; appropriate clothing; and essential medical services and sanitation.” It also

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<sup>77</sup> See ICESCR, Art. 3.

<sup>78</sup> *Ibid.*, Art. 11.

<sup>79</sup> Tesis aislada 1a. CCCLIII/2014 (10a.), First Chamber, Direct Amparo in Review 1200/2014, *Derecho a acceder a un nivel de vida adecuado. Su plena vigencia depende de la completa satisfacción de los derechos fundamentales propios de la esfera de necesidades básicas de los seres humanos.*

indicates that “special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.”<sup>80</sup>

Adequacy means that these goods and services are available in sufficient quality and quantity, accessible, acceptable (i.e., sensitive to gender and age, culturally appropriate) and adaptable (i.e., provided in ways that adapt to IDPs’ changing needs).<sup>81</sup>

It is important to mention that the right to receive humanitarian assistance is an indispensable element of the right to live with dignity. “This encompasses the right to an adequate standard of living, including adequate food, water, clothing, shelter and the requirements for good health.” It should be emphasised that humanitarian assistance must be provided according to the principle of impartiality, which requires that it be provided solely on the basis of need and in proportion to need. This reflects the wider principle of non-discrimination.<sup>82</sup>

On humanitarian assistance, the Guiding Principles point out in Principles 3 and 25 that the authorities have the primary obligation and responsibility to provide protection and humanitarian assistance to internally displaced persons; and that internally displaced persons in turn have the right to seek and receive protection and humanitarian assistance. They also have the right not be persecuted or punished for making such a request.

It should be noted that there are already a number of resolutions within the Judicial Branch of the Federation, where omissions by various authorities to grant help or humanitarian assistance and satisfactory living conditions to internally displaced persons have been identified through the amparo

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<sup>80</sup> Guiding Principles on Internal Displacement, Principle 18.

<sup>81</sup> See IASC, Adequate standard of living indicator. Available at <https://inform-durablesolutions-idp.org/library/adequate-standard-of-living/>.

<sup>82</sup> See *Sphere Association, The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*. Available at <https://spherestandards.org/wp-content/uploads/Sphere-Handbook-2018-EN.pdf>.

proceedings, and considering the Guiding Principles as an instrument of international *soft law*, provision has been made in kind of “suitable clothing taking into account the weather conditions of the city in which displaced persons currently live,” or, otherwise, “the delivery of an amount in national currency sufficient to meet these needs”, etc. (own translation.)<sup>83</sup>

On the other hand, it is noted that Principle 28 of the Guiding Principles states that international humanitarian organizations and other appropriate authorities have the right to offer their services in support of internally displaced persons. Their offers may not be considered an unfriendly act or interference in the internal affairs of the State and will be examined in good faith. They also indicate that their acceptance may not be arbitrarily withdrawn, in particular, when the appropriate authorities are unable or unwilling to provide the necessary humanitarian assistance.

It is noted that the Special Rapporteur on the human rights of internally displaced persons has stated that:

humanitarian assistance and protection address the immediate needs of internally displaced persons, but also prevent secondary displacement by creating the conditions for people to remain in a safe and dignified situation in an area while waiting for a solution to their displacement.<sup>84</sup>

The Special Rapporteur also notes that “if the conditions for survival are not met, internally displaced persons may be forced to relocate, for example, to escape hunger, insecurity or violence” (own translation.)<sup>85</sup>

Below, there is an in-depth look at some specific issues of three of the sub-themes derived from the right to an adequate standard of living: (i)

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<sup>83</sup> Second District Court of Amparo and Federal Proceedings in the State of Chiapas, indirect amparo trial 833/2018.

<sup>84</sup> UN, General Assembly, Report of the Special Rapporteur on the human rights of internally displaced persons, pursuant to: Human Rights Council Resolution 74/160 and Resolution 41/15, par. 55.

<sup>85</sup> *Id.*

accommodation, (ii) food aid and nutrition, (iii) water and sanitation; the right to health is covered in a later section.

## 1. Accommodation as Part of the Right to Adequate Housing

Accommodation is a fundamental protection priority. “The right to shelter involves both access to adequate shelter and the sustained ability to enjoy an adequate standard of shelter.”<sup>86</sup>

When referring to shelter, the term generally means habitable, covered living space, providing a secure and healthy living environment with privacy and dignity.<sup>87</sup>

In certain situations, the State may claim that it lacks the capacity to protect the right to adequate housing, either because it lacks the necessary financial resources, or because of the absence or malfunctioning of mechanisms to ensure compliance with laws, or due to the inability to access certain parts of its territory. However, the State must demonstrate that it has made every effort to use all the resources at its disposal to meet the basic housing needs. These include those resources “available from the international community through international cooperation and assistance.”<sup>88</sup>

As other economic, social and cultural rights, the right to shelter is progressively realized, and the State needs to take the necessary steps to respect, protect and fulfil this right. In emergency situations, the minimum requirements that need to be fulfilled in relation to the right to adequate shelter would be privacy, security of person, health and food.<sup>89</sup>

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<sup>86</sup> Global Protection Cluster, *op. cit.*, p. 250.

<sup>87</sup> *Id.*

<sup>88</sup> CESCR, General Comment No. 3 *on the Nature of States Parties' Obligations*, par. 13.

<sup>89</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 254.

Shelter interventions for displaced persons in early stages can reduce the fluidity of the population. In doing so, they can help to mitigate or avoid additional displacement-related protection risks.<sup>90</sup> An important aspect to take into account is that continued monitoring and evaluation of the displaced persons situation should take place to measure the standards and overall conditions of shelter and to identify possible protection risks related to inappropriate standards or a threatening environment. Such evaluations should lead to different assistance interventions as well as to the search for alternative shelter options.<sup>91</sup>

The right to adequate housing in the broad sense will be addressed in Section X of this chapter.

## 2. Food Aid and Nutrition

As we mentioned before, the right to adequate, sufficient and quality food is included in Article 11 of the ICCPR, paragraph 2, which recognises that more immediate and urgent measures may need to be taken to ensure “the fundamental right of everyone to be free from hunger” and malnutrition.

For its part, the Protocol Additional to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights —Protocol of San Salvador— recognises in Article 12 the right to food by stating:

“Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development,” stating that “in order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote

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<sup>90</sup>*Ibid.*, p. 256.

<sup>91</sup>*Ibid.*, p. 252.

greater international cooperation in support of the relevant national policies.”<sup>92</sup>

At the domestic level, Article 4 of the Constitution states that “everyone has the right to adequate and quality nutrition. The State shall guarantee this” (own translation.)

It is important to note that the right to food does not mean that the State has an obligation to feed everyone. However, States have a general obligation to work toward the progressive realization of rights using the maximum number of available resources. This includes seeking the support of the international community when necessary.

Moreover, States must also create the conditions needed to guarantee food security through, for example, legislation, public policies and specific programs. As well as the immediate obligation to prevent or avoid discrimination in the access to adequate food, including discrimination on the basis of displacement, and to prevent malnutrition and hunger.<sup>93</sup>

It is worth noting that both the IACHR and the Constitutional Court of Colombia have mentioned the right to minimum diet, indicating that, in a large number of cases, it is often unsatisfied due to the high levels of extreme poverty suffered by many displaced persons.<sup>94</sup> These courts also indicate that violations of the right to food can occur due to actions directly carried out by States or by other entities insufficiently regulated by States.

These include officially derogating or suspending the regulations needed to continue enjoying the right to food; denying access to food to certain

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<sup>92</sup> Protocol Additional to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights, Article 12.

<sup>93</sup> Cf. Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons*, p. 266 and 271.

<sup>94</sup> Cf. Constitutional Court of Colombia, Decision T-025/04... *title*; IACHR, *Massacres of Ituango v. Colombia... title*, par. 12.



individuals or groups, regardless if the discrimination is based on the legislation or if it is active; preventing access to humanitarian food assistance in internal conflicts or other emergency situations, among others.<sup>95</sup>

Finally, for the protection of the right to food assistance and nutrition, it is important to mention two issues to avoid worse impacts:

- On the one hand, adapting food assistance according to specific needs —children, pregnant or breastfeeding women, among others—, customs and religious beliefs —indigenous peoples have different feeding practices according to their customs and worldview.
- On the other hand, food distribution should include strategies that avoid exposure to additional protection risks or human rights violations, as well as discrimination against host communities.

In order to achieve quality, sufficient, culturally appropriate, differentiated, relevant, safe, and non-discriminatory food and nutritional assistance, the participation of the displaced population and the host community is essential in the entire response chain, from design to final distribution. This is crucial to mitigate risks and conflicts between the two population groups.

### 3. Water and sanitation

The human right to water is the right of everyone to sufficient, safe, acceptable, healthy, accessible and affordable water for personal and domestic use.

With regards to this right, Article 11, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) lists a series of rights generated from the right to an adequate standard of living, “including adequate food, clothing and housing”. In this regard, the Covenant on

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<sup>95</sup> CESCR, General Comment No. 12 on the right to adequate food (Art. 11); IACHR, *Massacres of Ituango v. Colombia... title*, par. 19.

Economic, Social and Cultural Rights (CESCR) has indicated that the use of the word "including" shows that this list of rights is not limited to the items included in the list. Therefore, the right to water is considered in the same set of conditions to ensure the right to an adequate standard of living, particularly, because it is one essential for survival.<sup>96</sup>

The Committee has also indicated that the right to water entails both freedoms and rights:

Freedoms imply the right to maintain access to a water supply necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water. Thus, the elements of the right to water must be adequate for human dignity, life and health.<sup>97</sup>

Finally, the Committee noted in General Comment No. 5 that, even though the right to drinking water is applicable for everybody, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, explicitly mentioning internally displaced persons.<sup>98</sup>

However, regarding access to this right in displacement conditions, it is essential that States guarantee that displaced persons have access to water, sanitation and basic hygiene facilities to ensure their survival. This aims at protecting them from disease and maintaining their dignity until they can return to their homes or find another long-term solution, on the same conditions as granted to nationals.<sup>99</sup>

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<sup>96</sup> See CESCR, General Comment No. 15, *right to water* (Art. 11 and 12 of ICRSCR.)

<sup>97</sup> *Ibid.*, par. 10 and 11.

<sup>98</sup> *Ibid.*, par. 16.

<sup>99</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 274.

Furthermore, in this comment it is stated that access to water and sanitation facilities should be located where all segments of the population can reach it in dignity and safety. It also implies that these are designed considering age and gender factors, and that they are affordable for all people.<sup>100</sup>

## VII. Health

Everyone has the right to enjoy the highest possible health standard. This implies not only the right to timely and appropriate health care, but also to the underlying health determinant factors, such as adequate food, water, sustainable livelihoods, housing and sanitation. Meeting the health needs of the population requires a multisectoral response that considers the connection between health and protection.<sup>101</sup>

Article 10 of the Protocol of San Salvador considers the right of every person to health, understanding it as enjoying the highest level of physical, mental and social well-being. It states that, in order to make this right effective, States must adopt various measures such as:

- Primary health care, understood as essential health care made available to all individuals in a community.
- The extension of health care benefits to all individuals subject to the State's jurisdiction.
- Universal immunization against principal infectious diseases.
- Prevention and treatment of endemic, occupational and other diseases.
- Education of the population on the prevention and treatment of health problems.

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<sup>100</sup> *Ibid.*, p. 275.

<sup>101</sup> *Ibid.*, p. 283.

- Satisfying the health needs of the highest risk groups and those whose poverty makes them most vulnerable.<sup>102</sup>

At the domestic level, the Constitution states in Article 4 that everyone is entitled to the protection of health, and that the law shall define “a health system for the well-being, in order to guarantee the progressive, quantitative and qualitative expansion of health services for the comprehensive and free care of people who do not have social security (own translation.)”<sup>103</sup>

There are different interpretations on this right. In this regard, the SCJN has stated the following:

health protection is a goal that the State may legitimately pursue as it is an essential constitutional right, and that has both an individual or personal projection, as well as a public or social projection. As regards “protection [...] individually, the right to health translates into ensuring certain general well-being comprising physical, mental, emotional and social state of the person, from which derives another essential right, consisting of the right to physical and mental health [...]. On the other hand, the social or public aspect of the right to health consists of the State's duty to address health problems that affect society in general, as well as to establish the necessary mechanisms so that all people have access to health services. This includes the duty to undertake the actions needed to achieve this goal, such as the development of public policies [...] among others (own translation.)”<sup>104</sup>

Likewise, other bodies of the Judicial Branch of the Federation have interpreted that this right “entails, among others, State obligation to provide the services and benefits to guarantee the highest protection level to people’s health

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<sup>102</sup> See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 10

<sup>103</sup> CPEUM, Art. 4.

<sup>104</sup> Tesis de jurisprudencia 1a./J. 8/2019 (10a.), Primera Sala, Décimo Octavo Tribunal Colegiado en materia Administrativa del Primer Circuito, *Derecho a la protección de la salud. Dimensiones individual y social. (Thesis on Jurisprudence 1a./J. 8/2019 (10a.), First Chamber, Eighteenth Chartered Administrative Court for the First Circuit, Right to the protection of health.)*

(through medical care, treatment, medicines, rehabilitation, granting of medical licenses, etc.)” (own translation.) In this way, regarding these services, the bodies indicate:

When in the indirect amparo, the omission to grant medical services for treating an illness that threatens applicant’s life is claimed, suspension must be decreed outright, in terms of Article 126 of the Amparo Law. The effects of such measure must be clearly specified to bind the authority to provide the due and urgent medical care required, as well as the follow-up and exact communication of the procedures to be applied, together with the necessary medications and treatment, and even the legally due medical licenses, in order to fully guarantee the right to health.<sup>105</sup>

In turn, Principle 19 of the Guiding Principles states:

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.<sup>106</sup>

In addition, principles also state that “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 counselling for victims of sexual and other abuses.” Finally, they state that “Special attention should also be given to the prevention of contagious and infectious diseases, among internally displaced persons.”<sup>107</sup> In this way, the protection of physical, mental and reproductive health is highlighted.

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<sup>105</sup> Tesis aislada 18o. A.33 K (10a.), Queja 80/2019 (in Spanish.)

<sup>106</sup> Guiding Principles on Internal Displacement, Principle 19.

<sup>107</sup> *Id.*

The conditions that characterise forced displacement can have a profound impact on the health and well-being of individuals and communities.<sup>108</sup> These risks are generally exacerbated by limited or lack of access to health care facilities and services, as well as supplies and medicines, during displacement. In many cases, internally displaced persons cannot receive timely and adequate health care.<sup>109</sup>

Authorities are primarily responsible for ensuring that all persons under their jurisdiction enjoy the highest attainable standard of health, including the displaced population. Consequently, authorities have the obligation to take all possible measures for progressively exercising the right to health, including legislative, administrative, financial, educational and social measures, to the maximum extent of their available resources. In particular, authorities should make every effort to ensure that public health facilities, goods and services and health care centres are available, accessible, culturally acceptable and of good quality.<sup>110</sup>

It should be noted that the United Nations CESCR has stated the following:

*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 [...] giving priority to the most vulnerable or marginalized groups of the population.<sup>111</sup>

It should be noted that, in order to protect and guarantee this right, the services provided should include both the physical and mental health of internally displaced persons, since the displacement phenomenon impacts people in both aspects.

<sup>108</sup> Cf. Global Protection Cluster, *op. cit.*, p. 283.

<sup>109</sup> *Ibid.*, p. 284.

<sup>110</sup> *Ibid.*, p. 285.

<sup>111</sup> CESCR, General Comment No. 14 on the enjoyment of the highest attainable standard of health (Art. 12), par. 40. Available at <https://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf>.

Finally, the Committee noted that in indigenous communities, individual health is often linked to social health, as a whole, i.e., it has a collective dimension. Thus, development-related activities that lead to indigenous populations' displacement, against their will, from their traditional territories and environments, with the consequent loss of their food resources and the rupture of their symbiotic relationship with the land, have a detrimental effect on these populations' health.<sup>112</sup>

### VIII. Education

Article 13 of ICESCR recognises the right of everyone to education, which “shall be directed to the full development of the human personality and sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.” This is achieved by compulsory, affordable and free primary education. Secondary, technical and professional education should also be generalised. Finally, higher education must be affordable and with a progressive introduction of free education.<sup>113</sup>

At the domestic level, Article 3 of the Constitution states that everyone has the right “to education, indicating that authorities at all governmental levels shall provide and guarantee early childhood, preschool, primary, secondary, middle and higher education” (own translation.) It also states, *inter alia*, that the State shall prioritise the best interests of children, adolescents and young people in accessing, remaining in and participating in educational services.<sup>114</sup>

On the other hand, Article 2 paragraph B, sub-section II indicates that in order to promote opportunities equality for indigenous people and eliminate any discriminatory practice, the authorities of the three government levels have, *inter alia*, the obligation to guarantee and increase the schooling levels,

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<sup>112</sup> *Ibid.*, par. 27.

<sup>113</sup> See UN, General Assembly, ICESCR, Art. 13. Available at [https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch\\_iv\\_03.pdf](https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf)

<sup>114</sup> See CPEUM, Art. 3.

favouring bilingual and intercultural education, literacy, termination of basic education, productive training and secondary and higher education.

Focusing on the specific context of internal displacement, in Principle 23, the Guiding Principles state that everyone shall have the right to education. To enforce this right, competent authorities shall ensure that internally displaced persons, in particular displaced children, receive free and compulsory education at the primary level. Education shall respect their cultural identity, language and religion. In addition, this principle indicates that special efforts should be made to achieve the full and equal participation of women and girls in educational programmes. Besides, as soon as possible, the education and training services shall be made available to internally displaced persons whether or not they are living in camps.<sup>115</sup>

Regarding the right to education in Mexico, especially internally displaced persons, the *Ley General de Educación* (in Spanish) states, in Article 9, that educational authorities, -within the scope of their respective competencies and with the purpose of establishing conditions that allow for the full exercise of the right to education of each person, with equity and excellence-, will take among other actions “the promotion of measures to facilitate and guarantee the inclusion and permanence in public educational services of children, adolescents and young people who have been repatriated to our country, return voluntarily or face situations of internal displacement or migration” (own translation.)<sup>116</sup>

It is worth mentioning that this law is one of the few federal laws that expressly mentions the concept of internal displacement. However, although it does not provide a definition, it establishes the educational authorities' obligation to favour and guarantee their inclusion and permanence in the educational services.

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<sup>115</sup> See Guiding Principles on Internal Displacement, Principle 23.

<sup>116</sup> *Ley General de Educación* (in Spanish), (General Law on Education) Art. 9 Sub-section XI.



This is particularly relevant in the case of children who suffer forced displacement, since this means they have had to interrupt their education. Therefore, it is essential that authorities can guarantee their access to and continuity of their education without being discriminated against at host sites. This is a crucial element for their protection and, as such, it will be necessary to control that authorities do not impose discriminatory conditions for access, permanence and termination, but that they rather consider the inherent impacts of displacement. The role of the judiciary is essential here.

This situation is due to the various obstacles that internally displaced persons often face in gaining access to safe education. Such difficulties may be: (i) the lack of adequate educational facilities, which may be damaged as a result of a disaster or armed conflict, or may be occupied by displaced persons in need of accommodation; (ii) the lack of resources, such as loss of home, land and livelihood, which often leads to poverty and marginalisation, and internally displaced persons may lack the resources to pay for education, books, uniforms, school supplies or meals; (iii) discrimination on several grounds, such as gender or ethnic or linguistic origin, for example, displaced children often cannot enrol in schools at the place of displacement because they lack the necessary documentation or because they cannot meet the strict admission and registration requirements; (iv) insecurity, as children may face different risks of protection in their way to schools or training centres or during classes.<sup>117</sup>

Therefore, the above-mentioned obstacles should be tackled by: (i) granting displaced persons access to education on an equal basis to formal education systems; (ii) offering displaced teachers the possibility to work in local schools without any discrimination; (iii) reducing or adapting school enrolment and admission criteria, such as documentation requirements, so that they do not exclude internally displaced persons; (iv) providing the necessary facilities and resources to enable schools and other educational institutions to include

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<sup>117</sup> Cf. Global Protection Cluster, *op. cit.*, p. 303.

internally displaced persons, for example, by expanding existing school infrastructure or creating new centres;<sup>118</sup> (v) facilitating access for displaced persons who do not have sufficient resources to cover the cost of uniforms, books and other supplies; (vi) promoting the safety of children in schools and learning spaces so as not to expose them to protection risks.

It is also important to take measures to ensure that women and girls participate fully and effectively in training programmes on an equal basis. To this end, affirmative action will often be necessary.

Efforts to ensure full access to education should be directed to the entire community, i.e., both internally displaced populations and host communities. The aim is to avoid stigmatization and discrimination towards the displaced population as much as possible, and to adopt a community approach so that both displaced persons and host communities participate in the design, implementation and monitoring of activities in the field of education, and they be part of the decision-making process at all stages.<sup>119</sup>

The Constitutional Court of Colombia determined that the fundamental nature of the right to education “is much more important in the case of children displaced by the conflict because the abrupt abandonment of their place of residence obliges them to interrupt their education cycles” (own translation.) This underlines the State’s obligation to solve the conflict and facilitate children’s access to the education system in their places of residence, so that they do not interrupt their learning.<sup>120</sup>

Regarding the protection of the fundamental right to education of displaced children, the Constitutional Court of Colombia also noted the following:

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<sup>118</sup> *Ibid.*, p. 304.

<sup>119</sup> *Ibid.*, p. 305.

<sup>120</sup> See Fourth Chamber Review of the Constitutional Court, Decision T-215/02.

It becomes an imperative for the Constitutional Court because, apart from the circumstances that make the protection of this right in favour of any child viable, in the case of displaced children, protection is even more important by their blatant state of defenselessness. In order to ensure that the possibilities of a viable future for these minors are not hampered by their displacement, the State must guarantee the continuity of the educational process and, if it fails to do so, the constitutional judge, having exercised the action of tutelage, shall provide all necessary means for the protection of said fundamental right.<sup>121</sup>

Likewise, the Colombian State established the obligation to train teachers and generate support to facilitate study conditions, including the psychological care that may be required in forced displacement contexts.<sup>122</sup>

Finally, the Constitutional Court of Colombia determined that the minimum obligation of the State in relation to the education of displaced children is to guarantee their access to education, by providing the necessary places in public or private entities in the area.<sup>123</sup>

## IX. Livelihood, Labour and Social Security

Livelihoods are “capabilities, assets and strategies that people use to make a living, i.e., to secure food and income through a variety of economic activities.” Everyone has the right to develop a livelihood,<sup>124</sup> which is included in the

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<sup>121</sup> *Id.*

<sup>122</sup> Cf. Guerrero, Useda, and Guerrero, Barón, *Acceso a la educación de la población desplazada por el conflicto armado en Colombia 1999-2009* (in Spanish,) p. 71.

<sup>123</sup> This was the order given by the court in 2002 Decision T-215 to the defendant Board of Municipal Education: Arrange the admission to the educational system of the children under protection, using the quota available in the schools of the area. This preferential treatment of displaced children is justified not only by the fact that education is an entitled fundamental right, just like all other minors in the national territory, but also because, given their conditions of particular vulnerability, they are subject to enhanced constitutional protection. This means that, in terms of education, if their basic education is not guaranteed, the impact of their displacement will worsen the effects on their personal autonomy and the exercise of their rights. (own translation)

<sup>124</sup> Cf. Global Protection Cluster, *op. cit.*, p. 3.

principle of non-discrimination, the right to an adequate standard of living and the right to work.<sup>125</sup>

Article 6 of the San Salvador Protocol thus provides for the right of every person to work, which includes the opportunity to obtain the means to lead a dignified and decent life through a freely chosen or accepted lawful activity. It claims that States should take measures to ensure full effectiveness of the right to work, in particular those relating to the achievement of full employment, vocational guidance and the development of technical-vocational training projects, as well as measures to enable women to have effective access to the right to work.<sup>126</sup>

In addition, Article 7 of that instrument states that the right to work described above implies fair, equitable and satisfactory conditions. This Article identifies a number of issues that must be guaranteed in the legislation, such as having a remuneration that ensures at least a dignified and decent livelihood, and a fair and equal salary for equal work, without distinctions amongst other provisions.<sup>127</sup>

The right to social security is provided for in Article 9 of said Protocol, stating that “everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence.” Likewise, in this article it is stated that “in the event of the death of a beneficiary, social security benefits shall be applied to his dependents.”<sup>128</sup>

In turn, Article 5 of the Mexican Constitution states:

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<sup>125</sup> *Ibid*, p. 321.

<sup>126</sup> See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 6.

<sup>127</sup> *Id*.

<sup>128</sup> *Ibid*, Art. 22.

No person may be prevented from performing the profession, industry, commerce or work he desires, so long as these are lawful. The exercise of this freedom can only be cancelled by judicial decision when the rights of a third party are infringed, or by government resolution, dictated in the terms of law, when the rights of Society are offended. No-one can be deprived of the fruits of his work except under a court order.<sup>129</sup>

It also states that “No-one can be obliged to render personal services without fair retribution and without their full consent, except for work imposed as a penalty by the judicial authorities.”<sup>130</sup>

It is worth mentioning that the right to work has been stated in the Guiding Principles, which in its Article 22 mention that no distinction should be made between internally displaced persons, whether or not they are living in camps, in their right to freely seek employment opportunities and participate in economic activities.<sup>131</sup>

It is also important to highlight, that people leave their livelihoods or jobs because of the impacts on these rights in contexts of forced displacement. This loss can generate protection risks, as it affects not only their psychosocial well-being, but also their lack of income. This may lead to situations of prolonged aid dependence and the risk of further discrimination and abuse.<sup>132</sup>

Displaced persons may also experience difficulties in adapting to new markets, acquiring new skills and integrating into communities around them. These communities often perceive displaced persons as a threat to their already scarce resources, which can lead to discrimination and exclusion.<sup>133</sup>

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<sup>129</sup> CPEUM, Art. 5.

<sup>130</sup> *Id.*

<sup>131</sup> See Guiding Principles on Internal Displacement, Principle 22.

<sup>132</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 312.

<sup>133</sup> *Ibid.*, p. 313.

In this regard, the key role of programmes for the identification of sustainable livelihoods is of paramount importance. It is important that these programmes have an approach that includes both internally displaced persons and host communities, in order to contribute to peaceful co-existence and ensure sustainability of support strategies.<sup>134</sup>

To prevent abuse within the framework of informal mechanisms that allow access to employment, authorities will also need to substitute or issue documents such as degrees, work or academic certificates. In addition, authorities must protect the property and activities of internally displaced persons on which they depend for self-reliance.<sup>135</sup>

Regarding comparative law, the Constitutional Court of Colombia examined the case of a woman who was the head of her displaced family, mother of five children with a grandson, and illiterate, who was not given access to economic stabilization programmes due to omitting an effective answer to her petition. The Court analysed the State policy on productive projects for the displaced population and concluded that her petition to be included in a productive project had not been answered, thus, her petition and work rights had been violated.<sup>136</sup>

In this case, the Constitutional Court of Colombia highlighted the fact that, from the moment persons are forced to flee and leave their homes, their right to work, among other rights, is affected.

In most of the cases, the displaced persons have managed to develop a *modus vivendi* by means of a certain productive activity, but sustaining it becomes impossible. Therefore, the Court has considered that, in this situation, it is the State's obligation to provide them with training so that they can assume a new role in the labour market. Considering that the State's obligation of

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<sup>134</sup> *Id.*

<sup>135</sup> *Ibid.*, p. 314.

<sup>136</sup> See Constitutional Court of Colombia, Decision T-669.

reestablishment in the original places of residence becomes highly complex, the State must ensure the means of work that help achieve a minimum living wage. (own translation)<sup>137</sup>

With regard to the provision of support for the socio-economic stabilization of displaced persons, the minimum obligation of the State is to identify, precisely and with the full participation of the person involved, the specific individual and family circumstances, their immediate origin, and the decent livelihood alternatives to which they can access. This is intended to define their specific possibilities of undertaking a reasonable project of individual economic stabilization, or of participating productively in a collective project that allows them to generate income to survive autonomously, including their dependent displaced family members. (own translation)<sup>138</sup>

It should be noted that, when this right is not protected, this may result in many people having to return to their places of origin against their will, and even under bad conditions because they have no means of subsistence,<sup>139</sup> worsening their risk.

## X. Housing, Land and Property

According to the Global Protection Cluster, property may include:

Tangible and intangible goods such as land, housing, money, crops, and livestock. Rights to property are not limited to private ownership but include a range of formal and/or informal rights and entitlements relating to access to, use of, control over and/or transfer of property. Property rights can be defined by diverse sources, including not only national law, but also customary or religious law or practice, and local tradition. They can also be acquired over time through consistent use and practice. Such rights can be held privately by, for instance, an individual or collectively by, for instance, a family, a social

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<sup>137</sup> *Id.*

<sup>138</sup> See Constitutional Court of Colombia, Decision T-025/04... *quot.*

<sup>139</sup> Cf. IACHR, *Pueblo Bello Massacre v. Colombia...* *quot.*, par. 159.

group, or a community. Today, this area of law is often referred to, particularly by humanitarian and development actors, as “Housing, Land and Property Rights,” or “HLP.”<sup>140</sup>

At the regional level, the ACHR states in article 21 the right to private property, indicating that persons have the right to the use and enjoyment of their property, and that no one shall be deprived of their 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.<sup>141</sup>

According to the last report of the Special Rapporteur on the human rights of internally displaced persons, rights to housing, land and property include:

To obtain adequate housing free from the fear of forced eviction; a place that offers shelter, safety and the ability to secure a livelihood. [It] includes the full spectrum of rights to housing, land and property held according to statutory or customary law or informally [...] <sup>142</sup> Moreover, housing, land and property rights encompass the right to an adequate standard of living, adequate housing, property, return and remedy, including restitution and compensation. <sup>143</sup>

The Special Rapporteur also states that the right to adequate housing has multiple dimensions, including legal security of tenure, access to public goods and services, affordability, habitability, physical accessibility, location and cultural adequacy, and that the prohibition of forced eviction is a key aspect of legal security of tenure, <sup>144</sup> which was addressed in chapter II of this Manual.

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<sup>140</sup> Global Protection Cluster, *op. cit.*, p. 324.

<sup>141</sup> V ACHR, Art. 21.

<sup>142</sup> Norwegian Refugee Council and International Federation of Red Cross and Red Crescent Societies, “The importance of addressing housing, land and property challenges in humanitarian response”, p. 5. Quoted at Human Rights Council 47<sup>th</sup> regular session, 21 June to 9 July, 2021. *Housing, land and property issues in the context of internal displacement - Report of the Special Rapporteur on the human rights of internally displaced persons, Cecilia Jimenez-Damary*, par. 11.

<sup>143</sup> Human Rights Council 47<sup>th</sup> regular session, *op. cit.*, par. 11.

<sup>144</sup> *Ibid.*, par. 12.



The Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 4 argues that the right to adequate housing should take into account the following aspects: (i) legal security of tenure, (ii) availability of services, materials, facilities and infrastructure, (iii) affordability, (iv) habitability, (v) accessibility, (vi) location, and (vii) cultural adequacy.<sup>145</sup>

Due to the impacts of displacement, the Guiding Principles contain provisions on key obligations in relation to housing, land and property, and displacement.

Principle 7 is about the prevention aspects and how authorities should explore viable alternatives to displacement. In addition, when no alternatives exist, all necessary measures shall be taken to minimise displacement and its adverse effects. Moreover, Principle 9 indicates that States are under a particular obligation to take protective measures against displacement of indigenous peoples and other groups with a special dependency on or attachment to their lands.

For the phase during displacement, Principle 19 considers the right to a *standard of living* that was previously addressed within this chapter. Principle 21 also states that property and goods that displaced persons had to leave behind shall be protected against destruction, and arbitrary and illegal appropriation, occupation or use.

Finally, as regards durable solutions, Principles 28 and 29 affirm that States should take measures to facilitate reintegration of returned persons, in particular by helping them recover their property or by granting them compensation.

On this last point, it is relevant to mention the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles). They provide guidance for designing mechanisms to return property to refugees and internally displaced persons. These principles not only reaffirm

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<sup>145</sup> See CESCR, General Comment No. 4.

the rights of non-owners, but also of tenants, residents of informal settlements, secondary occupants, and holders of customary land rights.<sup>146</sup>

Furthermore, according to the principles mentioned above, all displaced persons have the right to restitution of their housing, land and property of which they have been arbitrarily or illegally deprived, or to compensation for any housing, land or property whose restitution is, in fact, considered impossible by an independent and impartial court.

In addition, the Special Rapporteur notes that given the multiple dimensions of housing, land and property, a multisectoral approach is needed to address them, taking into account the different implications for each specific group.<sup>147</sup>

The principles emphasise that women must be guaranteed equal access as men in every property matter, as there are often obstacles mainly arising from gender-based discrimination.

On the other hand, it is important to note that, as displacement continues and resources are exhausted, internally displaced persons may face eviction<sup>148</sup>, which will lead to a secondary displacement. This is due to situations such as not paying rent, illegally occupying someone else's property, or residing on land that the owner wants to recover.<sup>149</sup>

In this way, the protection of property rights in situations of internal displacement requires a multisectoral effort aimed at *inter alia*: (i) preventing arbitrary deprivation of property; (ii) preserving property rights of property left behind or lost during displacement; (iii) providing an effective resource in case

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<sup>146</sup> Cf. Human Rights Council 47<sup>th</sup> regular session, *op. cit.*, par. 18.

<sup>147</sup> *Ibid.*, par. 8.

<sup>148</sup> See Joint IDP Profiling Service (JIPS), *Profile at a glance: Somalia, Mogadishu*.

<sup>149</sup> Cf. Human Rights Council 47<sup>th</sup> regular session, *op. cit.*, par. 28.

of arbitrary deprivation of property in the form of restitution or compensation.<sup>150</sup>

### A. Preventing Arbitrary Deprivation of Property

As for the first item, it is important that authorities refrain from any arbitrary deprivation of property. To prevent it, the Special Rapporteur notes as an important element the security of tenure, indicating that tenure may be understood as follows:

the relationship of individuals and groups to the land and housing, which can be defined legally, informally or customarily, and property can be understood in its various dimensions as individual, joint, collective, as well as possession through leases or various rights on possession, emergency housing and informal settlements, including occupation of land or property. Security of tenure exists when the relationship to land and housing enables one to live in security, peace and dignity.<sup>151</sup>

Similarly, the Special Rapporteur indicates that a degree of security of tenure should be guaranteed in order to protect people from forced eviction, harassment and other threats, regardless of the form of tenure.<sup>152</sup>

Furthermore, the Special Rapporteur notes that the lack of government recognition and protection of legitimate customary tenure rights in a context of increased competition has led to forced evictions, land grabbing, displacement and inadequate compensation.<sup>153</sup>

Efforts at improving security of tenure through titling policies formalising customary land rights require strong institutional capacity to maintain land

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<sup>150</sup> Cf. Working Group of the Global Protection Cluster, *op. cit.*, p. 331.

<sup>151</sup> CESCR, General Comment No. 4, par. 8 a).

<sup>152</sup> *Id.* Quoted in *Housing, land and property issues in the context of internal displacement*, *quot.*, par. 33.

<sup>153</sup> Cf. World Bank and International Federation of Surveyors, "Fit-for-purpose land administration." Quoted in *Housing, land and property issues in the context of internal displacement*, *quot.*, par. 35.

registrations. Processes focusing on individual titling often undermine collective rights to land, for example in respect of activities such as gathering, grazing, hunting and fishing. Collective titling is seen as a more effective way to improve tenure while safeguarding access to common land and resources. It allows communities to maintain their customary land management processes and makes them more resilient to external pressures to sell land.<sup>154</sup>

Finally, prevention on this item is extremely important in the context of property rights of members of indigenous peoples. In this regard, the IACHR has indicated that Article 21 of ACHR protects the close connection that indigenous peoples and other tribal communities or peoples, such as Afro-descendant communities, have with their lands, As well as with the natural resources of ancestral lands and integral elements that emerge from them. Due precisely to that intrinsic connection that indigenous and tribal peoples have with their land, the protection of the right to property, use and enjoyment thereof is necessary to ensure their survival.<sup>155</sup>

### *B. Preserving property rights for property left behind or lost during displacement*

The second item emphasises that authorities must protect these properties. However, protection is not usually provided or has various challenges that to be provided.

It is therefore important to specify that regarding the “abandonment” of housing, land and property, regardless of their duration, under no circumstance can we blame the owners, nor does it imply the loss of their rights if the abandonment

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<sup>154</sup> Cf. Human Rights Council 47<sup>th</sup> regular session, *op. cit.*, par. 36.

<sup>155</sup> Cf. IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia...* *quot.*

occurs as a result of armed conflict or acts of violence, discrimination or other violations of rights<sup>156</sup> which generate displacement.

### *C. Providing an effective resource in case of arbitrary deprivation of property in the form of restitution or compensation*

Thirdly, the right to restitution and the right to compensation must under no circumstances be subjected by physical return of persons, and they should be preserved even if another solution is determined for their displacement situation as mentioned in the Guiding Principles.

A common problem is that many times there is no evidence to prove possession of properties, either because official records are incomplete or damaged, or because tenure of stolen properties was established by informal or customary agreements. To solve this problem, and in order to carry out restitution, alternative proof of residence, such as utility bills, witness statements, demonstration of an in-depth knowledge of the property on the land, digital records, proof of possession, among others, can be accepted.<sup>157</sup>

Moreover, displacement may result in loss of property or position titles, and in some cases these documents may not have existed or have never been registered before public property registrations. Therefore, the Pinheiro Principles indicate in Principle 19.2 the following:

States should take steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution, and should ensure legal remedies for those wrongfully harmed by the prior application of such laws.<sup>158</sup>

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<sup>156</sup> Cf. Global Protection Cluster, *op. cit.*, p. 327.

<sup>157</sup> Cf. Human Rights Council 47<sup>th</sup> regular session, *op. cit.*, par. 74.

<sup>158</sup> See Principles on Housing and Property Restitution for Refugees and Displaced Persons,

In addition, Principle 15.7 provides that in situations of displacement where little documentary evidence exists as to ownership or rights of possession, “States may adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution.”<sup>159</sup> In such cases, the principle states that administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.

On the other hand, Principle 7.2 affirms that States should ensure that safeguards of due process extended to secondary occupants do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner.

It is important to stress that deprivation of property is not always arbitrary or illegal. The Special Rapporteur reaffirms that, in certain cases, the authorities may have a legitimate interest in regularising or confiscating private or communal property. However, it indicates that a legal action of this nature must meet certain requirements:

On the one hand, it must be provided for by law and pursue a legitimate aim, such as protection of the public interest, and must be granted to achieve that end. On the other hand, it must respect certain substantive and procedural guarantees. For example, evictions must be preceded by timely notification, and persons to be evicted must have the possibility to challenge the eviction order. Even in cases where evictions are considered lawful, fair reparation must be provided to the persons concerned.<sup>160</sup>

In line with this, the Basic Principles and Guidelines on Development-based Evictions and Displacement indicate, in cases of evictions, that such evictions

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Principle 19.2.

<sup>159</sup> *Ibid.*, Principle 15.7

<sup>160</sup> *Ibid.*, Principle 17.1. Quoted in *Housing, land and property issues in the context of internal displacement, quot.*, par. 74.

are authorised only in exceptional circumstances and that their full justification shall be provided only with the following guarantees:

(a) be authorised by law; (b) be carried out in accordance with international human rights law; (c) be undertaken solely for the purpose of promoting the general welfare; (d) be reasonable and proportional; (e) be regulated so as to ensure full and fair compensation and rehabilitation; and (f) to be carried out in accordance with the present guidelines. The protection provided by these procedural requirements applies to all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under national law.<sup>161</sup>

As regards comparative law, the Constitutional Court of Colombia, in 2018 Decision T-247, reaffirmed that, within the State's obligations on the right to housing of victims of forced displacement, the following must be immediately fulfilled:

(i) to relocate displaced persons who have been forced to settle on high-risk land because of displacement; (ii) to provide temporary housing solutions to them and subsequently facilitate access to permanent housing. In this sense, it is not enough to provide long-term housing solutions if, in the meantime, displaced persons are not provided with temporary accommodation in a decent manner; (iii) to provide counselling to displaced persons on the procedures to be followed in accessing housing programmes; (iv) to take into account the special needs of displaced population and subgroups within it, such as the elderly, single mothers, children, disabled persons, etc., and to design housing plans and programmes with a differential approach; and (v) to remove barriers that prevent displaced persons from accessing to State social assistance programmes, among others.<sup>162</sup>

Likewise, in 2014 Decision 1-885, the Constitutional Court of Colombia indicated that access to clear and concrete information, counselling and special

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<sup>161</sup> Basic Principles and Guidelines on Development-based Evictions and Displacement, Principle 21. Available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines_en.pdf).

<sup>162</sup> Constitutional Court of Colombia, Decision T-247.

accompaniment in the procedures they must present before the competent authorities to access subsidy programs, are part of the hard core of the *iusfundamental* subjective right to decent housing for displaced population.<sup>163</sup>

Finally, the Special Rapporteur has stressed that housing, land and property issues may also be closely linked to the enjoyment of other human rights, such as the rights to food, freedom of movement and choice of residence, protection against interference with one's private life and home, water, sanitation and health. The lack of such services is harmful to health, since it promotes the spread of infectious diseases such as COVID-19.<sup>164</sup>

## **XI. Legal Capacity and Documentation Access**

Article 16 of ICCPR provides for the right of every human being everywhere to recognition as a person before the law, and Article 4 states that, despite exceptional circumstances, this right may not be suspended.<sup>165</sup>

In the same vein, the ACHR recognises in Article 3 the right of everyone to recognition as a person before the law. Article 27 states that this right shall not be suspended.

For its part, in Principle 20, the Guiding Principles mention the right of everyone, everywhere, to recognition as a person before the law. This principle indicates that to give effect to this right, the authorities shall issue to internally displaced persons “all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates.” Additionally, the principle states that, in particular, in order to facilitate the issuance or replacement of documents lost in

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<sup>163</sup> See Constitutional Court of Colombia, Decision T-885.

<sup>164</sup> Cf. Human Rights Council 47<sup>th</sup> regular session, *op. cit.*, par. 13.

<sup>165</sup> See International Covenant on Civil and Political Rights (ICCPR), Art. 4 and 16. Available at <https://www.ohchr.org/sites/default/files/ccpr.pdf>.



the course of displacement, the authorities shall not impose unreasonable conditions, such as forced return. Likewise, the principles indicate that both 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.<sup>166</sup>

In situations of forced displacement, personal documentation is often lost, damaged or destroyed. In addition, civil registration systems, both formal and traditional, are often seriously damaged. In some countries, civil registries may be incomplete from the outset, or certain segments of the population have never been registered or issued with any documentation, or existing documents may have become invalid as a result of a change of legal or administrative regime.<sup>167</sup>

As a result, in order to guarantee the right of internally displaced persons to protection and recognition as a person before the law, access to courts and tribunals, and fair and non-discriminatory treatment by these are required. Likewise, according to the Global Protection Cluster in many cases, in order to fulfil this right, States must adopt affirmative actions “to ensure that internally displaced persons can access formal or informal mechanisms of justice.” This guarantee may also imply the need to “adopt positive discrimination measures favouring women, children and excluded groups, such as ethnic, religious, or linguistic minorities, elderly or disabled persons.”<sup>168</sup>

It should also be promoted that internally displaced persons have access to civil registration and documentation derived from it, or to the replacement of lost documentation, without discrimination and without requiring them to return to their places of origin or travel in unsafe areas. It is important that the authorities abolish or facilitate onerous, administrative, or other requirements

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<sup>166</sup> See Guiding Principles on Internal Displacement, Principle 20.

<sup>167</sup> Cf. Global Protection Cluster, *op. cit.*, p. 241.

<sup>168</sup> *Ibid.*, p. 344.

and that they promote the application of flexible criteria and rules for the submission of evidence<sup>169</sup> in each case.

## XII. Political Participation and Right to Vote

Everyone, including internally displaced persons, has the right to participate in the conduct of public affairs and government in their country, including the right to vote and to have access to public service.<sup>170</sup>

At the regional level, the ACHR makes reference to political rights in Article 23, indicating that all citizens must enjoy the following rights and opportunities:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot, that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country.<sup>171</sup>

Article 27 of the ACHR also considers that political rights may not be suspended.

For their part, Principle 22 of the Guiding Principles mentions that no distinction shall be made between internally displaced persons, whether they live in camps or not, in terms of rights such as “the right to associate freely and participate equally in community affairs”; as well as “the right to vote and the right to participate in public and governmental affairs, including access to the means necessary to exercise this right”; among others.<sup>172</sup>

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<sup>169</sup> *Ibid.*, p. 246.

<sup>170</sup> *Ibid.*, p. 355.

<sup>171</sup> ACHR, Art. 23.

<sup>172</sup> See Guiding Principles on Internal Displacement, Principle 22.

Additionally, Principle 29.1 states that displaced persons returning or resettling elsewhere in the country “shall not be discriminated against as a result of their having been displaced, and shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.”<sup>173</sup>

For internally displaced persons, the exercise of these rights presents a number of important obstacles that often result in them being unable to vote and being excluded from political or public life.

These obstacles include restrictive residency requirements, lack of documentation, discrimination, conflicts and insecurities, lack of access to voting places and lack of information, as follows:<sup>174</sup>

- *Residence requirements:* national electoral provisions often link the exercise of electoral rights to the place of residence. However, displacement entails the temporary or permanent loss of residence, which may complicate their registration and voting. In some cases, they may even be forced to return to their places of origin where insecurity often exists.<sup>175</sup>
- *Lack of documentation:* often, during displacement, the documentation is forgotten at home or lost, and these documents are required to vote. Sometimes, it is also difficult to replace documentation.<sup>176</sup>
- *Discrimination:* discriminatory laws and practices can negatively affect all aspects of the electoral process. In some cases, displaced persons or certain groups such as ethnic minorities have been prevented from voting. They have also been given access to fewer voting places; or these places have been located in remote areas with reduced schedules; or they have been imposed difficult procedures

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<sup>173</sup> *Ibid.*, Principle 29.

<sup>174</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 355 and 356.

<sup>175</sup> *Ibid.*, p. 355.

<sup>176</sup> *Id.*

to register for the electoral roll; or they have been deprived of access to electoral information in a language they could understand.<sup>177</sup>

- *Conflict and insecurity*: elections are sometimes held in a climate of violence where voters and candidates are threatened, harassed or attacked. For elections to be free, fair and legitimate, voters must be able to participate without fear of any risk, intimidation or damage.<sup>178</sup>
- *Lack of access*: access to voting places in situations of displacement is often limited by insecurity, long distances and lack of safe and affordable transport, or the lack of voting facilities.<sup>179</sup>
- *Lack of information*: internally displaced persons, mainly those living in camps or settlements, often lack information about political processes and parties, and the electoral system in a language they can understand.<sup>180</sup>

In view of these obstacles, the State has the duty to protect and guarantee the exercise of this right to both displaced persons and rest of the population. Therefore, it must remove both regulatory and practical obstacles so that they can exercise this right without discrimination, in a free, informed and safe manner.

Accordingly, in order to facilitate the participation of internally displaced persons, States may take the following measures: to change national legislation and administrative procedures to enable people to register and vote in areas of displacement without prejudice; to adopt a voting system to enable them to participate in elections; to strengthen security on the roads to the ballot boxes and in voting places, for example by ensuring the deployment of a sufficient number of police officers, both men and women, trained in this field; to carry

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<sup>177</sup> *Ibid.*, p. 355 and 356.

<sup>178</sup> *Ibid.*, p. 356.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

out specific information and communication campaigns to inform internally displaced persons about registration and voting systems; to ensure the availability of safe and affordable transportation so that all people, including internally displaced persons, can go to the voting places;<sup>181</sup> and to issue the necessary documentation, or other.

As regards this right, from the Judicial Branch of the Federation, the jurisdictional bodies—the Superior Court of the Electoral Tribunal and one of the regional chambers—have become aware of some violations of these rights and have resolved favourably in support of several indigenous people displaced by violence in Chiapas, who, thanks to the determination of the electoral courts, were able to exercise their right to vote according to the following measures:

- The installation of a box in the camp where they were so that they did not have to expose their life and physical integrity when leaving the camp to go to the municipality from which they fled in order to vote.
- The reprint voting cards for those people who did not have one, because they left it in their homes when they fled.
- A new voting card, since as having been displaced for more than two years, there were people who at that time reached the age to vote.<sup>182</sup>

To achieve the above, they first sent documents to the National Electoral Institute (INE, by its Spanish acronym). As there was no answer, and due to the urgency of electoral times and the proximity of the elections, they sponsor a trial for the protection of the political-electoral rights of the citizens before the

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<sup>181</sup> Cf. Global Protection Cluster Working Group, *op. cit.*, p. 357.

<sup>182</sup> V Betanzos, Torres, “Caso de la primera casilla extraordinaria en un campamento de desplazados internos” in *Casos relevantes de la Defensoría Pública Electoral para Pueblos y Comunidades Indígenas*. Available (in Spanish) at [https://www.te.gob.mx/publicaciones/sites/default/files/06\\_Caso%20de%20la%20primera%20casilla%20extraordinaria%20en%20un%20campamento%20de%20desplazados\\_Betanzos.pdf](https://www.te.gob.mx/publicaciones/sites/default/files/06_Caso%20de%20la%20primera%20casilla%20extraordinaria%20en%20un%20campamento%20de%20desplazados_Betanzos.pdf).

Superior Court of the Electoral Tribunal of the Judicial Branch of the Federation for the violation of the right of petition and for not responding to the request for the installation of a special box. It was resolved in favour so that the INE issued a consistent, complete and comprehensive response. It also ordered the General Council of the INE to ensure that indigenous people in the camp had their current right to vote, and if so, take the necessary steps to exercise their vote in the elections, requesting that the Superior Court be informed of the compliance.<sup>183</sup>

Pursuant to the above, the General Council of the INE issued an agreement in response to the request. To this end, in order to promote the right to vote, the INE as an independent entity of the Mexican State carried out an analysis of the relevance of the installation of a special box. Given the proximity of the elections, considering the extraordinary situation of petitioners and the vulnerability of their rights, and anticipating the operational activities necessary to guarantee the right to vote, all this was made to safeguard the integrity and security of internally displaced persons.<sup>184</sup>

Based on this analysis, the General Council of the INE pointed out that, although it would initially be up to a district council to decide on the installation of a box, it was necessary that exceptionally it was the General Council that determined what would be required for its installation, as well as all the mechanisms for the votes to be added to the corresponding recount. The Council also noted that although the request was the installation of a special box, it was convenient to install a special box, since the former would restrict its right to vote by not contemplating the votes of members of its local and federal governments and councils.<sup>185</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

As regards displaced citizens who could not take their documents, including the voter card, a member of the Federal Register of Electors of the corresponding district board had to go and collect their data and, after verifying the correspondence with the nominal list, they would issue the reprint of their card or provide the necessary documents for them to cast their vote.<sup>186</sup>

The duty was also established to change positions to the Ministry of the Interior, the National Public Security Commissioner, the Specialised Public Prosecutor's Office for Electoral Crimes, the Governor of Chiapas, the General Secretary of Government, the Public Prosecutor's Office for Electoral Crimes of the State of Chiapas, the constitutional council involved and the other competent bodies. The aim was to provide security and ensure the integrity of the people living in the camp and of the electoral officials who would carry out the installation of the special box. The National Human Rights Commission and the State Commission for Human Rights in Chiapas were also notified to support the fulfilment of the agreement, given the conditions of vulnerability of the people in the camps for internally displaced persons.<sup>187</sup>

Along with the above, a process was also followed before the Regional Court in Xalapa for the processing of requests for the issuance of voting cards to vote, which agreed favourably to the requests. In this way, in support of the decisions of the Superior Court and the Xalapa Regional Court in the trials, as well as what it was set out in the INE agreement, the internally displaced persons cast their vote without incidents for the 2018 elections. Those who requested the reprint of their card could get it, and people who did not have the voting card exercised the right to vote with the decision issued by the III district Regional Court of the Electoral Tribunal of the Judicial Branch of the Federation.<sup>188</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

### XIII. Access to Justice and Effective Judicial Remedy

Access to justice is a fundamental right and an essential means of defending other human rights and ensuring accountability for committed crimes, violence and abuses. Justice plays a key role in fighting against impunity, discrimination and poverty and paving the way for peace and reconciliation. Efforts to access justice are aimed at strengthening the Rule of Law and ensuring full and equal access to justice for all, including internally displaced persons.<sup>189</sup>

Access to justice is provided for in Article 14.1 of the ICCPR, which mentions the following:

all persons are equal before the courts and courts of justice. Everyone shall have the right to a fair and public hearing by a competent, independent and impartial court established by law, in the conduct of any criminal charges or in the determination of their civil rights or obligations.<sup>190</sup>

Similarly, the ACHR, as a regional example, indicates among the provisions contained in Article 8.1 the right of everyone to “be heard, in due process and within a reasonable time, by a competent, independent and impartial judge or court, previously established by law in the conduct of any criminal charges, or in the determination of their civil, labour, tax or any other rights and obligations.” Likewise, Article 25.1 states the right of everyone to “simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws or by this Convention.”

In Mexico, Articles 14, 17 and 20 B and C of the Political Constitution, among other provisions, also provide for the right to access to justice. On this constitutional right, the First Chamber of the SCJN has indicated that this right

<sup>189</sup> Cf. Global Protection Cluster, *op. cit.*, p. 337.

<sup>190</sup> See ICCPR, Art. 14.1.



includes, in addition to certain socio-economic and political factors, the right to the effective judicial protection and the mechanisms of non-judicial protection that must also be effective, constitutional and legal based.<sup>191</sup>

Likewise, the SCJN has interpreted the right to access to judicial protection as the subjective public law that every person has, within the deadlines and terms set by the laws, to access independent and impartial courts quickly to raise or defend a claim. In order to ensure that, through a process in which certain formalities are obeyed, a decision is taken on the claim or defence and, where appropriate, such a decision is implemented. Therefore, this right includes three stages, to which the three rights listed below are appropriate:

- *Pre-trial stage*: concerning the right of access to jurisdiction. This stage is based on the right of action as a kind of petition addressed to the jurisdictional authorities and which motivates their declaration.
- *Judicial stage*: from the beginning of the procedure to the last action; this stage is based on due process.
- *Post-trial stage*: identified with the effectiveness of the resolutions issued. Now, the aforementioned rights include not only the proceedings presented before judges and courts of the Judicial Branch, but also all those pursued before authorities who, when deciding on the determination of rights and obligations, perform materially jurisdictional functions.<sup>192</sup>

Regarding this right, the State is the main responsible for maintaining public order and ensuring full and equal access to justice for everyone under its jurisdiction. This implies ensuring that all State institutions and agents, including courts, police forces, public prosecutors' offices and prison authorities, respect and protect human rights.

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<sup>191</sup> See Tesis 1a.J. 103/2017 (10a.), First Chamber, *Derecho de acceso efectivo a la justicia. Etapas y derechos que le corresponden*.

<sup>192</sup> *Id.*

To that end, States should undertake *inter alia* the following actions: to take all appropriate legislative, administrative, and other measures to prevent human-rights violations; to investigate violations in a timely, effective, comprehensive and impartial manner; to prosecute or take other measures against alleged offenders; to facilitate the full, equitable, effective and safe access of victims to justice; and to ensure that State institutions provide and implement remedies.<sup>193</sup>

It is important to note that internally displaced persons often face multiple obstacles to access justice, or that this right is restricted as a result of their displacement. This is because systems that could operate regularly often cannot be reached by displaced persons and communities as a result of discrimination, marginalisation and poverty.<sup>194</sup>

To protect this right, it will be important to ensure the availability of affordable and adequate legal assistance in the appropriate language. Moreover, measures should also be taken to ensure the safety of internally displaced persons and witnesses seeking justice.<sup>195</sup>

Regarding equal access to justice, the First Chamber of the SCJN has interpreted that Jurisdictional Bodies during criminal proceedings must take action and verify that the necessary conditions exist to ensure dignified and identical treatment of the parties. This is based on equity in the exercise of their rights under the Federal Constitution, international treaties and the laws derived from them. So, they cannot privilege a subject, during the debate, with a procedural act that gives them an undue advantage over their opponent since such a thing would be in violation of the principle of procedural fairness.<sup>196</sup>

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<sup>193</sup> Cf. Global Protection Cluster, *op. cit.*, p. 340.

<sup>194</sup> *Ibid.*, p. 338.

<sup>195</sup> *Ibid.*, p. 342.

<sup>196</sup> See Tesis aislada 1a. LXXX/2019 (10a), *Semanario Judicial de la Federación*, First Chamber, Amparo decision in Review 119/2018, *Principio de igualdad procesal en el procedimiento penal. Sus alcances*.

Procedural criterion becomes relevant in the displacement context. This is due to fact that displaced persons often face various procedural obstacles or protection gaps, caused by situations of discrimination that may hamper their right to equally access to justice. For example, in many cases, they will need an interpreter who has knowledge of their language and culture. Besides, because of displacement, they often lose their documentation, and their replacement will be necessary.

Moreover, as a result of the recognition of human rights to equality and non-discrimination on the basis of gender, the First Chamber has interpreted that any court should provide justice with gender perspective. To that end, in any legal dispute, a method must be implemented, even if parties do not request it, to verify whether there is a situation of gender-based violence or vulnerability that prevents full and equal justice.<sup>197</sup> In every moment, this approach should also be used to analyse cases of displaced population.

In addition, with regard to internally displaced persons who have been detained or deprived of their liberty, it will be important to adopt measures needed to guarantee respect for their rights as well; such as the right not to be subjected to ill-treatment, to be informed about the accusation made, to be brought promptly before a judge and to a fair trial, among other rights.<sup>198</sup>

On the other hand, there are several ways to address past abuses in post-conflict societies, often through some form of *transitional justice*. The concept of transitional justice refers to judicial or non-judicial mechanisms or processes adopted by communities to overcome the legacy of abuse perpetrated during a past conflict or authoritarian regime. Transitional justice is not a special

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<sup>197</sup> See Tesis de jurisprudencia 1a./J. 22/2016 (10a.), *Semanario Judicial de la Federación*, Primera Sala, *Acceso a la justicia en condiciones de igualdad. Elementos para juzgar con perspectiva de género*.

<sup>198</sup> Cf. Global Protection Cluster, *op. cit.*, p. 342.

category of justice but implies adapting justice to changing societies after a period dominated by human rights violations.<sup>199</sup>

Finally, transitional justice has four main principles: the right to the truth, the right to justice, the right to reparation and guarantees of non-recurrence.<sup>200</sup> In general, transitional justice involves a combination of complementary judicial and non-judicial strategies that may vary from society to society. Some of them are:

- Prosecution of alleged perpetrators of widespread or systematic human rights violations by national, hybrid or international courts.
- Truth commissions or other truth-setting initiatives, including research and information on past abuses, public hearings, documentation of testimonies of survivors and witnesses, exhumation of victims' mortal remains, historical studies and recommendations on institutional repairs or reforms.
- Reparation programmes for victims, that give real or symbolic restitution, compensation or rehabilitation, as appropriate, for abuses suffered.
- Commemoration acts of victims and survivors through ceremonies or the monuments construction or museums, often transforming the places where abuse occurred, such as prisons or detention camps.
- Reconciliation initiatives, such as healing ceremonies for victims and personal acts of recognition, apology, symbolic payment or community services by perpetrators.
- Institutional reforms to build fair, effective and transparent public institutions to protect against further abuse.<sup>201</sup>

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<sup>199</sup> *Ibid.*, p. 352.

<sup>200</sup> See UN, General Assembly, A/HRC/30/42, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, Pablo de Greiff; and Informe específico sobre la reforma del sector de la seguridad y la verificación, A/70/438 (in Spanish.)

<sup>201</sup> *Cf.* Global Protection Cluster, *op. cit.*, p. 352.

## XIV. Participation of displaced persons and representation in decision-making

It is crucial to hear internally displaced persons and consider their views for decision-making during all phases of displacement, to appropriately ensure their rights, and to address the specific needs of each case.

Regarding this, the Guiding Principles state in Article 28 that special efforts should be made to ensure the full and effective participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Likewise, Principle 29 indicates that internally displaced persons have the right to fully and equally participate in public affairs at all levels and to have equitable access to public services.

Therefore, it is important to restate that the appropriate way to really understand the risks and threats faced by displaced populations, their capacities, their survival mechanisms and their aspirations is to ensure their participation in all decisions affecting them and including their views and concerns. Such participation is thus essential to ensure that protection programmes respond to the key challenges they face and build on their own capacity to create a protective environment.<sup>202</sup>

On this aspect, it is essential that its intervention guarantees the representativeness of groups in a vulnerability situation among the displaced population. It will also be necessary to ensure host communities participation in formulating the response to the needs of internally displaced persons and also to avoid possible discrimination situations.

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<sup>202</sup> *Ibid.*, p. 125.

To conclude this chapter, it is important to stress that a large number of authorities are responsible for providing a comprehensive protection of all the rights contemplated and other rights that can be violated in forced displacement. However, the Judicial Branch of the Federation has a major role to play in determining violations of fundamental rights in cases under its jurisdiction and in making an essential contribution to ensuring that internally displaced persons have access to comprehensive reparation for the damage.

It should be noted that writing this chapter was a challenge because it was developed without yet having a specific national legislation on internal displacement in effect, with which specific rights for internally displaced population could be more clearly illustrated. In addition, it highlights the very low specialised jurisprudence on displaced population's access to rights in Mexico. Despite this, the main international and regional standards on the rights of internally displaced persons were compiled; reminding, as already emphasised in this text, that displacement violates a large number of rights and that the main ones were treated in this chapter.

Finally, it is expected that this chapter can serve as a baseline when resolving specific cases, and that from the Judicial Branch of the Federation it can make sure that responsible authorities fulfil their obligations and take various measures to protect internally displaced population and ensure that they can effectively enjoy their rights without discrimination.

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## State Responsibility, Activities and Tools for the Protection of the Rights of Internally Displaced Persons

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**State Responsibility, Activities and Tools for the Protection of the Rights of Internally Displaced Persons** I. Introduction; II. State responsibility for internal displacement; III. Addressing Internal Displacement: A Framework for National Responsibility.

Sovereignty means responsibility towards individuals in the territory. Primary responsibility for promoting the security, welfare and liberty of people rests with the state. These responsibilities are articulated in international law, particularly in human rights law and humanitarian law. No state claiming legitimacy can justifiably quarrel with the commitment to protect all its citizens against human rights abuses. Effective sovereignty implies a system of law and order that is responsive for the needs of the population.<sup>1</sup>

## I. Introduction

In this chapter, we will address the main obligations of States arising from their primary responsibility for internal displacement, as well as the measures, actions and tools through which national authorities can fulfil their duty to protect and ensure the full exercise of the rights of internally displaced persons during all stages of displacement and until a durable solution is achieved, and to prevent factors and conditions that force individuals to move.

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<sup>1</sup>United Nations High Commissioner for Refugees (UNHCR), *Handbook for Applying the Guiding Principles on Internal Displacement*. Available at <https://www.unhcr.org/protection/idps/50f94df59/handbook-applying-guiding-principles-internal-displacement-ocha-november.html>.



First of all, in order to contextualise and lay the foundations for the obligations of national authorities, Article II will briefly recap on the legal basis of State responsibility for internal displacement,<sup>2</sup> as well as examples of how this responsibility has been recognised, interpreted and promoted in the jurisprudence of the Inter-American Court of Human Rights (IACHR) and of two countries in the region, Colombia and El Salvador. Subsequently, the main obligations of national authorities in situations of internal displacement and their implications will be presented in Article III, entitled *Addressing Internal Displacement: A Framework for National Responsibility*, in line with international standards<sup>3</sup> and applicable regulation.

Specifically, this Chapter will address the need to: adopt special measures to address the situation of internal displacement and have the operational, technical and budgetary capacity for its implementation; have specialised information to guide decision-making processes and monitor the situation of internally displaced populations and communities affected by displacement; ensure the participation of internally displaced persons and communities affected by displacement in the decision-making processes, as well as implement prevention, assistance and protection measures and durable solutions. The issue of durable solutions will be addressed in a general way, as it will be discussed in detail in another chapter later on.<sup>4</sup>

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<sup>2</sup> This topic is addressed in detail in Chapter I of this Manual.

<sup>3</sup> In particular, the Guiding Principles on Internal Displacement and the IASC Framework on Durable Solutions for IDPs. These tools have served as the basis for the development of many guiding documents, such as the *Handbook for the Protection of Internally Displaced Persons*, the Framework for action on internal displacement in the Americas and the document *Addressing Internal Displacement: A Framework for National Responsibility*. Because of their practical nature, the above-mentioned documents were very valuable in the crafting of this Chapter. For more information on international standards for internal displacement, refer to Chapter I of this Manual.

<sup>4</sup> See Chapter VIII of this Manual.

## II. State responsibility for internal displacement

Chapter I of this Manual presented the foundations for the protection of internally displaced persons, including the applicable legal framework and existing standards at the national, regional and international levels. These instruments establish the primary responsibility of national authorities to address the situation of internal displacement in their countries.<sup>5</sup> In this section, we will recap on some of these foundations in order to highlight their implications and how they translate into specific obligations that require concrete actions and positive measures from the State.

One of the foundations of State responsibility for internal displacement is the State obligation to protect and guarantee the exercise of the human right to free movement and residence.<sup>6</sup> In order to ensure the full exercise of this right, on the one hand, it is the State obligation to prevent factors or conditions that force individuals to move and remain internally displaced, particularly in cases where its acts or omissions could generate said factors and conditions. On the other hand, this obligation also entails the implementation of the necessary measures to minimise the duration of internal movements that could not be avoided or that were carried out to safeguard the lives and integrity of persons,

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<sup>5</sup> See Chapter I of this Manual.

<sup>6</sup> Art. 22 of the American Convention on Human Rights (ACHR) states:

“every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law” and that the exercise of the foregoing right “may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.”

It further states that the exercise of this right “may also be restricted by law in designated zones for reasons of public interest” (*ibid.*). According to the interpretation and jurisprudence of the IACHR, Article 22 of the ACHR protects the right of persons to not be forcibly displaced within a State Party. In its pronouncements, the IACHR has reaffirmed “what was indicated by the United Nations Human Rights Committee in its General Comment No. 27, which states that the right of movement and residence consists, *inter alia*, of: (a) “the right of everyone lawfully within the territory of a State to liberty of movement within that territory and freedom to choose his residence;” and (b) “the right of everyone to enter and remain in his country” (own translation.) *Cf.* IACHR and German Agency for International Cooperation (GIZ), “Personas en situación de desplazamiento,” in *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos*, No.3 Available (in Spanish) at <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo3.pdf>.

including measures aimed at achieving durable solutions, since remaining in a situation of internal displacement against their will also violates the right to free movement and residence.<sup>7</sup>

Regarding regional jurisprudence, the IACHR has recognised in several judgements that “the right to freedom of movement and residence may be violated formally or by *de facto* restrictions if the State has not established the conditions or provided the means to exercise this right.” This happens, for example, “when a person is victim of threats and harassment, and the State does not provide the necessary guarantees for them to move and live freely in a given territory, even when the threats and harassment are from non-state actors” (own translation.) Other examples of *de facto* restrictions by the State on the right to free movement and residence recognised in judgements of the IACHR are “the lack of effective investigations into violent actions” which “can foster or perpetuate forced exile or displacement” (own translation) and the failure to guarantee the conditions necessary for internally displaced persons to return to their homes.<sup>8</sup>

A fundamental precedent of jurisprudence that has developed in the inter-American system in this field is the judgement issued in June 2005 in the case of the *Moiwana Community v. Suriname*, in which the IACHR found that Suriname had violated Article 22 of the American Convention on Human Rights (ACHR) because the freedom of movement and residence of members of

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<sup>7</sup> Because it is a long-lasting condition, the IACHR has described internal displacement as a continuing violation of human rights. It has also determined that failure to guarantee the conditions necessary for internally displaced persons to return to their homes safely and voluntarily also violates their right to free movement and residence protected by Article 22 of the Commission. See Inter-American Court of Human Rights and German Agency for International Cooperation (GIZ), *op. cit.*

<sup>8</sup> *Ibid.* For specific examples, see the judgements of the following cases of the IACHR: *Moiwana Community v. Suriname*; *Chitay Nech et al. v. Guatemala*; *Río Negro Massacres v. Guatemala*; *Massacres of El Mozote and nearby places v. El Salvador*; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*; *Human Rights Defender et al. v. Guatemala*; *Yarce y otras vs. Colombia*; *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guatemala*; *Carvajal Carvajal et al. v. Colombia*; *Alvarado Espinoza et al. v. Mexico*.

the community was “circumscribed by a very precise, *de facto* restriction,” originating from their well-founded fears which excluded victims from their ancestral territory. Specifically, the Court noted that “the State has failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have a special dependency and attachment – as there is objectively no guarantee that their human rights, particularly their rights to life and to personal integrity, will be secure” and that “by not providing such elements – including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack – Suriname has failed to ensure the rights of the Moiwana survivors to move freely within the State and to choose their place of residence.”<sup>9</sup> As it was reaffirmed by the Court in other cases of internal displacement, “the obligation of States to protect the rights of displaced persons entails not only the responsibility of adopting prevention measures but also providing the necessary conditions to facilitate the safe and dignified return to the place of habitual residence or voluntary resettlement in other parts of the country” (own translation.)<sup>10</sup>

In this regard, in the judgement of the case of *Alvarado Espinoza et al. v. Mexico*, 2018, after determining the international responsibility of the Mexican State for not guaranteeing the right to free movement and residence of several members of the Alvarado family,<sup>11</sup> the IACHR, in addition to reaffirming the obligation to ensure a safe and dignified return or voluntary relocation of

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<sup>9</sup> IACHR, *Moiwana Community v. Suriname... quot.*

<sup>10</sup> IACHR and German Agency for International Cooperation (GIZ), *op. cit.*

<sup>11</sup> The Court determined that the right to free movement and residence had been violated, despite the existence of provisional measures issued by the Court, the risk analysis carried out by the Mexican State, as well as some assistance measures that proved insufficient to guarantee the right to free movement and residence and the right to family protection, since family members had to travel because of the forced disappearance of three relatives. IACHR, *Alvarado Espinoza et al. v. Mexico*.

displaced victims, determined that the State also had an obligation to pay “the moving expenses of family members and their property” (own translation.)<sup>12</sup>

In cases in which factors and conditions that generate or perpetuate situations of internal displacement affect or jeopardise other rights, such as the rights to life, security, personal integrity, access to justice and reparation, in addition to the right to free movement and residence, it is the State’s responsibility to ensure that individuals are not forced to move and remain internally displaced and also to protect those rights, in accordance with applicable national and international regulations.

The Constitutional Court of Colombia has analysed this concept in some of its judgements. In Decision T-721 of 2003, for example, in determining the State’s responsibility for preventing internal displacement, it stated that “the State is responsible for preventing displacement from occurring, because the authorities have been established to respect and ensure respect for the life, honour and property of associates” (own translation.)<sup>13</sup> Also, in Decision T-025 of 2004,<sup>14</sup> the Constitutional Court of Colombia stated that the ultimate foundation of the State’s duty to respond to internal displacement is “State’s inability to comply with its basic duty of preserving the minimum public order conditions to prevent the forced displacement of persons and guarantee the personal security of the members of society.” (own translation)<sup>15</sup> The above-mentioned judgements are an example of how representatives of the judiciary in that country have linked the responsibility of national authorities for internal displacement to the exercise of different human rights, such as the right to life, security and property.

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<sup>12</sup> *Ibid.*, pars. 279, 280 and 283.

<sup>13</sup> Constitutional Court of Colombia, Decision T-721/03.

<sup>14</sup> In this decision, the Constitutional Court of Colombia formally declared the existence of an unconstitutional status regarding the living conditions of the internally displaced population, and determined that, “therefore, both the national and the territorial authorities, within their spheres of jurisdiction, shall adopt the corrective measures necessary to overcome such state of affairs” (own translation.) Constitutional Court of Colombia, Decision T-025/04, *several times*.

<sup>15</sup> *Id.*

The violation of the human rights of internally displaced persons, including the right to free movement and residence, and other rights mentioned in the preceding paragraphs, implies the obligation of the State to take the necessary measures to compensate for the damage caused,<sup>16</sup> in accordance with national and international<sup>17</sup> regulations.<sup>18</sup>

Another foundation for the State's responsibility for internal displacement is its duty to protect the human rights of all persons without discrimination. As previously stated in this Manual,<sup>19</sup> internally displaced persons, whether citizens or habitual residents of the country, must enjoy all the rights recognised in Mexican law and in international treaties to which Mexico is a party. In accordance with Article I of the Constitution, it is the responsibility and obligation of the Mexican State, through the authorities of all powers and levels of government, according to its competence, to ensure that all persons can fully exercise their human rights, including persons who are internally displaced in their territory, without discrimination due to their status. This implies an obligation to take all necessary measures to protect the rights of internally displaced persons, including positive measures. It also covers the responsibility of identifying, preventing, and eliminating all obstacles and conditions that prevent them from fully and equally

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<sup>16</sup> For more information on compensation measures in cases of internal displacement, see Chapter VII of this Manual.

<sup>17</sup> In accordance with Art. 1 and 20 of the Political Constitution of the United Mexican States (CPEUM), General Victims' Law.

<sup>18</sup> In accordance with 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*, adopted by the United Nations General Assembly in 2005 and developed on the basis of legal obligations arising from international human rights and humanitarian law, "in accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law." See UN, UN General Assembly, *Basic principles and guidelines... quot.*, p. 7.

The IACHR has pointed out that "it is a principle of international law, that jurisprudence has considered 'even a general conception of law,' that any breach of an international obligation that has caused damage involves the duty to make proper reparation" (own translation.) See IACHR, *Velásquez Rodríguez v. Honduras*, p. 9, par. 25.

<sup>19</sup> See, in particular, Chapters I and III of this manual.

exercising their rights compared to those who have not been displaced, from the moment of displacement until they find a durable solution.

In this regard, the IACHR established that due to the effects that internal displacement has on rights, taking into account the circumstances of special vulnerability and defencelessness, and *de facto* situation of lack of protection in which those displaced usually find themselves,<sup>20</sup> “Under the terms of the American Convention, the differentiated situation of displaced persons places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defenselessness, including those vis-à-vis actions and practices of private third parties.”<sup>21</sup>

Similarly, in the 2003 Decision T-602, the Constitutional Court of Colombia stated that “positive actions in favour of displaced population are thus justified by the need to ensure fair treatment to one of the most disadvantaged sectors of Colombian society” (own translation) and that “special measures in favour of displaced persons make them less vulnerable, facilitate the reparation of injustices arising from involuntary displacement, and aim at the effective realization of certain minimum welfare rights essential for the autonomy and independence of displaced persons.” (own translation)<sup>22</sup>

In its Decision SU-1150/00, the Constitutional Court of Colombia determined the following:

If the State (which in theory is the association that must monopolise the exercise of force) was not able to prevent its associates from being expelled from their

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<sup>20</sup> See Chapter II of this manual.

<sup>21</sup> IACHR and German Agency for International Cooperation (GIZ), *op. cit.* For specific examples of cases where the court has used this argument, see the decision of the following cases: IACHR, *Ituango Massacres v. Colombia*, *Chitay Nech et al. v. Guatemala*, par. 141; *Massacres of Rio Negro v. Guatemala*, par. 174; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 315.

<sup>22</sup> Constitutional Court of Colombia, Decision T-602.

places of origin, it should at least guarantee the hundreds of thousands of Colombians, who have had to leave their homes and face extreme conditions of existence, the assistance required to rebuild their lives (own translation.)<sup>23</sup>

The aforementioned, according to the 2003 Decision T-721, “implies that the situation of each of the persons and families displaced by violence should be a priority matter to authorities.” (own translation)<sup>24</sup>

To sum up, in order to fulfil their responsibility to ensure full enjoyment of human rights by all persons, without discrimination, and in particular, to protect and guarantee the exercise of the right to free movement and residence of persons in their territory, States have at least the obligation to: (i) prevent existence of factors or conditions that force persons to move and to involuntarily remain internally displaced persons; (ii) implement the necessary measures to minimise the length of internal displacements that could not be avoided or that have occurred to safeguard the lives and integrity of persons, including measures aimed at durable solutions; (iii) take all necessary measures to protect the rights of internally displaced persons, including those of a positive nature, as well as to identify, prevent and eliminate all obstacles and conditions that prevent them from fully and equally exercising their rights compared to those who have not been displaced; and (iv) implement necessary measures to revert the damage caused by violations of the rights of internally displaced persons.

More specific and concrete obligations stem from obligations mentioned in the previous paragraph, as well as measures to implement those obligations, which will be presented in the following section.

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<sup>23</sup> *Ibid.*, Decision SU-1150/00.

<sup>24</sup> *Ibid.*, Decision T-721.



### III. Addressing Internal Displacement: A Framework for National Responsibility

In this section, we will address the main obligations and concrete measures arising from the primary responsibility of national authorities to address situations of internal displacement in their countries, and to protect the rights of internally displaced persons, in accordance with relevant international standards and applicable regulations.

In order to select obligations and measures presented below from the obligations mentioned in the previous section, and thus to establish a framework for fulfilling national responsibility, international standards on internal displacement were observed, particularly the Guiding Principles on Internal Displacement and the IASC Framework on Durable Solutions for Internally Displaced Persons, as well as reference documents prepared from them, such as the Framework for Action on Internal Displacement in America<sup>25</sup> and the document *Addressing Internal Displacement: A Framework for National Responsibility*,<sup>26</sup> which were especially designed to guide national authorities in their actions to fulfil their responsibility as regards internal displacement.

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<sup>25</sup> Paper developed at the Regional Seminar on Internal Displacement in the Americas, held in Mexico City in February 2004 and co-sponsored by the Government of Mexico Ministry of Foreign Affairs, the Office of the UN Representative of the Secretary-General on Internally Displaced Persons, and the Brookings Institution-Johns Hopkins SAIS Project on Internal Displacement. Available at [https://www.brookings.edu/wp-content/uploads/2012/04/20040218\\_americas.pdf](https://www.brookings.edu/wp-content/uploads/2012/04/20040218_americas.pdf).

<sup>26</sup> The document, prepared by the Brookings Institution-University of Bern Project on Internal Displacement, establishes 12 benchmarks for the exercise of national responsibility. These include preventing internal displacement and minimising its adverse effects; raising national awareness of the problem; collecting data on the number and conditions of internally displaced persons; promoting training on the rights of internally displaced persons; creating a legal framework upholding the rights of internally displaced persons; developing a national policy on internal displacement; designating an institutional focal point on internal displacement; encouraging national human rights institutions to integrate internal displacement into their work; ensuring the participation by internally displaced persons in decision-making; supporting durable solutions; allocating adequate resources to the problem; and cooperating with international community when national capacity is insufficient.

Each obligation section mentions how the duty is linked to compliance with State responsibility; it presents key elements to be taken into account for fulfilling that obligation, based on international standards, guidance documents and good practices, and it includes examples on how the Inter-American Court of Human Rights and legal authorities of other countries have resumed this obligation and promoted its compliance.

## 1. Taking Necessary Special Measures

In order to fulfil their primary responsibility for internal displacement, national authorities should identify and take the necessary special measures to ensure protection and full exercise of the rights of internally displaced persons within their territory, whether it be these laws, programmes, protocols, mechanisms or other necessary instruments. These measures and tools make it possible to improve planning and implementation of the response to the phenomenon; they can be useful to facilitate the identification of internally displaced persons and to explicitly establish their rights (either by recognising specific rights due to their special vulnerable situation or by restating existing rights); they allow allocation of responsibilities and budgets, and establish administrative and operational structures for internal displacement.<sup>27</sup>

While necessary special measures may vary according to the context of each location, there are recommendations from national and international experts and agencies that States (and Mexico, specifically) should have at least a regulatory framework that protects and guarantees the rights of internally displaced persons, and national policies on internal displacement.

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<sup>27</sup> See Internal Displacement Monitoring Centre (IDMC), *et al.*, *National Instruments on Internal Displacement: A Guide to their Development*. Available at <https://www.internal-displacement.org/sites/default/files/publications/documents/201309-national-instruments-on-internal-displacement-thematic-en2.pdf>.

As an example of the above, the Framework for Action on Internal Displacement in America states that, among key elements of national responsibility in cases of internal displacement, there is “developing national legislation upholding the rights of IDPs” and “adopting a national policy on internal displacement.”<sup>28</sup> These recommendations were also expressed in the document *Addressing Internal Displacement: A Framework for National Responsibility*,<sup>29</sup> in the report *Human Rights Situation in Mexico* published in 2015 by the Inter-American Commission on Human Rights (IACHR),<sup>30</sup> which also pointed out that laws and policies in question should conform to international standards in this matter, in particular the Guiding Principles on Internal Displacement (Guiding Principles) and the *Protocolo para la atención y protección de las víctimas de desplazamiento forzado interno* (DPI) [Protocol for Attention to and Protection of Victims of Forced Internal Displacement (FID)] *in Mexico of the National Human Rights Commission* (NHRC).<sup>31</sup>

As regards the need to adopt special regulatory frameworks, an analysis carried out internationally by the then Representative of the United Nations Secretary-General on Internally Displaced Persons, in collaboration with a group of legal

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<sup>28</sup> Secretariat of Foreign Affairs of Mexico, *et al.*, Framework for Action on Internal Displacement in America.

<sup>29</sup> The document includes the existence of a regulatory framework guaranteeing the rights of internally displaced persons, and a national policy or an action plan on internal displacement with 12 benchmarks for the exercise of national responsibility.

<sup>30</sup> In the report, the IACHR included among its recommendations to the Mexican State on internal displacement “to adopt a national policy and measures to provide a response to this problem in accordance with international standards on the subject, particularly the UN Guiding Principles on Internal Displacement” and “to adopt specific legislation at the federal and state level to address internal displacement, in accordance with the UN Guiding Principles on Internal Displacement.” *Cf.* IACHR, *Situation of Human Rights in Mexico*, p. 230, pars. 57 and 58.

<sup>31</sup> The protocol sets out a series of guidelines for authorities and institutions at the three levels of government, as well as for public human rights bodies and representatives of legislative and judicial branches at the federal and local levels, which include “developing a work plan or public policy that considers their institutional capacity to assist displaced population,” (own translation) “designing one or more care routes for FID victims,” (own translation) and “ensuring that a national legal framework exists, and that is adequate for preventing future FIDs, caring and protecting victims, and implementing durable solutions.” (own translation.) NHRC, *Protocolo para la atención y protección de las víctimas de desplazamiento forzado interno (DFI) en México*. Available (in Spanish) at <https://forodfi.cndh.org.mx/Content/doc/Informes/Protocolo-DFI.pdf>.

experts, and conducted prior to the elaboration of the Guiding Principles, concluded that “while existing [international] law provides substantial coverage

for the internally displaced, there are significant areas in which it fails to provide an adequate basis for their protection and assistance,” and that “the provisions of existing law are dispersed in a wide variety of international instruments which make them too diffused and unfocused to be effective in providing adequate protection and assistance for the internally displaced.”<sup>32</sup> In addition, “Ordinary legislation often fails to address the specific needs and vulnerabilities of internally displaced people (IDPs), to allocate clear responsibilities to competent authorities at the national and local level, or to provide a sound basis for making adequate resources available.”<sup>33</sup>

In the decision issued by the Constitution Bench of the Supreme Court of Justice of El Salvador in the amparo process 411-2017, the obligations imposed on national authorities included “recognising the victims of violence and forced displacement as subjects of rights and categorising them normatively, for which the special legislation aimed at protecting victims and witnesses shall be revised and issued” (own translation) and “designing and implementing public policies and protocols for action aimed at preventing forced displacement of the country citizens.” (own translation)<sup>34</sup> When, in January 2020, the *Ley especial para la atención y protección integral de personas en condición de desplazamiento forzado interno* (Special Law for the Comprehensive Care and Protection of People in a situation of Forced Internal Displacement) was issued, it resumed the aforementioned decision:

The Decision issued on 13 July 2018 by the Constitution Bench of the Supreme Court of Justice, in the amparo process with reference 411-2017, pointed out that in the country there is a phenomenon of forced displacement of persons due to violence and insecurity that seriously affects vulnerable

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<sup>32</sup> United Nations (UN), Economic and Social Council, Report of the Representative of the Secretary-General, Francis M. Deng, submitted pursuant to the Commission on Human Rights Resolution 1997/39: *Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the commission. Human rights, mass exoduses and displaced persons*, p. 3, par. 7.

<sup>33</sup> IDMC, *et al.*, *op. cit.*

<sup>34</sup> Constitution Bench of the Supreme Court of Justice of El Salvador, Decision of 13 October, 2018.

groups from different geographical areas, controlled by organised crime groups, specifically gangs or *ruaras*, which affect fundamental rights. Therefore, there is a mandate to recognise the victims of violence and forced displacement as subjects of rights and categorise them normatively, and to issue special legislation aimed at their protection.<sup>35</sup>

The advantages of having a regulatory framework to address the situation of internal displacement include distribution of clear responsibilities and specific designations among the various government units at national and local levels, which in turn provides a basis for guiding inter-agency coordination; identification of deadlines for compliance with certain provisions; and allocation of resources for their implementation. As it was pointed out in the *Ley Especial para la Prevención y Protección Integral de Personas en Condición de Desplazamiento Forzado Interno* of El Salvador:

Regulatory frameworks and laws to address the phenomenon of forced internal displacement are necessary to be able to comprehensively respond to it, since these instruments require competencies, facilitate institutional coordination, encourage allocation of resources, allow for the establishment of monitoring and evaluation mechanisms, but above all, a Special Law in this area gives the displaced population tools for enforceability of rights and activates the response of other State bodies (own translation.)<sup>36</sup>

Several countries have adopted special measures on internal displacement. Some examples of countries with national legislation on internal displacement include Colombia, El Salvador, Peru, Azerbaijan, Georgia, Xenia, Niger and Ukraine. Some examples of countries with specific national policies on internal displacement include: Afghanistan, Bangladesh, Colombia, Mali, Yemen, Uganda and Sudan.<sup>37</sup>

<sup>35</sup> Legislative Assembly of El Salvador Republic, *Ley Especial para la Prevención y Protección Integral de Personas en Condición de Desplazamiento Forzado Interno*, p. 1.

<sup>36</sup> *Ibid.*, p. 2.

<sup>37</sup> For a comprehensive overview of existing global laws, policies and other specialised instruments on

## 2. Having Sufficient and Adequate Capacities and Resources

Because fulfilling national responsibility on internal displacement implies effective protection and guarantee of full exercise of the rights of internally displaced persons, in addition to formally adopting relevant special measures, States have an obligation to ensure the availability of necessary resources and capacities for their proper and effective implementation.

On the one hand, this implies ensuring that units of the three levels of government (federal, state and municipal) with powers and responsibilities for internal displacement have sufficient human, material and financial resources to guarantee compliance. According to the Framework for Action on Internal Displacement in America, allocating adequate resources to respond to internal displacement “is necessary not only to carry out effective responses, but also to signal that addressing the plight of the internally displaced is truly a national priority.”<sup>38</sup> With regard to financial resources, in particular, States may allocate specific budgets to internal displacement, according to the size, impacts and implications of the phenomenon. It is also possible to create special funds that are supported by profits obtained from the export of raw materials, for example, or from other sources, and allocated to the implementation of measures on internal displacement.<sup>39</sup>

Moreover, it is essential that public officers involved in the response to internal displacement have the necessary knowledge and skills to adequately perform their role; therefore, it is the State's obligation to ensure the training of these officers. This includes, in addition to developing technical skills in accordance

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internal displacement worldwide, see Global Protection Cluster. *Global Database on Laws and Policies on Internal Displacement*. Available at <https://www.globalprotectioncluster.org/old/global-database-on-idp-laws-and-policies/>.

<sup>38</sup> Secretariat of Foreign Affairs of Mexico, *et al.*, *op. cit.*, p. 32.

<sup>39</sup> Brookings Institution and University of Bern project on Internal Displacement, *Addressing Internal Displacement... quot.*

with their specific roles, informing them and raising awareness about the situation of internal displacement in the country and the conditions of displaced persons, as well as promoting training on the rights of internally displaced persons, international standards on internal displacement and, where they exist, on applicable regulatory, administrative, programming and public policy instruments.

Decision T-025 of the Constitutional Court of Colombia recognises that the lack of resources has significantly affected the implementation of policies on the assistance of the displaced population in the country, impeding it to achieve its objectives. Specifically, the decision states:

The lack of resources has been consistently pointed out by the documents of the proceeding, published at different times and prepared by both public and private entities, as the central cause of the failures in the implementation of policies for the assistance to the displaced population. The central government has allocated insufficient financial resources to cover policy needs and many of the territorial entities have not allocated their own resources to serve the various programmes. The lack of resources has affected most of the components of the policy and has made it impossible for the entities that are part of the National System of Comprehensive Care for the Displaced Population (SNAIPD, by its Spanish acronym) to take appropriate concrete actions to meet the policy objectives. That is why the level of implementation of policies is insufficient to meet the needs of the displaced population and the coverage rates of its various components are so low. (own translation)<sup>40</sup>

With regard to the State's obligation to allocate sufficient resources for the implementation of the special measures on internal displacement, the Constitutional Court of Colombia stated that:

From the constitutional point of view, it is imperative to allocate the necessary budget so that the fundamental rights of the displaced population are

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<sup>40</sup> Constitutional Court of Colombia, Decision T-025/04.



completely fulfilled. The constitutional obligation of the State to ensure adequate protection for those who, due to forced internal displacement, experience undignified living conditions cannot be postponed indefinitely. Act 387 of 1997 recognised that the care of the displaced population is urgent and critical. The jurisprudence of this Corporation has restated the priority of the allocation of resources to serve this population and thus solve the social and humanitarian crisis that this phenomenon represents. However, this has not occurred and so the Constitution, what was ordered by the Congress of the Republic, and the provisions of the development policies adopted by the Executive itself, have not been honoured. (own translation)<sup>41</sup>

The Constitutional Chamber of the Supreme Court of Justice of El Salvador, in the amparo process decision 411-2017, provides a concrete example of how the court resolution can promote compliance with the State obligation to allocate resources to the response to internal displacement. In that decision, the court ordered the President of the Republic to “include the assistance to victims of forced displacement due to violence as a priority in the development of the general budget of the State” (own translation.)<sup>42</sup>

When States do not have sufficient financial, material and technical capacities to fulfil their responsibilities as regards internal displacement, they must find ways to fill existing gaps. One way to do this is to exercise “responsible sovereignty” and to request or accept the assistance of actors such as the international community and civil society agencies.<sup>43</sup> The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) included this aspect among the obligations that States Parties have to ensure the protection of and assistance to internally displaced persons, by noting that:

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<sup>41</sup> Id.

<sup>42</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, amparo decision 411-2017, p. 46, subsection g (ii).

<sup>43</sup> Cf. Brookings Institution and University of Bern project on Internal Displacement, *Addressing Internal Displacement...* quot., p. 24

“The States Parties shall provide adequate protection and assistance to internally displaced persons, and where available resources are insufficient to do so, shall cooperate in seeking assistance from international organizations and humanitarian agencies, civil society organizations and other relevant actors” (own translation.)<sup>44</sup>

Generally, and in accordance with their own capacities, mandates and action areas, the international community, civil society organizations, the private and academic sectors and other actors can contribute to the response to internal displacement and fulfilment of national responsibility through the exchange of experiences, good practices and knowledge,<sup>45</sup> as well as to strengthen or generate —e.g., with donations— technical, human, material and financial capabilities.<sup>46</sup> In this way, these actors contribute to filling potential gaps in the capacities and resources of national authorities and to strengthening the protection of the rights of internally displaced persons, in particular in the face of the challenges imposed by the complexity inherent in the phenomenon and by the increase in new displacement and situations of prolonged displacement.<sup>47</sup>

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<sup>44</sup> Kampala Convention, Article 5, Subsection 6.

<sup>45</sup> In the document *Internal Displacement in the Northern Triangle of Central America: Public Policy Guidelines*, the IACHR included some practical recommendations addressed to States, including identifying cooperation agencies working in the promotion and protection of human rights that can be asked for technical advice and exchange diagnoses, experiences and good practices.

<sup>46</sup> Some concrete examples of how other actors can contribute to the State's response to internal displacement are: producing and spreading specialised information on the context of internal displacement and the situation of the displaced population; providing humanitarian assistance, accompaniment, legal advice and psychosocial support to internally displaced persons; providing technical advice; strengthening the abilities of internally displaced persons, communities affected by displacement, government bodies and other stakeholders through workshops, courses and other initiatives; promoting and facilitating dialogue between internally displaced persons and national authorities and mobilising financial resources. Cf. IACHR, *Internal displacement in the Northern Triangle... quot.*, p. 92.

<sup>47</sup> Although various resolutions of the United Nations Human Rights Council and thematic reports issued by the United Nations Special Rapporteur on the human rights of internally displaced persons recognise the primary responsibility of national authorities to address situations of internal displacement, in order to improve intervention and achieve effective results, they have placed particular emphasis on the duty of States to promote and strengthen cooperation with relevant actors at the international, regional and national levels, in particular in the development of prevention and response strategies, in national action plans and in mobilising financial resources. UN, General

The NHRC *Protocol for Attention to and Protection of Victims of Forced Internal Displacement (FID) in Mexico* provides specific examples of how national authorities could rely on the support of other actors in responding to internal displacement: in the field of health, “government authorities and institutions can develop agreements with private or civil organizations that could provide health services;”<sup>48</sup> in training processes, “authorities may seek advice from civil society organizations or international human rights protection agencies, specialised in human rights training, displacement or protection of vulnerable populations;”<sup>49</sup> in order to raise awareness of the problem, “authorities may seek advice from civil society organisations or international human rights protection agencies, specialised in issues of discrimination, displacement or protection of vulnerable populations;”<sup>50</sup> with regard to the submission of bills on internal displacement at national or local level, the authorities must have “the advice of national and international human rights organizations and agencies” (own translation.)<sup>51</sup>

As an example of how the court resolution has promoted collaboration with other actors in fulfilling national responsibility for internal displacement, in the decision of the amparo process 411-2017, the Constitutional Chamber of the Supreme Court of Justice of El Salvador included among the measures it ordered various authorities to remedy the situation of internal displacement “the signing of cooperation agreements at the national and international levels to ensure the protection of victims and witnesses” (own translation.)<sup>52</sup> Another example is Decision T-025 of the Constitutional Court of Colombia, where, in

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Assembly, Resolution 70/1, p. 6 and 12. In this regard, see the following resolutions: A/72/439/Add.2; A/HRC/16/43/Add.5; A/71/279 and the thematic reports on internal displacement and the role of national human rights institutions; internal displacement in the context of the adverse effects of slow climate change and internal displacement and transitional justice.

<sup>48</sup> NHRC, *Protocol for Attention... quot.*, p. 27.

<sup>49</sup> *Ibid.*, p. 30.

<sup>50</sup> *Ibid.*, p. 32.

<sup>51</sup> *Ibid.*, p. 27.

<sup>52</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, amparo decision 411-2017, p. 46, subsection 4.

relation to the design and implementation of the policy on the care of the internally displaced population, it was noted that “State entities may conclude agreements with non-governmental organizations” and that “the rules provide that the State may request assistance from international organizations” (own translation.)<sup>53</sup>

Finally, one additional way in which other actors can contribute to strengthening national capacities and advancing the response to internal displacement in a given country is through instruments and cooperation mechanisms. At the regional level, some cooperation mechanisms and instruments have been created to generate a comprehensive, joint and coordinated response to the situation of migration and forced displacement, including the situation within countries. Among the most relevant information in the area of internal displacement, we can mention some agreements that the States of the region have adopted —such as the Brazilian Declaration: A Framework for Regional Cooperation and Solidarity to Strengthen the International Protection of Refugee, Displaced and Stateless Persons in Latin America and the Caribbean and its corresponding Plan of Action<sup>54</sup> and the San José Declaration of Action—<sup>55</sup> and the working group on internal displacement that was created within the Comprehensive Regional Protection and Solutions Framework (MIRPS, by its Spanish acronym),<sup>56</sup> which is composed of El Salvador, Honduras, Mexico and Costa Rica —the latter as an observer country— and operates as a space that seeks to strengthen capacities and

<sup>53</sup> Constitutional Court of Colombia, Decision T-025.

<sup>54</sup> The Brazil Declaration and Plan of Action, adopted in 2014, established a broad set of priorities for the protection of refugees, asylum seekers, internally displaced and stateless persons on the continent. See UNHCR, Brazil Declaration and Plan of Action, *passim*.

<sup>55</sup> The San José Declaration of Action, which includes a number of commitments from States and relevant actors to respond to the situation of displaced persons at the regional level, was adopted in 2016. See UNHCR, San José Declaration of Action, *passim*.

<sup>56</sup> The Comprehensive Regional Protection and Solutions Framework (MIRPS) was formed in 2017, following regional consultations to identify gaps and priorities in the implementation of existing commitments on forced displacement and international protection. See UNHCR, Comprehensive Regional Protection and Solutions Framework (MIRPS). Available (in Spanish) at <https://www.acnur.org/marco-integral-regional-para-la-proteccion-y-soluciones-mirps.html>.

develop legal and institutional frameworks to respond to the phenomenon in the countries that are part of it.<sup>57</sup>

### 3. Ensuring the Participation of Internally Displaced Persons and Communities Affected by Displacement

The right to participation, in addition to being pointed out throughout the Guiding Principles,<sup>58</sup> has been reflected in various international regulatory instruments, such as the International Covenant on Civil and Political Rights (ICCPR),<sup>59</sup> the ACHR, the Convention on the Elimination of All Forms of Discrimination against Women<sup>60</sup> (CEDAW, by its Spanish acronym) and International Labour Organization Convention No. 169 on Indigenous and

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<sup>57</sup> The working group was established in 2020 and it received advice by a panel of international experts on internal displacement.

<sup>58</sup> The Guiding Principles reaffirm this right in various sections. For example, Principle 7 points out the duty to involve affected persons, particularly women, in the planning and management of their resettlement. Principle 18 emphasises the special efforts that will need to be made to ensure women's full participation in the planning and distribution of basic supplies. Principle 28, in turn, points out the special efforts to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

<sup>59</sup> "Article 25 of the Covenant recognises and protects the right of every citizen to participate in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service. Whatever form of constitution or government a State may take, the Covenant imposes the obligation on States to take such legislative or other measures as may be necessary to ensure that citizens are effectively able to enjoy their rights" (own translation.) See UN. General Comment No. 25, *General comments adopted by the Human Rights Committee, Article 25. Participation in public affairs and the right to vote, passim.*

<sup>60</sup> In Article 7, the Convention states:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) to participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 14, Subsection 2 states that "in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: a) To participate in the elaboration and implementation of development planning at all levels."

Tribal Peoples.<sup>61</sup> However, in addition to being a right,<sup>62</sup> what it already implies the obligation of the State to ensure that the population can exercise it, the participation of internally displaced persons and communities affected by displacement in decision-making processes that concerns them is a key element in achieving an adequate and effective response to internal displacement and should therefore be a priority for national authorities.

Involvement of internally displaced persons in decision-making processes during all phases of displacement is essential to enable national authorities and other actors involved in the response to the phenomenon to know and take into account their needs, concerns, priorities, interests and abilities and thus to generate more appropriate, effective and sustainable interventions. In this sense, participation represents “a fundamental tool for the identification, design, planning and implementation of measures that can guarantee the effective exercise of other rights”<sup>63</sup> and a central element of national responsibility for internal displacement.

The duty to ensure the participation of internally displaced persons and communities affected by displacement in relevant decision-making processes has been addressed in various resolutions and reports prepared under the United Nations system, including thematic reports issued by the United Nations Special Rapporteur on the human rights of internally displaced persons,<sup>64</sup> in the Framework for Action on Internal Displacement in the

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<sup>61</sup> Convention 169 refers to the participation of indigenous peoples in the formulation and implementation of plans, policies and other actions of public functions in Articles 2, 5, 7, Subsections 2, 22, 23, and 27, and Subsection 2.

<sup>62</sup> See Chapter III of this Manual.

<sup>63</sup> See Kivelá, *et al.*, *Durable Solutions Analysis Guide*, p. 56.

<sup>64</sup> In general, these documents indicate that national authorities should provide procedural, consultation, participation and accountability mechanisms that promote and guarantee the full and meaningful participation of the affected population at all stages of displacement. See the following General Assembly resolutions: 64/162, par. 7; A/66/285; A/HRC/16/43/Add.5, p. 11, 14 and 15, 26 and 33; A/70/334; A/71/279. And the thematic reports on Internal Displacement and the Role of Institutions... *quot.*; Internal Displacement in the Context of Adverse Effects... *quot.* and Internal Displacement and Transitional Justice... *quot.*

Americas and in the document *Addressing Internal Displacement: A Framework for National Responsibility*<sup>65</sup> and the *NHRC Protocol for Attention to and Protection of Victims of Forced Internal Displacement (FID) in Mexico*.<sup>66</sup>

The IACHR has incorporated in its jurisprudence States' obligation to ensure the internally displaced persons' participation in decision-making processes, particularly, in planning and managing their return or reintegration and in designing reparation measures. In the decision of the case *Chitay Nech et al. v. Guatemala*, for example, the IACHR determined that, apart from providing the necessary conditions for a dignified and safe return of the displaced population to their habitual residence or their voluntary resettlement elsewhere in the country, the State should guarantee, "their full participation in the planification and manner in which they should return or be reintegrated."<sup>67</sup> This interpretation has subsequently been considered in judgements it has issued in other cases of internal displacement.<sup>68</sup> Also, in the judgement of the case *Yarce y otras v.*

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<sup>65</sup> These frameworks reinforce the national authorities' responsibility to ensure the internally displaced persons' participation in the design, planning and implementation of laws, policies and programmes to address their situation, through mechanisms that can ensure that such participation truly influences the Government's response. See Brookings Institution-University of Johns Hopkins SAIS on internal displacement, *et al., op quot., p. 7* and also Brookings Institution and University of Bern project on internal displacement, *Addressing Internal Displacement... quot.*

<sup>66</sup> *The Protocol for Attention to and Protection of Victims of Forced Internal Displacement (FID) in Mexico* establishes the participation of internal displacement victims as one of the main elements that national authorities should consider in the assistance and protection processes targeted to internally displaced persons. It also specifically mentions the importance of the participation of victims and civil society organizations specialising in victims' displacement or protection in: generating a diagnosis and a work plan for the victims' assistance and protection, raising awareness and providing training for public servants, preparing bills for the implementation of productive projects, organising campaigns for spreading rights of internally displaced persons and awareness-raising campaigns targeted to communities and designing assistance routes for FID victims.

<sup>67</sup> IACHR, *Chitay Nech et al. v. Guatemala*, par. 149.

<sup>68</sup> See IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, par. 188; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 220; *Human Rights Defender et al. v. Guatemala*, par. 167; *Yarce y otras vs. Colombia*, par. 224; *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guatemala*, par. 175; *Carvajal Carvajal et al. v. Colombia*, par. 190.

*Colombia*, regarding reparation measures, the IACHR stated that “in contexts of massive and gross human rights violations, these reparation measures must be conceived together with other truth and justice measures, and comply with certain requirements related, among others, to their legitimacy, especially, based on victims’ consultation and participation” (own translation.)<sup>69</sup>

Another example of how the judiciary has promoted internally displaced population participation is Decision T-025 of the Constitutional Court of Colombia, that states that “the design and execution of the policies must be carried out with the participation of the displaced communities” (own translation.)<sup>70</sup>

To be representative, participation initiatives and activities should ensure the inclusion of all groups that make up the internally displaced population, in particular, those with special needs and those in a particularly vulnerable situation such as women, children, adolescents, the elderly, indigenous people and persons with disabilities, as well as communities that receive and host internally displaced persons and other interested groups. Moreover, in order to ensure equal and effective participation, internally displaced persons should have sufficient and adequate prior information -including information on their rights, on procedures, instruments and decisions affecting them and on participation processes- and consultation and participation mechanisms should be open, transparent and accessible; this may involve, for example, supporting population transport or providing translation and interpretation services between different languages.

Consultation and participation initiatives used at all displacement stages should also be flexible to the political and social context, culturally appropriate and based on social structures, organizational forms and local decision-making processes.<sup>71</sup> Moreover, as participation processes often involve sharing sensitive

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<sup>69</sup> See IACHR, *Yarce y otras vs. Colombia*, par. 326.

<sup>70</sup> Constitutional Court of Colombia, Decision T-025/04.

<sup>71</sup> See UN, Human Rights Council, Framework on Durable Solutions for Internally Displaced Persons, *Working Together Better to Prevent, Address and Find Durable Solutions to Internal Displacement: GP20 Compilation of National Practices*, prepared by the GP20 Initiative, Available at



information, it is essential that national authorities and other actors involved avoid secondary victimization<sup>72</sup> and ensure that personal data of participating people is confidential at all times.

In addition to consultation initiatives and spaces such as roundtables, another way to promote participation is to implement transparency and accountability mechanisms. These mechanisms enable internally displaced persons and communities affected by displacement to make informed decisions; to feed back the various initiatives and instruments developed and implemented to benefit them; to monitor and assess the national authorities' performance and the fulfilment of State responsibility; and to confirm that their participation is actually significant and has a direct impact on results.<sup>73</sup>

When properly implemented, participation processes are also able to promote confidence-building and are essential for the success of conflict resolution processes, reconstructing social ties, generating and consolidating peace and reconciliation processes, including information-gathering and analysis processes,<sup>74</sup> as mentioned in the next section.

National authorities should encourage and support the collaboration of actors assisting and accompanying internally displaced persons and communities affected by displacement in participation processes, as they can expand and

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<https://reliefweb.int/report/world/working-together-better-prevent-address-and-find-durable-solutions-internal>.

<sup>72</sup> Regarding secondary victimization, Article 4 of General Victims' Law provides that "the particular characteristics and conditions of the victim may not be grounds for denying them their status. In addition, State may not require mechanisms or procedures that worsen their condition, nor establish requirements that hinder and prevent the exercise of their rights or expose them to further harm caused by public servants' actions" (own translation.)

<sup>73</sup> Reference documents on participation include the report GP20 Initiative, *op cit.*, and the document *Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters*, prepared by Brookings Institution and University of Bern project on Internal Displacement. Both consider strategies, methods and good practices employed by some countries to improve the consultation and participation processes of internally displaced persons and communities affected by displacement.

<sup>74</sup> See GP20 Initiative, *op. cit.*

facilitate their effective participation capacity. In that sense, in Decision T-025, the Constitutional Court of Colombia determined that, by making the necessary decisions to ensure consistency between the obligations stated in the Constitution and in the applicable regulatory framework for internally displaced persons' assistance, as well as decisions regarding the resources they must allocate to effectively protect their rights, governors and mayors must provide "sufficient opportunities for effective participation of organisations representing the interests of the displaced population" (own translation.)

#### 4. Generating and having sufficient and adequate information

As mentioned in the capacities and resources section, apart from a formal response, the fulfilling the national responsibility for internal displacement implies to effectively protect and guarantee the full exercise of the internally displaced persons' rights, that also depends on taking efficient action to do so. For the instruments and initiatives developed and implemented to address the phenomenon to meet their objectives, it is essential that they are relevant according to local reality. This implies knowing the context and special features of internal displacement situation, as well as the characteristics and needs of internally displaced persons and communities affected by displacement. This information will allow to plan logistical, technical, administrative and budget aspects of the State response; to design interventions and instruments adapted to reality; to prioritise interventions and resources and capacities allocation; to evaluate and promote the effectiveness and adequacy of existing interventions, instruments and tools; and to incorporate internally displaced persons' needs and perspectives, as they are the main stakeholders of the process and the best positioned actors to represent their experience.

Sufficient, reliable, adequate and up-to-date information on internal displacement is therefore a key requirement for national responsibility. An example is found in Decision T-025, in which the Constitutional Court of

Colombia, regarding obligation of national authorities to ensure the socio-economic stabilization of internal displacement, determined that:

this minimum right of displaced persons does not bind the authorities to provide, in an immediate manner, the material support required to begin the productive projects which are formulated, or to secure access to the work market on the grounds of the individual evaluation at hand; even though such support must necessarily materialise through the programs and projects designed and implemented by the authorities for the purpose, the minimum and immediately enforceable duty imposed by this right upon the State is that of gathering the information which can allow it to provide the necessary attention and consideration to the specific conditions of each displaced person or family, identifying with the highest possible accuracy and diligence their personal capacities, so as to extract from such evaluation solid conclusions that can facilitate the creation of stabilization opportunities that respond to the real conditions of each displaced persons, and which can, in turn, be incorporated into the national or territorial development plans.<sup>75</sup>

In the same decision, to allow the implementation of measures to protect land, property and possessions abandoned by internally displaced persons, the Constitutional Court of Colombia stated:

the Social Solidarity Network, as coordinator of the policy for assisting the displaced population and administrator of the Central Registry of Displaced Population, to include as part of the information required from displaced persons, the one referring to the rural lands that they possess or own, clarifying the type of rights they bear and the basic features of the property, so that on the grounds of that information, the protective procedures and mechanisms established in Decree 2007 of 2001 for said assets can be applied.<sup>76</sup>

Internal displacement information also allows national authorities to make efforts to make the phenomenon visible, sensitise and raise awareness. In turn,

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<sup>75</sup> Id.

<sup>76</sup> Id.

this makes it possible to strengthen capacities, fight against stigmas suffered by internally displaced population and promote the recognition of the phenomenon among decision makers and civil servants of the three levels of government. This is the first step in fulfilling national responsibility and generating an effective state response.<sup>77</sup>

The need for governments to have relevant information on the situation of internal displacement and internally displaced persons has been recognised by various national and international actors and instruments, such as the Framework for Action on Internal Displacement in the America and the document *Addressing Internal Displacement: A Framework for National Responsibility*,<sup>78</sup> the UN Human Rights Council,<sup>79</sup> the United Nations Special Rapporteur on the human rights of internally displaced persons,<sup>80</sup> the IACHR<sup>81</sup>

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<sup>77</sup> Ministry of Foreign Affairs, *et al.*, *op. cit.* and Brookings Institution and University of Bern project on Internal Displacement, *Addressing Internal Displacement... tit.*

<sup>78</sup> These documents include, among the key elements for fulfilling national responsibility for internal displacement, collecting information on the number of displaced persons and their living conditions. They also mention that “data should be disaggregated by age, gender, and other key indicators so that the specific needs of particular groups of internally displaced persons, such as adolescents, women heads of household, the elderly, ethnic and indigenous persons, can be adequately addressed” (own translation.) *Id.*

<sup>79</sup> In General Assembly resolution A/HRC/20/L.14, for example, the United Nations Human Rights Council has emphasised that effectively collecting data on internally displaced persons, including information disaggregated by age, sex, location and belonging to groups with particular needs, is important for the protection of their human rights, the implementation of durable solutions and the evaluation of their specific needs and vulnerabilities. See UN, Human Rights Council, resolution A/HRC/20/L.14. Available at <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session20/res-dec-stat>.

<sup>80</sup> In his latest report as United Nations Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani acknowledged the lack of reliable and comprehensive information on internally displaced persons and the negative impact this has on the ability of governments to implement an effective response and to take measures capable of providing protection, assistance and durable solutions to displaced persons. In his conclusions, he noted that national authorities should collect and share data on all internal displacement causes in their countries. UN, United Nations, Human Rights Council, Report of the Special Rapporteur on the human rights of internally displaced persons. Available at <https://reliefweb.int/sites/reliefweb.int/files/resources/G1608880.pdf>.

<sup>81</sup> In his report on *The Human Rights Situation in Mexico*, published in December, 2015, the IACHR expressed concern about “the lack of meaningful official information on the extent reached by internal displacement in Mexico, as evidenced by the invisibility of the problem.” Therefore, it determined that “the lack of data on the size and characteristics of internal displacement in Mexico requires that the

and the NHRC in its protocol<sup>82</sup> and the recommendations it has issued in internal displacement cases.<sup>83</sup>

In order to obtain the necessary information, it will be essential for national authorities to identify, compile and analyse relevant data available from different sources such as censuses, surveys and administrative records, and to carry out *ad hoc* exercises to collect the data necessary to fill any information gaps. Considering that the situations of internal displacement are complex and multidimensional, and recognising that collecting, handling and analysing information on this phenomenon can represent a significant challenge for national authorities, a number of international standards and practical tools

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State conduct a nationwide analysis to characterise displacement,” p. 135.

<sup>82</sup> In the *Protocol for Attention to and Protection of Victims of Forced Internal Displacement (FID) in Mexico*, the NHRC states that “each public authority and institution must verify the existence of FID victims in the in which it exercises its powers to determine the approximate number of displaced persons to be included in its actions or programmes for the assistance of vulnerable persons, or for which it must design and implement specific strategies and courses of action” and “apart from calculating the number of displaced persons, it is essential that the authorities of the three levels of government, acting in coordination and considering the indications of the person acting as main contact, generate an initial diagnosis of the FID and the situation of its victims, to know the people’s vulnerability level, the scenario in which they live and the situations that cause the violation of other human rights” (own translation.) The NHRC identifies some of the specific aspects that the authorities must consider in the preparation of local diagnoses on the situation of internal displacement, including: the number of victims of internal displacement in the territory of competence or action of the government authority; the number of family groups of the internally displaced population; the percentage of women; the percentage of minors under 18 who travel unaccompanied; the percentage of people with disabilities; the percentage of people belonging to the LGBTTTI community; the percentage of indigenous peoples; the percentage of Afro-descendant people, among other vulnerable groups; the place of origin or the place where they were victims of displacement; the causes of their displacement; the possessions they had and where they were located, and the structural and temporal factors that contribute to reinforcing their vulnerability, p. 23 and 24.

<sup>83</sup> Among its recommendations in cases of internal displacement, the NHRC included recommendatory points addressed to authorities at different levels of government concerning the undertaking of census of the internally displaced population of the case (with data disaggregated by sex, age and, in some cases, ethnic origin and information on the date of displacement and location before and after the displacement) and of diagnoses that make it possible to know aspects related to their current situation, to analyse the security situation in the municipalities or federative entities where the displacement in question originated, and to identify the existence of other internally displaced persons in the federal entity to which the case relates and their current situation. See NHRC, recommendation 39/2017; recommendation 94/2019; recommendation 90/2018; recommendation 87/2018 and recommendation 91/2018.

have been developed to guide the collection, handling and analysis processes of internal displacement information. At the international level, specialised organizations have also been established to collect and analyse information on this phenomenon, in line with available international standards, and States may request technical support and advice from them.<sup>84</sup>

The main international instrument for data on internally displaced persons is the International Recommendations on Internally Displaced Persons Statistics (IRIS),<sup>85</sup> prepared by the Expert Group on Refugees and IDP Statistics (EGRIS)<sup>86</sup> and adopted by the United Nations Statistical Commission in March,

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<sup>84</sup> Among them, the EGRIS, the Internal Displacement Monitoring Centre (IDMC), JIPS and agencies of the United Nations system. About IDMC: It was established in 1998 as part of the Norwegian Refugee Council and aims to provide reliable information on internal displacement in order to guide decision-making processes at the national, regional and global levels. The IDMC provides estimates of the number of internally displaced persons in conflict, violence and disaster situations at the global level, calculated from data obtained from different sources, as well as analyses of aspects such as the causes, patterns and impacts of internal displacement in different contexts and scenarios. Available at <https://www.internal-displacement.org/>; About JIPS: JIPS is an interagency service established in 2009 to provide technical support to governments and humanitarian and development organizations in the collection and analysis of information on internal displacement, both in field and remotely, through technical and strategic advice, guidance, training and practical tools. It has specialised in coordinating and facilitating collaborative processes aimed at building a solid evidence base, which is in line with international standards and governed by consensus, on the situation of displacement in a given territory or region. See for more information <https://www.jips.org/>.

<sup>85</sup> EGRIS. *International Recommendations on Internally Displaced Persons Statistics*. Available at <https://ec.europa.eu/eurostat/documents/3859598/12257846/KS-GQ-20-005-EN-N.pdf/714a7ba0-7ae6-1707-fef4-984a760e0034?t=1610984164036>.

<sup>86</sup> About EGRIS: In 2016, the United Nations Statistical Commission agreed to establish an international expert group on statistics on refugees and internally displaced persons, integrated by national authorities, mainly represented by their national statistical institutions, international and regional organizations and an Executive Committee consisting of the United Nations High Commissioner for Refugees (UNHCR), *Statistics Norway*, Eurostat, Turkstat, JIPS, the United Nations Statistics Division and the World Bank. The objective of the group is to improve national and international statistics on internally displaced persons and refugees by developing international recommendations on how to generate, compile and promote statistics on internally displaced persons and refugees. This includes upgrading the capacities of national statistical systems, providing technical advice and promoting the use of data from different sources such as surveys, censuses and administrative records. Available at [https://www.un.org/internal-displacement-panel/sites/www.un.org/internal-displacement-panel/files/egris\\_submission\\_to\\_hlp\\_final.pdf](https://www.un.org/internal-displacement-panel/sites/www.un.org/internal-displacement-panel/files/egris_submission_to_hlp_final.pdf); <https://ec.europa.eu/eurostat/documents/7723677/0690434/Terms+of+Reference/70b805f7-5c17-1f43-5ddf-ecbclbe637fa> and

2020.<sup>87</sup> Created from the Technical Report on Statistics of Internally Displaced Persons,<sup>88</sup> this document has the main objective of providing recommendations on the generation and promotion of official statistics on internal displacement. Furthermore, in light of the challenges for the implementation of the recommendations, an implementation handbook was adopted to offer guidance and practical examples.

The adoption of international standards also allows the generation of data compatible with other sources and databases and comparable over time and at national, regional and global levels. This, in addition to ensuring the quality, usefulness and applicability of information, is particularly relevant because, as well as its key role in guiding the response of national authorities to internal displacement, data on internally displaced persons are also key to guiding and monitoring the implementation of international instruments and agreements.<sup>89</sup>

A key aspect in determining the necessary information is that the response to internal displacement should be inclusive and should address all situations of internal displacement and all groups of internally displaced persons without discrimination.<sup>90</sup> On the one hand, this implies identifying internally displaced persons, estimating the size of the displaced population, as well as obtaining information about their location. It should also be noted that internally displaced persons are not a homogeneous group; instead, they have different profiles, needs, conditions, resources and preferences. Groups with particular

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<https://ec.europa.eu/eurostat/web/expert-group-on-refugee-statistics>.

<sup>87</sup> Specifically, the recommendations were developed by the EGRIS subgroup on internally displaced persons, headed by JIPS with support from the United Nations Statistics Division, *Statistics Norway* and IDMC. Available at [https://www.sica.int/documentos/recomendaciones-internacionales-sobre-estadisticas-de-personas-desplazadas-internamente-iris-ingles\\_1\\_128095.html](https://www.sica.int/documentos/recomendaciones-internacionales-sobre-estadisticas-de-personas-desplazadas-internamente-iris-ingles_1_128095.html).

<sup>88</sup> EGRIS, *Technical Report on Statistics of Internally Displaced Persons*. Available at <https://ec.europa.eu/eurostat/web/products-manuals-and-guidelines/-/ks-gq-18-003>.

<sup>89</sup> For example, the 2030 Agenda for Sustainable Development, the Sendai Framework for Disaster Risk Reduction 2015-2030 and the Paris Agreement on climate change.

<sup>90</sup> See Brookings Institution and University of Bern project on Internal Displacement, *Addressing Internal Displacement... quot*.

characteristics, such as women, children, adolescents, the elderly, indigenous people, people with disabilities, among others, have needs and vulnerabilities that require specific measures and interventions.<sup>91</sup> In this sense, it is essential to have socio-demographic information on the internally displaced population, as well as data disaggregated by gender, age and diversity characteristics that are context relevant. In addition to displaced persons, there are other groups of people who are affected by or involved in situations of internal displacement, such as host communities and communities of origin or return, and it is also important to have information about these groups.

Another aspect to be considered is that the needs and prospects of internally displaced persons may vary over time and in the phases of displacement. For example, although both groups require and are subject to assistance and protection, the needs and priorities of internally displaced persons in an emergency situation may not be the same as a group that has been facing the impacts of prolonged displacement for years. It is therefore important to have up-to-date information as well as information on the needs of displaced persons at the various stages of displacement.

Internally displaced persons should be able to make informed decisions about their situation. For example, in order for them to decide on a possible return to or resettlement in another place, national authorities should provide them with information on security conditions and other relevant aspects, such as the availability of public services, that exist in that place. This duty has also been recognised by the Constitutional Court of Colombia in Decision T-025, where it stated that “in regards to the right to return and re-establishment, authorities’ minimum duty is that of [...] (iii) providing the necessary information about the security conditions that exist at the place where they will return, and about the

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<sup>91</sup> On this subject, *cf.* Chapter III of this Manual, on the differentiated approach of age, gender and diversity.



responsibilities that the State shall assume in the fields of security and socio-economic assistance in order to guarantee a safe and dignified return.”<sup>92</sup>

As mentioned at the beginning of this Chapter, it is also the State obligation to prevent factors or conditions that force individuals to move and remain internally displaced. Therefore, it is also essential to have information on the structural causes and triggering factors of this phenomenon, as well as on areas and populations at risk of displacement.

It is important to note that the collection, documentation and handling of data on internal displacement are fundamentally practical and informative, aimed at guiding decision-making and organizing government response. Under no circumstances should the recognition of the status of internally displaced persons or their access to relevant care and protection measures be restricted or prevented if they are unable or unwilling to provide certain information, for example, if they do not wish to answer a survey or authorise their registration in an administrative register.<sup>93</sup> Likewise, the collection and handling of information on internal displacement also entail obligations for the authorities. In particular, it is essential that they take steps to ensure the protection of sensitive data and personal information of internally displaced persons, in accordance with applicable national and international standards, so that their right to privacy is guaranteed and their safety, life, integrity or freedom is not compromised.<sup>94</sup>

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<sup>92</sup> Constitutional Court of Colombia, Decision T-025/04.

<sup>93</sup> Brookings Institution and University of Bern project on Internal Displacement, *Addressing Internal Displacement, op. cit.*

<sup>94</sup> See Ley General de Protección de Datos Personales en Posesión de Sujetos Obligados (General Law for the Protection of Personal Data for the Obligated Subjects), *Official Journal of the Federation*.

## 5. Prevention of involuntary displacement

As stated in Section II of this Chapter, and in line with international law and international standards on displacement, it is the duty of the States to protect individuals against involuntary displacement and particularly against arbitrary displacement.<sup>95</sup> In this sense, it is important to highlight that the prevention measures implemented in order to prevent persons from being forced to move should focus on the prevention, mitigation and elimination of the causes, factors and conditions that give rise to the need to move, in line with the provisions set out in the Guiding Principles, in Article 22 of the ACHR, and in other applicable legislation, so that no preventive measure should restrict, impair or impede the exercise of the right of persons to move freely and choose their place of residence,<sup>96</sup> including the right to seek security in other parts of the country and the right to seek asylum. The IACHR considers that these rights are indispensable for achieving the free development of individuals.<sup>97</sup>

As the IACHR has stated, “to effectively fulfill the duty to prevent situations that jeopardise the effective exercise of human rights and bring about forced displacement, the measures that States must adopt and put into practice must be of two kinds: (i) general measures and (ii) specific measures.”<sup>98</sup>

This body has established general measures, including:

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<sup>95</sup> Guiding Principles on Internal Displacement, Principle 6. This principle, in accordance with international law, prohibits arbitrary displacement and identifies the circumstances in which it occurs. Moreover, Principle 9 indicates that “States are under a particular obligation to take protective measures against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on or attachment to their lands.”

<sup>96</sup> ACHR, Art. 22, *passim*; IACHR, *Cuadernillo de jurisprudencia, passim*; and UN, Economic and Social Council, *op. cit.*, Principle 15.

<sup>97</sup> See IACHR, *Massacres of Rio Negro v. Guatemala*, par. 172; IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, par. 186; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 219.

<sup>98</sup> IACHR, *Internal displacement in the Northern Triangle... quot.*, par. 101.

“all those of a legal, political, administrative and cultural nature that serve to safeguard human rights, such as a suitable legal framework of protection, adjustment and strengthening of institutional systems, the measures necessary to ensure effective implementation of legal frameworks, prevention policies, practices that allow effective action in response to complaints, and awareness campaigns, among many others.”

In line with the foregoing, therefore, general preventive measures may include: (i) promoting and ensuring compliance with national and international human rights standards through applicable legal, administrative and public policy instruments, including rules on protection against arbitrary displacement, for example, the Kampala Convention, which incorporated the right of all persons to be protected against arbitrary displacement, and the obligation of States Parties to refrain from, and prohibit and prevent, arbitrary displacement;<sup>99 100</sup> (ii) adapting national public policy, programme and policy frameworks to strengthen the protection of the rights of all persons; (iii) acting with due diligence<sup>101</sup> in cases of potential and effective human rights violations; (iv)

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<sup>99</sup> *Ibid.*, par. 102.

<sup>100</sup> The Kampala Convention also establishes a number of prohibited categories of arbitrary displacement, including but not limited to: displacement based on racially discriminatory policies or other similar practices whose purpose or result is to alter the ethnic, religious or racial composition of the population; the individual or massive displacement of civilians in situations of armed conflict, unless there are security or imperative military reasons, in accordance with international humanitarian law; displacement used intentionally as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict; displacement caused by widespread violence or violation of human rights; forced evacuations in the event of disasters, whether natural, man-made or other causes, if they are not essential to preserve the safety and health of those affected; displacement used as collective punishment; and displacement caused by any act, event, factor or phenomenon of similar severity that is not justified under international law, including international human rights law and international humanitarian law.

<sup>101</sup> NHRC, *Protocolo para la atención y protección de las víctimas... quot.*, p. 3:

*Due diligence* is defined as the duty arising in direct proportion to the magnitude and specific circumstances of each case. Due diligence is an evaluation indicator of State conduct versus the individuals' conduct who may call into question the full realization of a person's rights in a given context. The International Court of Justice developed the concept of due diligence as a standard of conduct to determine, depending on the circumstances of each case, whether a State was internationally responsible for failing to exercise due diligence in order to prevent, investigate or suppress the conduct of non-State actors on its territory.

ensuring public security, including effective measures, capacity building and peacemaking and conflict resolution initiatives; (v) strengthening governance and the Rule of Law; (vi) properly enforcing existing laws, which may include criminal codes; (vii) implementing and strengthening accountability mechanisms;<sup>102</sup> (viii) addressing other root causes of violence, conflict and disaster such as poverty, violations of economic, social and cultural rights, discrimination on the basis of ethnicity, religion or others, inequality of access to livelihood opportunities and social exclusion, among others.

As an example of how the judiciary has promoted the adoption of general preventive measures, in the decision issued in the amparo process 411-2017,<sup>103</sup> in which the Constitution Bench of the Supreme Court of Justice of El Salvador found that, in the absence or lack of protection by public authorities, the claimants were forced to move due to systematic violence generated mainly by gangs; therefore, the Bench ordered national authorities to comply with the following measures:

Design and implement public policies and action protocols aimed at preventing forced displacement of country citizens, for which they should promote and adopt (depending on their capacity) measures to regain territorial control of areas dominated by gangs, and prevent future displacement and continuity of systematic effects on fundamental rights [...] strengthen institutions responsible for public safety and crime investigation [...] and carry out] necessary actions to prevent and control the phenomenon of violence through, on the one hand, the formulation and implementation of social policies preventing marginalization of vulnerable sectors in society and, on the other, the implementation of actions aimed at progressively and permanently regaining the territories under gang control.<sup>104</sup>

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<sup>102</sup> See UN Secretary-General's High-Level Panel on Internal Displacement, *Shining a Light on Internal Displacement: A Vision for the Future*, *passim*.

<sup>103</sup> *Cf.* Constitution Bench of the Supreme Court of Justice of El Salvador, amparo decision 411-2017, *passim*.

<sup>104</sup> *Ibid.*, p. 44.

For internal displacement caused by disasters, Governments of multiple countries and the international community have established a number of recommendations and commitments regarding the adoption of structural prevention measures, which are aimed primarily at addressing climate change and declining ecosystems, such as reducing greenhouse gas emissions and addressing factors that exacerbate these phenomena (like rapid and unplanned urbanisation, poor land regulation and management, demographic changes, limited availability of technology, poverty, inequality, among others).<sup>105</sup>

The thematic report on internal displacement and transitional justice<sup>106</sup> by the United Nations Special Rapporteur on the human rights of internally displaced persons highlights the important role of transitional justice in preventing displacement, as this is a crucial element in addressing the causes of displacement, reducing the risks of future displacement and attacking its consequences.<sup>107</sup> Due to the wide range of rights violated in situations of internal displacement, as well as violations of international humanitarian law and the injustices that such situations entail, which may even contribute to perpetuating displacement, transitional justice,<sup>108</sup> in particular in terms of the right to truth, the right to justice and guarantees of non-repetition,<sup>109</sup> constitutes a primary prevention base and acts as “a deterrent to future forced displacement and as active steps towards strengthening legal protection against displacement.”<sup>110</sup>

The prevention measures set out in the thematic report include:

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<sup>105</sup> Cf. UN, Paris Agreement, *passim*; Sendai Framework for Disaster Risk Reduction 2015-2030, *passim*; Report on internal displacement in the context of the slow-onset adverse effects of climate change, *passim*.

<sup>106</sup> Cf. UN, Report on... *quot.*, *passim*.

<sup>107</sup> *Id.*

<sup>108</sup> Transitional justice is based on four fundamental rights: the right to truth, the right to justice, the right to reparation and guarantees of non-repetition.

<sup>109</sup> The right to reparation and the right to justice are considered as contributing directly to addressing the obstacles to durable solutions. UN, Report on... *quot.*, par. 33.

<sup>110</sup> *Id.*

- A. “Criminal accountability and prosecutions,”<sup>111</sup> which may be applied to “perpetrators of violations that have led to arbitrary displacement or by targeting arbitrary displacement as a crime in itself”<sup>112</sup> including as a first step “the criminalization of arbitrary displacement.”<sup>113</sup>

The criminalization of internal displacement<sup>114</sup> represents a preventive measure since, through investigation and effective sanction processes, it is able to prevent recidivism of the facts that caused internal displacement and to promote non-repetition. It also constitutes a measure to access to justice and favours identification, recognition and combating of causes of displacement, including other vexations and related crimes that accompany it before, during and following its occurrence.<sup>115</sup>

Among the countries that have incorporated internal displacement as a crime in their penal codes are Colombia, El Salvador, the Philippines, Xenia and Nigeria.<sup>116</sup> Likewise, international courts stand out (such as the International Criminal Court), which allow prosecution of forced displacement as a war crime or a crime against humanity,<sup>117</sup> and courts that

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<sup>111</sup> *Ibid.*, par. 38.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> For in-depth analysis on this subject, see chapter IX of this handbook.

<sup>115</sup> Such as murder, enforced disappearances committed by individuals, arbitrary detention, extortion, persecution, threats, robbery, looting, destruction and dispossession of homes, land and property, as well as other forms of violence and human rights violations. To elaborate on the characteristics and impacts of internal displacement in the Mexican case, see the annual reports of the Mexican Commission for the Defence and Promotion of Human Rights, *Episodios de desplazamiento interno forzado masivo en México*.

<sup>116</sup> Cf. Criminal Code of Colombia, *Diario Oficial*, sec. 159; Legislative Assembly of El Salvador Republic, Código Penal de El Salvador, Art. 361; Republic of the Philippines, Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity; Republic of Xenia, The Prevention, Protection and Assistance to IDPs and Affected Communities, sec. 6, 23, and Republic of Nigeria, Projet de loi relative à la protection et l'assistance aux personnes déplacées internes au Niger, Art. 10, 30-2.

<sup>117</sup> See International Criminal Court, Rome Statute, Art. 7.1; European Union, *Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, Art. 17, and the references cited in Schabas, *The International Criminal*

have examined deportation and forced transfer of populations in countries such as Rwanda,<sup>118</sup> the former Yugoslavia<sup>119</sup> and Cambodia.<sup>120</sup>

- B. “Truth-seeking initiatives”, which, besides being a preventive tool, are also an element of access to justice, make it possible to investigate, determine and report facts and patterns underlying internal displacement, and contribute to their analysis and recognition “as a serious human rights issue.”<sup>121</sup> Examples of some countries that established Truth Commissions and specifically included conflict-related displacement include Liberia, Sierra Leone, East Timor, Colombia and Guatemala.<sup>122</sup>
- C. Finally, actions aimed at generating structural reforms to laws and institutions of security, governance and judicial sector, in order to promote their sensitivity to justice and take into account the set of implications of internal displacement.

The obligation of States to establish measures to ensure protection of fundamental rights to truth, justice and guarantees of non-repetition for internally displaced persons has also been identified by the judiciary, mainly in Colombian constitutional jurisprudence.

In order 008 of 2009,<sup>123</sup> on the persistence of the state of unconstitutional things declared by decision T-025, the Constitutional Court of Colombia

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*Court: A Commentary on the Rome Statute*, p. 150-152.

<sup>118</sup> Cf., UN, *Statute of the International Criminal Tribunal for Rwanda*, *passim*.

<sup>119</sup> See IACHR, *International Criminal Tribunal for the former Yugoslavia - Justice for Peace*, and Roch, “Forced Displacement in the Former Yugoslavia: A Crime under International Law?” in *Dickinson Journal of International Law*.

<sup>120</sup> *Id.*

<sup>121</sup> UN, *Report on... quot.*, par. 38.

<sup>122</sup> Cf. Hayner, *Truth commissions: a schematic overview*, *passim*; Duthie, “Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies. Research Report”, in *International Centre for Transitional Justice*, *passim*.

<sup>123</sup> Colombian constitutional jurisprudence has defined these rights as follows:

(i) The right to know or the right to truth, which implies the right to know the circumstances and

ordered the national government to formulate a public policy guaranteeing the rights to truth, justice, reparation and non-repetition of the displaced population.<sup>124</sup> In order 219 of 2011, the Constitutional Court of Colombia stated that such fundamental rights “give rise to a series of non-derogable obligations on the part of the State, such as clarifying the truth of what happened, preventing, investigating and punishing this systematic and massive crime against the civilian population [...] and adopting measures to guarantee non-repetition of such violations” (own translation.)<sup>125</sup>

As regards specific prevention measures, when displacement is foreseeable, the State has an obligation to take preventive measures aimed at early action in the face of latent displacement or the recurrence of threats, violence, conflicts or disasters that may trigger it, in order to prevent the risk from materialising,<sup>126</sup> and explore fully every possible option for preventing displacement.<sup>127</sup> When displacement is inevitable, they must develop measures that mitigate the negative impacts of displacement; ensure that displacement does not last longer than circumstances require and direct response actions from an early stage towards durable solutions.

In situations where there are no alternatives to prevent the risk of damage and displacement, States should respond in a timely manner to reduce the adverse

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actors of human rights violations, which is an imprescriptible right and has a double connotation both individually and collectively, the latter referring to the need for collective and historical memory and for preventing further acts of violations; (ii) the right to justice, which implies the possibility for victims to access a fair and effective legal remedy, to the investigation of facts and persecution, judgement and sanction of perpetrators, and to reparation in criminal proceedings. The right to justice also implies that legal figures such as criminal prescription should not operate for crimes of serious violations of human rights and international humanitarian law, nor be applied for cases of lack of effective remedies, and amnesty should have no legal effect against the claim for reparation by victims; and (iv) the guarantee of non-repetition, which includes various types of measures aimed at influencing structural factors or causes of serious violations of rights in order to prevent their repetition. Constitutional Court of Colombia, order 219.

<sup>124</sup> *Ibid.*, order 008.

<sup>125</sup> *Ibid.*, order 219.

<sup>126</sup> IACHR, *Internal displacement in the Northern Triangle... quot.*, par. 103.

<sup>127</sup> UN, Economic and Social Council, *op. cit.*, Principle 7.1.



effects faced by the population, and to ensure certain safeguards of due process to guarantee that displacement is carried out under satisfactory conditions of safety and dignity.<sup>128</sup> It is part of its obligation to prepare for crises, to integrate risk reduction, adaptation and recovery strategies within national laws and policies, to have contingency plans, to facilitate the evacuation of internally displaced population outside high-risk areas, and to plan a relocation that, as a preventive measure, also allows the necessary conditions for internally displaced population to remain in a safe environment as long as they achieve a lasting solution, and thus preventing them from having to move again.<sup>129</sup>

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<sup>128</sup> According to the Guiding Principles, satisfactory conditions of security and dignity refer to the duty of States to provide protection and assistance. UN, Economic and Social Council, *op. cit.*, Principle 7.2.

<sup>129</sup> In order to implement this set of measures, there are important tools that reflect actions and strategies that Governments and various actors must implement, as well as the specific procedures based on international standards that must guide responses in order to effectively reduce and mitigate displacement. Some of the relevant documents include: the *Handbook for the Protection of Internally Displaced Persons*, which includes a chapter on “Protection Risks: Prevention, Mitigation and Response” and a specific section on humanitarian evacuations; the Sendai Framework for Disaster Risk Reduction 2015-2030, which presents seven global objectives and a set of guiding principles that States and other institutions must implement to prevent, mitigate and manage disaster risks; the Paris Agreement on climate change, which presents countries’ commitments to reduce greenhouse gas emissions and improve resilience to long-term climate change; the thematic report on internal displacement in the context of the adverse effects of slow-onset climate change, developed by the Special Rapporteur on the human rights of internally displaced persons, which analyses the human rights obligations, responsibilities and roles of States and other actors, and offers recommendations to address internal displacement in the context of adverse effects of slow-onset climate change; *The Sphere Handbook: Humanitarian Charter and Minimum Standards for Humanitarian Response*, the UNHCR guidance note on *Humanitarian Evacuations in Armed Conflict* and the *Code of Conduct for the International Red Cross and Red Crescent Movement in Disaster Relief*, which bring together a set of minimum and common humanitarian principles and standards, as well as a set of protection and operational considerations for planning and implementing humanitarian evacuations; the *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, the *Guidelines on Mental Health and Psychosocial Support in Emergency Settings*, and *A toolbox: Planning Relocations to Protect People from Disasters and Environmental Change*, which provide general principles and practical and technical aspects for States and other actors to plan and implement planned relocations so as to protect people from disasters and environmental change; and the *Camp Management Toolkit*, which collects key information on protection and service delivery elements in camps, and provides practical guidance on roles and responsibilities for those working in this area in order to improve coordination and support management.

In order to be effective, such interventions should be based on special features of local context, which implies permanent monitoring and an adequate understanding of the risk, its evolution, the impacts, specific vulnerabilities, and capacities of the affected population, for which it is essential collecting and analysing information, and the participation of internally displaced persons and communities affected by displacement. National authorities should implement information systems and tools to compile, analyse and exchange data so as to inform the various risk assessments and prevention, mitigation, preparedness and response interventions undertaken. It will be essential to ensure that these systems and tools have, from the outset, common definitions, and are interoperable between the various governmental bodies involved in responding to the problem.<sup>130</sup>

Among the main prevention and risk reduction tools that have been developed to improve evidence generation and response process, the establishment of *early warning systems* stands out. They aim to collect, analyse and provide information on areas where displacement may occur and the possible risks that individuals and communities will have to face. Early warning systems contribute positively to discouraging the spread or resurgence of factors that cause displacement, allow people at risk to have full knowledge of hazards and make informed decisions in advance to lessen the impacts and possible economic and material losses to which they are exposed, help to adopt an early emergency and assistance response, and strengthen the contingency and resettlement plans implemented, as well as subsequent assessments made to determine possible returns.<sup>131</sup>

It is crucial that, during this stage, national and local governments design and implement plans and even simulations of preparedness and contingency, as well as protocols of action that allow an adequate and prompt response to crises. Such plans will have to consider the characteristics of displacement,

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<sup>130</sup> Cf. GP20 Initiative, *op. cit.*, *passim*.

<sup>131</sup> Cf. Global Protection Cluster, *Handbook for the Protection of Internally Displaced Persons*, Chapter IV.

especially if it is noticed that it can become a prolonged displacement, and the specific needs of the internally displaced population, particularly those of groups that are in the most vulnerable historical condition and with special attachment to their lands, including participatory and community-based approaches.<sup>132</sup>

With regard to examples and good practices regarding general and specific prevention measures in countries of the region, the *Ley especial para la atención y protección integral de personas en condición de desplazamiento forzado interno* of El Salvador, for example, included in Article 7 the adoption of preventive measures before, during and after displacement and noted the duty of the authorities to implement measures to “identify the causes of forced displacement and adjust the policies necessary to prevent them,” “adopt actions, plans and programmes aimed at defusing threats and mitigating the effects of their occurrence [... and] establish an early warning system for the timely identification of places, causes and situations that trigger forced displacement” (own translation.)<sup>133</sup>

According to various orders following the Decision T-025, issued by the Constitutional Court of Colombia,<sup>134</sup> the Follow-up Special Chamber, after analysing and evaluating the progress, obstacles and setbacks that emerged from the reformulation and implementation of each component of the public policy on internal displacement in Colombia, issued new corrective orders, including:

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<sup>132</sup> Among the materials that have been designed and that can support national authorities to carry out these activities, we highlight the following: *Field Protection Cluster Coordinator Model. Terms of Reference (ToR)*, emphasising the importance of leadership that coordinates, plans and develops the strategy during humanitarian emergencies and whose responsibilities are described; and the *Protection Mainstreaming Training Package*, which provides training, awareness and education resources to government actors and humanitarian personnel in general, to support the implementation of humanitarian and protection actions in the field.

<sup>133</sup> Legislative Assembly of El Salvador Republic, *Ley especial... quot., Section 7.*

<sup>134</sup> See Constitutional Court of Colombia, orders 008, 385 and 219.

(a) the incorporation of the policy for the prevention and protection of forced displacement into 12 Departmental Single Comprehensive Plans; (b) the strengthening of 12 Departmental Prevention and Protection Plans and/or Integrated Management of Displaced Population Committees in the prevention of forced displacement; (c) the technical advice for the formulation of 32 Departmental or Sub regional Plans for the prevention and protection of human rights in the framework of forced displacement; and (d) the technical advice for the formulation of 70 contingency plans for the care of mass displacement;” “plans for the prevention of human rights violations in the framework of forced displacement; the actions of law enforcement for the prevention of forced displacement; contingency plans for the care of mass displacement; the strategy for the care of communities with mobility restriction; the programme for the protection of displaced persons, protection route; preventive security.<sup>135</sup>

In cases of groups facing particular risks and vulnerabilities, through a series of follow-up orders, the Follow-up Special Chamber has also ordered the adoption of preventive measures of positive differentiation to address the accentuated and disproportionate impact that internal displacement has, specifically, in the cases of women,<sup>136</sup> children and adolescents,<sup>137</sup> indigenous population<sup>138</sup> and persons with disabilities,<sup>139</sup> including their caregivers.<sup>140</sup>

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<sup>135</sup> *Ibid.*, order 219, based on the information submitted by the national government in the 1 July, 2010 report.

<sup>136</sup> In order 092 concerning women victims of forced displacement caused by the armed conflict, the Constitutional Court of Colombia identified ten specific vulnerability factors to which women are exposed because of their gender and established as a constitutional and international obligation of the State the adoption of a differential approach that “attacks their root causes with sufficient specificity so as not to be subsumed into a general internal security policy, and thus ensures that the State’s response to forced displacement is not limited to the care of victims *a posteriori*, but also operates directly on their causal factors” (own translation.) In this order, the adoption of the “Programa de prevención del impacto de género desproporcionado del desplazamiento” (Program on Prevention of Disproportionate Gender Impact of Displacement) is ordered, through the prevention of extraordinary gender risks in the context of armed conflict and which must have components for the concrete prevention of the ten identified gender risks, and the “Program on Prevention of Domestic and Community Violence against Displaced Women and Comprehensive Assistance for Victims.”

<sup>137</sup> In order 251, the court ordered the national government to take specific measures against the risks

In order to ensure an effective response to internal displacement, general and specific prevention measures should be part of a broader and coordinated protection strategy to ensure complementarity with measures promoting mitigation of the impacts of internal displacement, development measures, reconstruction of the social network, building and consolidating peace processes and strengthening the capacities of internally displaced persons and host communities through, for example, coping and short-term, medium-term and long-term resilience strategies allowing for the prevention of multiple and prolonged displacement and focusing on early, efficient and durable solutions.

## 6. Protection and Assistance during Displacement

The protection of internally displaced persons is a cross-cutting element that must be present at all stages of displacement, and it is an elementary factor in

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and differential effects suffered by children and adolescents in the context of armed conflict and forced displacement, such as: the design and implementation of a new “Programa para la protección diferencial de los niños, niñas y adolescentes frente al desplazamiento forzado” (Programme for the differential protection of children and adolescents from forced displacement) and three pilot projects in the field of prevention of three special risks detected.

<sup>138</sup> Order 005 dictated the adoption of a sufficiently differentiated and specific forced displacement prevention approach to address the root causes of this phenomenon and its disproportionate impact on Afro-descendant communities and their members, “to design and implement medium-term and long-term solutions and to establish additional mechanisms for the prevention of displacement suitable to the risks faced by the Afro-Colombian population, to facilitate the implementation of contingency plans when the risk is related to legitimate State operations for the maintenance of public order and it allows to take the appropriate protective measures to ensure the lives of Afro-Colombian leaders and to prevent uprooting and lockdown.

<sup>139</sup> In order 006 about cases of displaced persons with disabilities and their caregivers and protected persons, to prevent the disproportionate risks faced by this population, the Constitutional Court ordered the entities comprising the National System of Comprehensive Care for the Displaced Population (SNAIPD) to design and implement five pilot projects for the prevention and care of persons with disabilities and their families, in situations of forced displacement.

<sup>140</sup> Some of main measures issued are the adoption of a differentiated approach to prevention in order to influence the root causes and address the disproportionate impact these populations face and the implementation of a set of specific risk prevention programmes identified for each of the groups considering the characteristics of the affected territories, the reports derived from the early warning system and the evolution of the conflict.

putting an end to and ensuring that displaced persons can overcome this condition and enjoy their human rights equally as the rest of the population that did not move.<sup>141</sup> The responsibility of national authorities to provide protection and assistance to internally displaced persons is to adopt a comprehensive set of measures, including those of a positive nature, aimed at guaranteeing them, equally and without discrimination,<sup>142</sup> the full exercise of human rights, including civil, political, economic, social and cultural rights.<sup>143</sup>

The Guiding Principles provide a clear, comprehensive and orderly basis on the responsibility of national authorities to protect and assist internally displaced persons during the various stages of displacement. The following are the main protection and assistance measures that, according to these Principles, must be taken into account during an internal displacement situation.

As regards the protection measures, in situations where displacement could not be avoided or protection of individuals is provided by law, national authorities should carry it out under certain standards and procedural guarantees in conditions of safety and dignity, in addition to all measures that “shall be taken to minimize displacement and its adverse effects” as set out in Principle 7.<sup>144</sup> In addition, Principle 8 determines that “displacement shall not be carried out manner that violates the rights to life, dignity, liberty and security of those affected.”<sup>145</sup> In this regard, this Principle sets forth that States have an

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<sup>141</sup> UN, General Assembly, Framework on Durable Solutions for Internally Displaced Persons... *quot.*, par. 8.

<sup>142</sup> Regarding situations of inequality and discrimination, the IACHR has established that pursuant to those obligations, States must refrain from actions that, in any way, aimed, directly or indirectly, at creating scenarios of *de jure* or *de facto* discrimination; and must adopt positive measures to reverse or change existing discriminatory situations in their societies that are detrimental to certain group of people. This implies the special duty of protection that the State must exercise as regards the actions and practices of third parties, who, under their tolerance or acquiescence, create, maintain or favour discriminatory situations.

IACHR, *Mapiripán Massacre v. Colombia*, par. 178.

<sup>143</sup> Kálin, *et al.*, *Guiding Principles on Internal Displacement: Annotations*, p. 19.

<sup>144</sup> UN, Economic and Social Council, *op. cit.*, Principle 7.

<sup>145</sup> *Ibid.*, Principle 8.

obligation to ensure, to the greatest extent possible, that adequate accommodation is provided to displaced persons, that displacement is carried out under satisfactory conditions of safety, food, health and hygiene and that members of the same family are not separated. It also notes that:

if displacement occurs in situations other than states of emergency due to armed conflicts and catastrophes, the following guarantees shall be respected: a) the state authority empowered by law to order such measures shall take a specific decision; b) appropriate measures shall be taken to provide future displaced persons with complete information on the reasons and procedures for their displacement and, where appropriate, on compensation and resettlement; c) free and informed consent of future displaced persons shall be sought; d) competent authorities shall endeavour to involve affected persons, in particular women, in the planning and management of their resettlement; e) competent legal authorities shall implement measures to ensure compliance with the law where necessary; and f) the right to an effective remedy, including reviewing the decisions by competent judicial authorities, shall be respected.<sup>146</sup>

Where internal displacement has materialised, national actors should establish specific measures to mitigate the humanitarian consequences and protection risks of internally displaced persons, guaranteeing them the right to life, liberty, security and well-being in their place of destination and, if so, in the event of a return, with special attention to population groups that have a special relationship with their land or particular needs and vulnerabilities. Colombian constitutional jurisprudence has incorporated important protection measures to guarantee constitutional rights in cases of internal displacement, particularly to Afro-descendant communities. For example, in order 005 of 2009, on the basis of ILO Convention No. 169 about indigenous and tribal peoples, the Court specified the Government's duty to provide protection to tribal communities

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<sup>146</sup> *Id.*

against violations of their rights and to ensure the conditions for responding to “their particular needs.”<sup>147</sup>

According to Principles 10 to 23 of the Guiding Principles, about protection during displacement, particular protection measures and strategies should be established to prevent internally displaced persons from being subjected to military attacks and forced recruitment, torture, violent, inhuman or degrading treatment, detention, lockdown, forced separation of their families, slavery, sexual assault, mutilation, forced prostitution and other violations of their human and civil rights.<sup>148</sup>

The Kampala Convention establishes the obligation of States Parties to protect the rights of internally displaced persons regardless of the cause of displacement, refraining from and avoiding, the following acts, among others:

[...] b. Genocide, crimes against humanity, war crimes and other violations of international humanitarian law against internally displaced persons; c. Arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman or degrading treatment or punishment; d. Sexual and gender-based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices,

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<sup>147</sup> Constitutional Court of Colombia, order 005.

<sup>148</sup> Some references about these protection measures are the report of the Secretary-General of the United Nations on *Special measures for protection from sexual exploitation and sexual abuse*, which provides an update on measures to strengthen protection from sexual exploitation and abuse; the *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action* and the *Guidelines for Gender-based Violence Interventions in Humanitarian Emergencies: Focusing on Prevention of and Response to Sexual Violence in Emergencies*, which provide government and humanitarian actors with guidance and examples of interventions to respond to gender-based violence and ensure that women's needs, contributions and capacities are part of the needs assessments and contingency plans; the Paris Principles; the *Principles and guidelines on children associated with armed forces or armed groups* and the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.



slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and smuggling; and e. Starvation.<sup>149</sup>

As regards the protection of specific groups of the displaced population, in order 009 of 2015, issued as a follow-up to Decision T-025 of the Constitutional Court of Colombia, it was stated that “sexual violence continues to be a gender-related risk factor for women in the context of internal armed conflict and that forced displacement due to violence persists as an expression of the discrimination and gender-based violence present in the territory” (own translation.)<sup>150</sup> Pursuant of the above, strengthened measures were stipulated for all displaced women victims of sexual violence within the framework of armed conflict and their families.<sup>151</sup>

Another key aspect is the protection of the land, property and possessions of internally displaced persons, described in Principle 21 of the Guiding Principles and developed in Principles on Housing and Property Restitution for Refugees and Displaced Persons, known as the Pinheiro Principles,<sup>152</sup> fundamental reference in this field. In Decision T-025, in order to promote the implementation of procedures and mechanisms for the protection of the land and property of internally displaced persons, the Constitutional Court of Colombia ordered that the Sole Registry of the Displaced Population collected the relevant information.

To protect the internally displaced persons' right to be recognised as a person before the law and to ensure the full enjoyment of their human rights, it is the obligation of national authorities to offer and facilitate access to effective mechanisms for issuing and replacing personal and other identity documents

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<sup>149</sup> Kampala Convention, Article 9, Subsections b, c, d and e.

<sup>150</sup> Constitutional Court of Colombia, Decision SU-599 quoting Decision 009 of 2015, issued by the Follow-up Special Chamber following Decision T-025 of 2004.

<sup>151</sup> *Ibid.*, order 009 in which Decision 218 of 24 August 2006 was quoted.

<sup>152</sup> UN, Economic and Social Council, Principles on Housing and Property Restitution for Refugees and Displaced Persons.

needed to exercise their human rights, in line with Principle 20 of the Guiding Principles. In Decision T-025, the Constitutional Court of Colombia stated that the right to be recognised as a person before the law is among the fundamental constitutional rights threatened or violated by internal displacement, since “the loss of identity documents poses obstacles to the registration of these persons as displaced individuals, as well as access to the different types of aid, and the identification of the legal guardians of minors who are separated from their families.” On this basis, the Court noted that:

in events in which the National Registry of the Civil State delays without any justification the issuance of the identity card, violates the fundamental right to be recognised as a person before the law, or, for example, the minimum vital to a household, when not delivering the citizenship card implies displaced persons lose their opportunity to effectively access humanitarian aid.<sup>153</sup>

During internal displacement, State should also provide internally displaced persons with humanitarian assistance and timely guarantee them the right to an adequate life, under the humanitarian principles “of humanity, neutrality, impartiality and independence.”<sup>154</sup> National authorities are responsible for planning, coordinating, distributing and managing the provision of main goods and services essential for the exercise of economic, social and cultural rights such as food, drinking water, shelter, adequate clothing, medical and sanitation services, education and other essential services, including psychosocial support<sup>155</sup> and the protection of their properties and belongings,<sup>156</sup> to ensure respect for the dignity of persons, to alleviate suffering, to mitigate displacement effects and to protect the fundamental rights of displaced persons during the whole internal displacement situation and until its causes and impacts are overcome.

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<sup>153</sup> Constitutional Court of Colombia, Decision T-025.

<sup>154</sup> UN, Economic and Social Council, *op. cit.*, Principles 18.1, 24.1 and 25.

<sup>155</sup> IACHR, *Internal displacement in the Northern Triangle... quot.*, par. 128.

<sup>156</sup> UN, Economic and Social Council, *op. cit.*, Principle 21.

As an example of how the judiciary has promoted compliance with the obligations mentioned in the previous paragraph and drawing on the Guiding Principles, the Constitutional Court of Colombia, in its Decision T-025, included among “the minimum positive obligations that must always be satisfied by the State”:

The right to a basic subsistence, as an expression of the fundamental right to a minimum subsistence income and clarified in Principle 18, which means that “*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*”. Authorities must also make special efforts to secure the full participation of displaced women in the planning and distribution of these basic supplies. This right should also be read in the light of the provisions of Principles 24 to 27 listed in Annex 3, since through humanitarian assistance, authorities meet this minimum duty related to dignified subsistence of displaced persons. This humanitarian assistance concerns both emergency humanitarian aid, provided when displacement occurs, and minimum aid components during the economic restoration and recovery phases.<sup>157</sup>

Humanitarian assistance should be granted in an accessible manner to all internally displaced persons, be available in sufficient quality and quantity, be acceptable in cultural, age, gender and diversity terms and be adaptable to the changing characteristics and particularities of each displacement stage,<sup>158</sup> and to the needs and perspectives of internally displaced persons. Regarding this obligation, the IACHR has considered that:

State insufficiency in basic assistance during displacement may jeopardise the State’s responsibility for the right to personal integrity if physical and psychological conditions that victims had to face do not coincide with minimum standards required in this type of case. Thus, the Court has declared

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<sup>157</sup> Constitutional Court of Colombia, Decision T-025.

<sup>158</sup> IDMC, Norwegian Refugee Council, Brookings-LSE Project on Internal Displacement, *National Instruments on Internal Displacement... quot.*, p. 82.

violations of personal integrity related to displacement in cases where there were specific effects additional to those caused due to displacement. For this reason, Colombia was previously condemned for failure to comply with its obligations to guarantee humanitarian assistance and a safe return, within the framework of the right to movement and residence, and the protection of the right to personal integrity, recognised in Articles 22.1 and 5.1 of the American Convention, in relation to Article 1.1 of the same document.<sup>159</sup>

In armed conflict -where protection responsibilities include all parties involved in the conflict-<sup>160</sup> or when States do not have the financial, technical or operational capacities to provide humanitarian assistance to the internally displaced population, in accordance with the Guiding Principles, national authorities should also seek international support, accept assistance offers, cooperate with humanitarian actors and allow them free and unhindered passage<sup>161</sup> for humanitarian aid to reach those who require it.

As humanitarian access is a fundamental requirement for effective intervention, States need to agree in good faith to access and external support from humanitarian organisms and agencies to enable them to complementarily contribute to ensuring the human rights of internally displaced persons. This implies ensuring the full entry of humanitarian personnel, facilitating their operations deployment and the impartial provision of assistance, maintaining their presence and providing them with adequate safe and protective conditions before any attack or act of violence.<sup>162</sup> Regarding this, the public dissemination of information and raising-awareness campaigns on humanitarian work and the presence of various actors involved can be a

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<sup>159</sup> IACHR, *Yarce y otras vs. Colombia*, par. 226.

<sup>160</sup> In accordance with international humanitarian law, to all parties in the conflict, including armed opposition groups.

<sup>161</sup> UN, Economic and Social Council, *op. cit.*, Principle 25.2 and 25.3.

<sup>162</sup> *Ibid.*, Principle 26.

positive tool<sup>163</sup> to ensure the safety of both internally displaced persons and communities affected by displacement and those providing assistance.<sup>164</sup>

The presence of humanitarian organisms and agencies on the ground, in addition to reinforcing and complementing the efforts undertaken by States, particularly when they do not have sufficient capacities to adequately provide humanitarian aid, also contributes, *inter alia*, to preventing further human rights violations and inhibiting possible acts of violence against affected population; to analysing the implications that such a presence and the granting of assistance can generate; to helping to identify, know, monitor and collect first-hand information on the risks and needs of the population and to inform relevant actors in this regard; to enabling accompanying the population at risk and to speeding up protection strategies implementation.<sup>165</sup>

## 7. Durable Solutions

As already stated, involuntary displacement represents a violation of the right to free movement and residence, while jeopardising or affecting the exercise of various human rights. In this regard, to fulfil its obligation to ensure the full exercise of all persons' human rights, without discrimination, it is the responsibility and obligation of the national authorities to put an end to involuntary displacement situations and to restore the exercise of internally displaced persons' rights.

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<sup>163</sup> Secretariat of Foreign Affairs of Mexico, *et al.*, *op. cit.*, p. 7.

<sup>164</sup> Other tools available useful in strengthening protection include the *Handbook for the Protection of Internally Displaced Persons*, specifically the sections on humanitarian access, humanitarian assistance and the coordination and management of camps and collective accommodation; the report *Stay and deliver. Good practice for humanitarian workers in complex security environments*, that provides an analysis of the greatest challenges that humanitarian workers have faced in various complex contexts to ensure humanitarian action, as well as recommendations to improve the response and maintain the presence of operations; and the Secretary-General of the United Nations report on The protection of civilians in armed conflict, that provides information on measures that can contribute to strengthening civilians' protection in such contexts.

<sup>165</sup> Global Protection Cluster, *op. cit.*, chapter See

Principles 28 to 30 of the Guiding Principles, which describe internally displaced persons' rights and national authorities' duties in relation to return, resettlement and reintegration,<sup>166</sup> establish internally displaced persons' right to a durable solution and national authorities primary responsibility to take the necessary measures to achieve it.<sup>167</sup> This is in line with international human rights law and international humanitarian law. These principles show that, although this is an important component of the response to internal displacement, the mere physical transfer of the internally displaced population is not enough for them to overcome this condition and regain full exercise of their rights.

Because of this, to establish a standard and criteria for determining when an internally displaced person has overcome displacement status, the IASC Framework was developed, stating that “a durable solution is achieved when internally displaced persons no longer have any specific assistance and protection needs that are linked to their displacement and can enjoy their human rights without discrimination on account of their displacement.”<sup>168</sup> The IASC Framework also determines that:

IDPs who have achieved a durable solution will enjoy without discrimination:

- a) Long-term safety, security and freedom of movement;
- b) An adequate standard of living, including at a minimum access to adequate food, water, housing, health care and basic education;
- c) Access to employment and livelihoods;
- d) Access to effective mechanisms that restore their housing, land and property or provide them with compensation [...]

a) Access to and replacement of personal and other documentation; b) Voluntary reunification with family members separated during displacement; c) Participation in public affairs at all levels on an equal basis with the resident population; d) Effective remedies for displacement-related violations, including access to justice, reparations and information about the causes of violations.<sup>169</sup>

<sup>166</sup> UN, Economic and Social Council, *op. cit.*, Principles 28 to 30.

<sup>167</sup> See UN, General Assembly, *op. cit.*

<sup>168</sup> *Ibid.*, p. 7. par. 8.

<sup>169</sup> *Ibid.*, p. 3-4.

Regarding the national authorities' responsibility, the framework states that “the primary responsibility to provide durable solutions for IDPs and ensure their protection and assistance needs to be assumed by the national authorities” and that:

“whilst the operationalization of this responsibility may vary depending on the context, in practical terms, the national authorities need to ensure at a minimum that the necessary legal and/or policy frameworks are in place to secure the rights of IDPs, to establish effective government structures to coordinate the national and local response, to facilitate provision of humanitarian and development assistance, and to ensure that adequate funding, through national budgets as well as international aid, is allocated to support the process.”<sup>170</sup>

Due to their relevance, durable solutions will be discussed in depth in Chapter VIII of this handbook.

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## Intersectionality and differentiated approach to internally displaced persons

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## **Intersectionality and differentiated approach to internally displaced persons.**

I. Introduction; II. Definitions; III. Particular Risks and Vulnerabilities to Internal Displacement: Enhanced Protection of Particularly Vulnerable Groups; IV. Conclusions.

Years ago, before the attack on the church, displaced people from other towns used to pass through our town; we used to see them crossing the highway, interminable lines of men and children and women, silent crowds with neither bread nor destinations. Years ago, three thousand indigenous people stayed for a long while in San José, but eventually had to leave due to extreme food shortages in the improvised shelters.

Now it is our turn.

Evelio Rosero, *The Armies*

## **I. Introduction**

Internal displacement is a multi-layered phenomenon involving the violation of multiple human rights of its victims.<sup>1</sup> Internally displaced persons (IDPs) are often subjected to other situations of discrimination, marginalization and lack

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<sup>1</sup>See Inter-American Commission on Human Rights (IACHR), *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, pars. 235 and 239; IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*, par. 85; IACHR, *Human Rights in Colombia: 3<sup>rd</sup> Report of the Inter-American Commission on Human Rights*; Inter-American Court of Human Rights (IACHR), “Personas en situación de desplazamiento” in *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos*, No. 3, p. 8 et seq.

of protection, which, when converging with internal displacement, make their situation more burdensome. Over the years, people belonging to historically discriminated and marginalised groups have been the most vulnerable to forced displacement, both internally and internationally.

The impacts of forced displacement on these groups are disproportionate and differential, and the different forms of discrimination they may suffer are the result of the combination of multiple factors, such as gender, gender identity, age, ethnicity, disability, sexual orientation, religion, poverty and other. In early 2000s, Roberta Cohen and Limeña Sánchez-Garzoli already highlighted the fact that IDPs in the Americas “are mainly from the rural poor majority,” and that many were members of the indigenous, “black populations”<sup>2</sup> and peasants.<sup>3</sup> A few decades later, I highlighted the persistence of the population groups mentioned above by Cohen and Sánchez-Garzoli within those presenting the greatest risk of forced displacement, while drawing attention to new groups:

The situation of people in the context of forced migration in the Americas is an intersectional phenomenon. Internally displaced persons, migrants, refugees and other persons with protection needs are often adversely affected, and are also part of vulnerable and historically discriminated groups, such as women, children and adolescents, indigenous peoples, Afro-descendant communities, people with disabilities and LGBTIQ+ communities (lesbians, gays, bisexual, transgender and intersexual), among others.<sup>4</sup>

Poverty, apart from being the common denominator of minorities, ethnic groups and other historically marginalised groups, is also often a condition that

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<sup>2</sup> Roberta Cohen and Gimena Sánchez-Garzoli used the term *black populations* citing the Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng, case study on displacement: Colombia, E/CN.4/1995/50/Add.1.

<sup>3</sup> Cf. Cohen and Sánchez-Garzoli, “Internal Displacement in the Americas: Some Distinctive Features,” The Brookings-Cuny Project on Internal Displacement, p. 5 and 6.

<sup>4</sup> Botero Navarro, “Against the Current: Protecting Asylum Seekers, Refugees, and Other Persons in Need of International Protection under the Inter-American Human Rights System”, in *Latin America and Refugee Protection: Regimes, Logics, and Challenges*, p. 368 and 369.

aggravates the discrimination against persons in the context of migration and forced displacement. In this sense, the Inter-American Commission on Human Rights (IACHR) has argued that “individuals who live in extreme poverty and in highly vulnerable situations tend to be those most affected by violence and forced displacement, both internally and internationally, in the countries of the Northern Triangle (El Salvador, Guatemala, and Honduras) and in Mexico.”<sup>5</sup>

IDPs have specific needs that the rest of the population does not usually have. In relation to the differentiated impacts of internal displacement, Walter Kálin, former Special Rapporteur on the human rights of internally displaced persons, created a list of eight specific needs of IDPs, which have also been extensively documented in reports on the missions to the countries of the representatives of the Secretary General and the Special Rapporteur on the human rights of internally displaced persons. These specific needs of IDPs are:

- Protection against displacement.
- Being able to leave the danger zone and reach a safe place, and not being forced to return to danger areas.
- Finding a place to stay temporarily, whether inside or outside a camp.
- Being protected against discrimination on grounds of displacement, for example, in relation to access to basic services or the labour market.
- Having access to the personal identity documents they have lost, as well as to the issuance of documents to children born during displacement, although, according to law, they can only be obtained in the area of the usual place of residence.
- Being able to register as voters and participate in elections and referendums, although, according to law, these political rights can only be exercised in the usual place of residence.

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<sup>5</sup> IACHR, *Report on Poverty and Human Rights in the Americas*, par. 397.

- Have real estate and other property left behind protected against being taken over by others and, where this has happened, to have the appropriate assets restituted at a later stage.
- Find a durable solution to their being displaced through sustainable return to the place of former habitual residence, or sustainable local integration where they had been displaced to, or in another part of the country.<sup>6</sup>

Besides the specific needs mentioned above, Kálin himself highlights other problems and vulnerabilities that IDPs face and that are not limited to them, but which may be particularly relevant in the context of internal displacement, such as the risks faced by children from being recruited into armed forces and non-State armed groups, or becoming victims of gender-based violence, among others.<sup>7</sup>

The international recognition of the IDP problem implies recognising their need for differentiated treatment due to their unique and critical characteristics. While the Guiding Principles on Internal Displacement (Guiding Principles) do not explicitly refer to the urgency to adopt a differentiated approach to IDP needs, various principles throughout this instrument mention certain population groups with specific protection needs, which require differentiated treatment through public policies and measures to eliminate the barriers they face compared to the rest of the population, and creating conditions of formal and material equality in the effective enjoyment of IDP human rights. These principles reflect protection needs of displaced persons, their rights and the State obligation to take measures considering special needs,<sup>8</sup> in particular

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<sup>6</sup> Kálin, "Internal Displacement", in *The Oxford Handbook of Refugee & Forced Migration Studies*, p. 167.

<sup>7</sup> *Id.*

<sup>8</sup> *Cf.* Cohen and Deng (eds.), *The forsaken people: case studies of the internally displaced*, p. 6 and 7.

women<sup>9</sup>, expectant mothers<sup>10</sup>, children and adolescents<sup>11</sup>, elderly persons,<sup>12</sup> persons with disabilities,<sup>13</sup> indigenous people,<sup>14</sup> and other vulnerable groups.<sup>15</sup>

In the case of Mexico, the IACHR has expressed concern about the lack of official information on the extent reached by internal displacement, which contributes to invisibility and aggravation of this problem.<sup>16</sup> In this sense, Andreas Feldmann has argued that, despite the magnitude of internal displacement in the country, it still has to produce a systematic body of knowledge about this problem.<sup>17</sup>

Although Mexico does not yet have an official registration of IDPs, the *Diagnóstico nacional sobre la situación del desplazamiento forzado interno en México* of 2021, developed by the National Population Council (CONAPO), showed that, according to 2020 Census data, 262,411 people migrated internally for criminal security or violence; 53 %, out of these, were women and 29 % were children and adolescents;<sup>18</sup> it should be noted that the 2020 Census was not designed to completely measure the problem of internal displacement, but it is an effort to approach it. On the other hand, reports published by the IACHR, the National Human Rights Commission (NHRC), as well as civil society organizations and academia, also show that displaced persons are mostly women, children and adolescents, the elderly, indigenous

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<sup>9</sup> See Guiding Principles, Principles 4.2, 7.3 d), 11.2, 18.3, 19.2, 23.3, and 23.3.

<sup>10</sup> See *Ibid.*, Principles 4.2 and 19.2.

<sup>11</sup> See *Ibid.*, Principles 4.2, 11.2 d), 23.2, and 23.4.

<sup>12</sup> See *Ibid.*, Principle 4.2.

<sup>13</sup> See *Ibid.*, Principles 4.2 and 19.1.

<sup>14</sup> See *Ibid.*, Principle 9.

<sup>15</sup> See principle of non-discrimination, *Ibid.*, Principles 4.1 and 18.

<sup>16</sup> IACHR, *The Human Rights Situation in Mexico*, pars. 287 and 296.

<sup>17</sup> Feldmann, "Internal displacement in Latin America", in *Routledge Handbook on Latin American Migration*, (pending publication).

<sup>18</sup> Cf. Romo, Segura, Villasana *et al.*, *Diagnóstico nacional sobre la situación del desplazamiento forzado interno en México*, p. 33. Available (in Spanish) at [https://www.gob.mx/cms/uploads/attachment/file/681782/Diagnostico\\_nacional\\_sobre\\_la\\_situacion\\_del\\_desplazamiento\\_forzado\\_interno.pdf](https://www.gob.mx/cms/uploads/attachment/file/681782/Diagnostico_nacional_sobre_la_situacion_del_desplazamiento_forzado_interno.pdf).

people, and peasant communities.<sup>19</sup> The IACHR has also noted how violence and mega development projects have particularly generated forced displacement of indigenous people, human rights defenders and journalists in Mexico.<sup>20</sup> The IACHR has drawn attention to the impact of natural disasters and the effects of climate change on generating new situations of internal displacement in Mexico.<sup>21</sup>

At the national level, the General Victims' Law of Mexico recognises that victims of crimes and human rights violations have specific characteristics and that, within groups of victims, there are persons at greater risk of vulnerability due to their age, gender, sexual preference or orientation, ethnicity, disability status or other reasons, such as internal displacement.<sup>22</sup> The same law establishes that authorities must adopt protection and assistance measures responding to the particularities and degree of vulnerability of groups exposed to a greater risk of violation of their rights.<sup>23</sup>

At state level, internal displacement laws from Sinaloa,<sup>24</sup> Guerrero<sup>25</sup> and Chiapas<sup>26</sup> show a clear reaffirmation of the need for a differentiated approach to addressing IDP needs, while referring to the particular vulnerability of certain

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<sup>19</sup> See, for example, figures presented in the Mexican Commission for the Defence and Promotion of Human Rights, *Episodios de desplazamiento interno forzado masivo en México* (2017, 2018, 2019, and 2020 reports); and Díaz Leal, "Internal displacement in Mexico: the debate on concepts, statistics and State responsibility", in *The New Refugees: Crime and Forced Displacement in Latin America*, p. 47-62.

<sup>20</sup> IACHR, *Situation of Human Rights in Mexico*, *quot.*, par. 286.

<sup>21</sup> See *Ibid.*, par. 286; and Organization of American States, "IACHR Expresses Solidarity with People Affected by Earthquake and Hurricanes in Countries of the Region and Urges States and the International Community to Take Steps to Address the Situation of Those Affected." Available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2017/139.asp](https://www.oas.org/en/iachr/media_center/PReleases/2017/139.asp).

<sup>22</sup> See Ley General de Víctimas, Art. 5.

<sup>23</sup> See *Id.*

<sup>24</sup> H. Congress of the Free and Sovereign State of Sinaloa.

<sup>25</sup> H. Congress of the Free and Sovereign State of Guerrero, Ley Número 487 para Prevenir y Atender el Desplazamiento Interno en el Estado de Guerrero.

<sup>26</sup> H. Congress of the Free and Sovereign State of Chiapas, Ley para la Prevención y Atención del Desplazamiento Interno del estado de Chiapas.

groups of displaced persons and recognising the obligation to prioritise their care or to take differential measures for their protection. For example, the Law of Sinaloa points out that authorities must prioritise assistance and protection of pregnant women, minors, the elderly and people with disabilities,<sup>27</sup> while the Law of Chiapas recognises that in applying the law, the most vulnerable internally displaced persons are entitled “to protection and assistance required by their condition and to treatment which takes into account their special needs.”<sup>28</sup>

According to the aforementioned, international, national and local agencies and instruments recognise specific IDP needs compared to the rest of the population, and that internally displaced population is not homogeneous and that there are groups with a higher degree of vulnerability within them. In this context, the goal of this article is to develop the right to enhanced protection to which IDPs are entitled, especially those belonging to groups considered to be most vulnerable in the context of internal displacement: women and children and adolescents, indigenous peoples, Afro-descendant communities and other ethnic groups, peasants, the elderly, persons with disabilities, LGBTIQ+, journalists and human rights, land and environmental defenders.

This chapter is divided into three sections. The first section defines the concepts of *intersectionality* and *differentiated approach*; the second section sets out the main identified risks and protection standards of groups considered as vulnerable; and finally, the third section examines how the concepts of *intersectionality* and *differentiated approaches* can be applied in assisting IDPs.

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<sup>27</sup> See Art. 5 VI of Law of Sinaloa.

<sup>28</sup> See Art. 6 of Law of Chiapas.



## II. Definitions

### 1. Intersectionality

Intersectionality *is* an approach that tries to catch the relationships between socio-cultural categories and identities;<sup>29</sup> is a theory that analyses the multidimensionality of social and cultural categories, and how they intervene in human relations.<sup>30</sup> The concept of *intersectionality* was coined in 1989 by African-American lawyer Kimberlé Crenshaw, who proposed intersectionality as a response to the invisible role of gender in the analysis of racial violence in the United States.<sup>31</sup>

Intersectionality is based on the idea that people live multiple, layered identities derived from social relations, history and the operation of structures of power. People are members of more than one community at the same time, and can simultaneously experience oppression and privilege.<sup>32</sup> From this approach, the term *intersectional discrimination* emerges, which *is* shaped when two or more grounds of discrimination interact simultaneously and inseparably; therefore, intersectionality becomes a tool that allows a comprehensive analysis of the multiple causes that can lead to discrimination in particularly vulnerable groups,<sup>33</sup> such as women, children and adolescents, LGBTIQ+, indigenous people, the elderly, people with disabilities, and other vulnerable groups.

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<sup>29</sup> Knudsen, “Intersectionality - A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks”, in *Caught in the Web or Lost in the Textbook?*, p. 61-76.

<sup>30</sup> Center for Intersectional Justice and European Network Against Racism, *Intersectional discrimination in Europe: relevance, challenges and ways forward*, p. 5. Available at [https://www.intersectionaljustice.org/img/intersectionality-report-FINAL\\_yizq4j.pdf](https://www.intersectionaljustice.org/img/intersectionality-report-FINAL_yizq4j.pdf).

<sup>31</sup> Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, in *Critical Race Theory. The Key Writings That Formed the Movement*.

<sup>32</sup> AWID, “Intersectionality: A Tool for Gender and Economic Justice”, in *Women’s Rights and Economic Change*. Available at [https://www.awid.org/sites/default/files/atoms/files/intersectionality\\_a\\_tool\\_for\\_gender\\_and\\_economic\\_justice.pdf](https://www.awid.org/sites/default/files/atoms/files/intersectionality_a_tool_for_gender_and_economic_justice.pdf).

<sup>33</sup> Cf. Parra Vera and Franco Franco, “El enfoque de interseccionalidad en la protección judicial contra la discriminación: alcances y desafíos del giro en la jurisprudencia interamericana”, in *Anuario de Derecho Constitucional Latinoamericano*, especialmente p. 603-616.

By recognising the special nature of discrimination that individuals may face in certain contexts, the application of an intersectional approach helps to analyse legal omissions and specific inequalities, and to identify how different categories of discrimination converge.<sup>34</sup> This is based on, as Crenshaw states, how intersectional analysis shows compound experiences of discrimination due to the multiple conditions of inequality to which the same person may be exposed due to the historical context.<sup>35</sup>

Intersectionality, besides being a legal term, is an approach that analyses the phenomenon of discrimination from the study of social structures and institutions, and historical facts. It cannot be confused with a joint analysis of several individual forms of discrimination;<sup>36</sup> what intersectionality really proposes is a compound analysis of discrimination which makes it possible to understand how the same discriminatory category affects each individual differently due to their characteristics, special conditions and context.<sup>37</sup>

One of the first international bodies to pronounce on intersectionality was the Committee on the Elimination of Racial Discrimination. Since 2000, the Committee noted that racial discrimination does not always affect women and men equally, but that there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination can escape detection if

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<sup>34</sup> Viveros Vigoya, “La interseccionalidad: una aproximación situada a la dominación,” in *Debate Feminista*, p. 5, quoting Crenshaw, “Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics,” in *Feminist Legal Theory*. Available (in Spanish) at <https://www.sciencedirect.com/science/article/pii/S0188947816300603>.

<sup>35</sup> See UNWOMEN, “Intersectional feminism: what it means and why it matters right now.” Available at <https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters>.

<sup>36</sup> Cf. Center for Intersectional Justice and European Network Against Racism, *op. cit.*, p. 19, 20 and 35.

<sup>37</sup> Cf. Jubany, Güell and Davis, “Standing up to Intersectional Discrimination: a Multi-dimensional Approach to the Case of Spain”, in *Droit et Cultures*, 62, par. 17-20. Available at <https://journals.openedition.org/droitcultures/2752>.

there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.<sup>38</sup>

In the inter-American sphere, the development of intersectionality took place for several years within the jurisprudence of the IACHR. On the one hand, in the Advisory Opinion OC-4/84, the Court already stated that persons belonging to certain social groups may face specific vulnerability situations because of the inferiority conception to which they were subjected.<sup>39</sup> However, it was until the case of the girl *Gonzales Lluy et al. v. Ecuador* that the IACHR found that numerous factors of vulnerability and risk of discrimination intersected, which were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different.<sup>40</sup>

In this landmark decision, Judge Eduardo Ferrer Mac-Gregor,<sup>41</sup> through a concurring opinion, defined intersectionality as the “meeting or *simultaneous concurrence* of different reasons for discrimination”<sup>42</sup> (own translation), which results in unique damage. Following this reasoning, Judge Eduardo Ferrer Mac-Gregor identified that, in order to make an intersectional analysis, it is necessary to carry out (i) an inseparable analysis of discrimination factors, and

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<sup>38</sup> Cf. Committee on the Elimination of Racial Discrimination, General Recommendation No. 25. *Gender Related Dimensions of Racial Discrimination*, par. 1.

<sup>39</sup> IACHR, Advisory Opinion OC-4/84, par. 55.

<sup>40</sup> IACHR, *Case of Gonzales Lluy et al. v. Ecuador*, par. 290.

<sup>41</sup> Judges Roberto F. Caldas and Manuel E. Ventura Robles joined the vote of Judge Eduardo Ferrer Mac-Gregor Poisot.

<sup>42</sup> Inter-American Court of Human Rights, *Case of Gonzales Lluy...* quot., concurring opinion of Judge Eduardo Mac-Gregor, par. 10.

(ii) a qualitative study of the specific consequences suffered by subjects in which several causes of discrimination interact.<sup>43</sup>

In this sense, intersectionality makes it possible to verify when there is a category of discrimination with a special nature due to the intersection of several grounds of discrimination.<sup>44</sup> From these analyses, the IACHR has managed to draw attention to differentiated impacts of certain State omissions or actions on the rights of vulnerable groups, such as women in poverty and pregnant women with HIV,<sup>45</sup> girls victims of sexual violence,<sup>46</sup> trans women<sup>47</sup> and people in poverty.<sup>48</sup>

In the case of displaced persons, the Constitutional Court of Colombia has stressed that intersectionality between gender identity, sexual orientation, ethnicity, age, disability and other factors may increase the risks faced by persons in the context of internal displacement.<sup>49</sup> After recognising these particular risks, the Constitutional Court has instructed national and territorial authorities to take concrete actions that adequately respond to the intersectionality between factors of discrimination, and to articulate in their response the differentiated approaches to assisting IDPs.<sup>50</sup>

As stated above, intersectionality can be considered as a legal methodology for interpreting the phenomenon of discrimination. In turn, it is an approach that helps to analyse social problems shaping certain types or levels of

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<sup>43</sup> *Ibid.*, par. 11.

<sup>44</sup> *Cf.* IACHR, *Ramírez Escobar et al. v. Guatemala*, pars. 276 and 304; *Case of IV v. Bolivia*, par. 321.

<sup>45</sup> *Cf.* IACHR, *Case of Cuscul Pivaral et al. v. Guatemala*, par. 138.

<sup>46</sup> *Cf.* IACHR, *V.R.P, V.P.C. et al. v. Nicaragua*, par. 159.

<sup>47</sup> *Cf.* IACHR, *Case of Vicky Hernández et al. v. Honduras*, par. 135.

<sup>48</sup> *Cf.* IACHR, *Case of Miskito Divers (Lemoth Morris et al.) v. Honduras*, par. 107; *Case of the Workers of the Fireworks Factory in Santo Antonio De Jesus and their Families v. Brazil*, par. 197.

<sup>49</sup> See Constitutional Court of Colombia, 2012 order No. 173.

<sup>50</sup> See *Id.*

discrimination, and it is a legal tool to adopt measures ensuring material equality of vulnerable and historically excluded groups.<sup>51</sup>

## 2. Differentiated Approach

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the differentiated approach has two dimensions, while

it is both an analysis method and a guide to action. In the first case, it employs a reading of the reality planning to make visible the forms of discrimination against those groups or inhabitants considered different by one majority or by a hegemonic group. In the second case, it considers this analysis to provide adequate care and protection of the rights of the population.<sup>52</sup>

Incorporating the differentiated approach into State public policies ensures adequate care and protection of displaced persons as regards material equality and comprehensive reparation.

In developing the concept of a *differentiated approach*, different categories have been established:

- Age: it allows recognising the specific and differentiated needs due to the age of the person, especially children and adolescents or elderly people.<sup>53</sup>
- Disability: it recognises the different forms of victimization that a person with disabilities may suffer because of stigmatization due to their physical, sensory, cognitive and psychosocial limitations; and it

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<sup>51</sup> See IACHR, *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, separate opinion of Judge Eduardo Ferrer Mac-Gregor, pars. 51-60.

<sup>52</sup> OHCHR, Newsletter. *¿Qué es el enfoque diferencial?*

<sup>53</sup> IACHR, Advisory Opinion OC-21/14, par. 179; Constitutional Court of Colombia, Order 251 of 2008; and Constitutional Court of Colombia, Order 756 of 2018.

makes visible the link between disability status and the phenomenon of armed conflict as a risk factor in victimization.<sup>54</sup>

- Ethnic: it addresses in a differentiated way the effects of violence and inequality on ethnic groups from an analysis considering the uniqueness and diversity of the identities of these communities.<sup>55</sup>
- Gender: it allows addressing and transforming the position of inequality, subordination and structural inequity to which women, children and adolescents are subjected in comparison with men as regards gender. It is also a tool to fight discrimination and violence against people with diverse sexual orientation and gender identity.<sup>56</sup>
- Sexual diversity: the approach recognising “all choices that persons have to assume, express, and live their sexuality as well as to assume sexual and gender expressions, preferences, or orientations” (own translation.)<sup>57</sup>

### III. Particular Risks and Vulnerabilities to Internal Displacement: Enhanced Protection of Particularly Vulnerable Groups

#### 1. Women and Girls

Principle 4 of the Guiding Principles states that expectant mothers, mothers with young children, female heads of household or persons with disabilities

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<sup>54</sup> National Centre for Historical Memory, *Enfoque diferencial de discapacidad*. Available (in Spanish) at <https://centrodememoriahistorica.gov.co/enfoque-diferencial-de-discapacidad/>.

<sup>55</sup> See OHCHR, *op. cit.*

<sup>56</sup> IACHR, *Guía práctica para la eliminación de la violencia y discriminación contra mujeres, niñas y adolescentes*, p. 7; Organization of American States (OAS), *Handbook on mainstreaming gender equality into the OAS project cycle*, p. 12.

<sup>57</sup> National Council to Prevent Discrimination, *Guía para la acción pública: contra la homofobia*, López Castañeda, *Diversidad sexual y derechos humanos*, p. 3.

shall be entitled to protection and assistance required by their condition.<sup>58</sup> In addition, Principle 11.2 provides that women must be protected from gender-specific violence and sexual violence, and Principle 19 states that authorities must pay special attention to the medical needs of women, including “appropriate counselling for victims of sexual and other abuses.”

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has defined discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women (...), on a basis of equality of men and women.”<sup>59</sup> According to the CEDAW, the prohibition of discrimination against women is a principle of Customary International Law and includes gender-based violence.<sup>60</sup>

At the regional level, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also known as the Convention of Belém do Para, establishes a legal framework aimed at protecting women from all forms of gender-based violence, and sets forth in its Article 1 that it should be understood as any “act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere;” furthermore, this instrument addresses the specific needs of women affected by forced displacement, since its Article 9 provides that, in the effort to adopt measures to eradicate violence against women, States shall take special account of vulnerability of women by reason of multiple causes, including displacement.

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<sup>58</sup> Cf. Guiding Principles, Principle 4.

<sup>59</sup> CEDAW, Art. 1.

<sup>60</sup> Cf. CEDAW Committee, General Recommendation No. 38, *on trafficking in women and girls in the context of global migration*, CEDAW/C/GC/38, par. 10, quoting General Recommendation No. 19 (General Comments), *violence against women*, and General Recommendation No. 35 *on gender-based violence against women, updating General Recommendation No. 19*, Doc. UN CEDAW/C/GC/35.

Furthermore, the IACHR has stated that certain acts of violence disproportionately affect women because many human rights violations specifically target this population,<sup>61</sup> that is why this court has determined that women may suffer from acts of discrimination not only on the basis of gender, but also because of the existence of several factors of vulnerability that converge with each other.<sup>62</sup>

In the face of gender-based violence, it is important to note that, at the national level, the Supreme Court of Justice of the Nation of Mexico (SCJN) determined that all jurisdictional bodies must provide justice with gender perspective; this implies that the judicial authorities have an obligation to identify whether there is an imbalance of power a regards gender in each case, and, if the situation of gender disadvantage is identified, authorities shall “question the neutrality of applicable law, as well as assess the differentiated impact of the proposed solution in order to seek a fair and equal resolution in accordance with the context of gender inequality” (own translation.)<sup>63</sup>

The IACHR has reaffirmed that girls and women suffer an “special impact” in the context of displacement, due to the radical and traumatic changes that forced displacement entails and are aggravated by increased exposure to violence and discrimination based on their gender.<sup>64</sup>

Similarly, the United Nations Organization (UN) has stressed that the risk faced by women and girls during displacement increases dramatically; in addition, the UN Special Rapporteur on violence against women, Rashida Manjoo, emphasised that women escape from multiple human rights violations, but usually settle in places of destination where conditions of insecurity and

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<sup>61</sup> IACHR, *Miguel Castro Castro Prison v. Peru*, par. 223.

<sup>62</sup> IACHR, *Case IV v. Bolivia*, pars. 247 and 318.

<sup>63</sup> SCJN, Tesis 1a./J. 22/2016 (10a.), *Acceso a la justicia en condiciones de igualdad. Elementos para juzgar con perspectiva de género*. Available (in Spanish) at <https://sjf2.scjn.gob.mx/detalle/tesis/2011430>.

<sup>64</sup> Cf. IACHR, *Violence and Discrimination against Women...* quot., pars. 70, 76 and 77.



violence similar to those of the place of origin develop, and these are aggravated by a high level of impunity.<sup>65</sup>

Both the IACHR and the CEDAW Committee have established that cases of gender-based violence are aggravated in the context of forced displacement.<sup>66</sup> In particular, the CEDAW Committee has stated that displacement has very specific dimensions of gender-based violence that depend on the cycle in which this phenomenon develops,<sup>67</sup> which must be considered by the States when taking the protection measures required by women and girls, since contexts such as displacement “help to create and to maintain an inter- and intra-gender hierarchy, in which women’s capacity to act is constrained by forces that increase their vulnerability to violence.”<sup>68</sup>

In the case of Mexico, the Mexican Commission for the Defence and Promotion of Human Rights (CMDPDH) has identified that women and girls are exposed to sexual violence, forced marriages, disappearance and other forms of gender-based violence during the various phases of displacement.<sup>69</sup>

Regarding forced displacement of women and girls, the Constitutional Court of Colombia, by Order 092 of 2008, used the term *gender facets of internal displacement* to identify human rights violations suffered by women displaced by their gender. In total, the Constitutional Court noted that there are at least 12 facets of gender in internal displacement related to structures of patriarchal discrimination, elements that are pre-existing to displacement but are

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<sup>65</sup> OHCHR, “Eliminate violence against internally displaced women and girls, say UN Experts. Violence against displaced women.” Available in <https://www.ohchr.org/en/press-releases/2014/11/eliminate-violence-against-internally-displaced-women-and-girls-say-un>.

<sup>66</sup> Cf. IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, par. 76; and CEDAW Committee, General Recommendation No. 35, *quot.*, par. 14.

<sup>67</sup> Cf. CEDAW Committee, General Recommendation No. 38, *quot.*, par. 25.

<sup>68</sup> Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/17/26, par. 78.

<sup>69</sup> Cf. CMDPDH, *Episodios de desplazamiento interno forzado masivo en México. Report 2020*, p. 22.

“enhanced and affected by it” (own translation.)<sup>70</sup> Among these gender facets, the Constitutional Court identified the following:

- Violence and sexual abuse.
- Intrafamilial and community gender-based violence.
- Violation of their health, sexual and reproductive rights.
- Assumption of the role of head of household in conditions that served against human dignity, especially in the case of elderly women, disabled women, and women with health problems or women with minors in their care.
- Aggravated obstacles preventing access to education.
- Aggravated obstacles to access employment or productive opportunities.
- Domestic and labour exploitation.
- Lack of access to land ownership rights and return and resettlement plans.
- Intensification of gender discrimination in the case of indigenous and Afro-descendant women.
- Intensification of violence against women leaders.
- Discrimination and obstacles to access public and political spaces of participation.
- Lack of knowledge regarding their rights as victims.<sup>71</sup>

According to the Constitutional Court of Colombia, the facets of gender in displacement also include “specific problems of displaced women, as a result of the combination of the vulnerability factors they bear, which affect neither not displaced women nor displaced men” (own translation.)<sup>72</sup> In total, five specific problems were identified:

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<sup>70</sup> Constitutional Court of Colombia, Order 092 of 2008.

<sup>71</sup> See *Id.*

<sup>72</sup> *Id.*

- Absence of psychosocial care and support mechanisms that respond to the specific needs of displaced women.
- Difficulty in accessing the registration of displaced persons.
- Absence of trained officers to care for displaced women.
- A “family” approach to the care system, which allows the exclusion of care programmes for women who are not mothers or heads of household.
- The refusal to extend humanitarian assistance.<sup>73</sup>

In this sense, the Counsel for Human Rights of Guatemala has identified gender-based and sexual violence as not only one of the sufferings women and girls face in the context of forced displacement, but also as “a risk factor causing internal forced displacement” (own translation.)<sup>74</sup> In addition, women and girls must face the invisibility of multiple violations of their rights due to the lack of registration and protection measures, which creates barriers to access justice for these victimising acts.<sup>75</sup>

It is therefore imperative that the State adopts comprehensive measures and strategies to address the specific needs of women and girls in the context of forced displacement and to address the “multiplicity of forms of violence against women.”<sup>76</sup> For this reason, the IACHR has determined that, in response to gender-based violence, States must (i) promptly create and implement a legal framework for the protection of women and girls, (ii) implement a strategy of prevention of violence against women based on capacity building and (iii) guarantee women and girls the enjoyment of the rights considered in the

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<sup>73</sup> See *Id.*

<sup>74</sup> Counsel for Human Rights, Instituto de Investigación y Proyección de las Dinámicas Globales and Rafael Landívar University, *Un éxodo que no se nombra. Aproximaciones al desplazamiento forzado interno por violencia en Guatemala (2010-2019)*, p. 34-35.

<sup>75</sup> See *Id.*

<sup>76</sup> Human Rights Council, Report of the Special Rapporteur on violence against women... *quot.*, par. 49; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, *A/HRC/22/53*, par. 48.

American Convention on Human Rights (ACHR) as a reinforced obligation due to their vulnerability.<sup>77</sup>

## 2. Children and Adolescents

The Guiding Principles establish that States should provide protection and special attention to children and adolescents, especially *unaccompanied* children.<sup>78</sup> These principles provide that children and adolescents should be particularly protected against sexual violence and exploitation, torture, cruel and inhuman treatment, slavery and forced labour and recruitment.<sup>79</sup>

The Guiding Principles also establish the right of displaced children and adolescents to receive free education that respects their cultural identity, language and religion. In addition, they point out that authorities must take appropriate measures to achieve family reunification, especially those with children and adolescents.<sup>80</sup>

The special protection of children and adolescents in the context of displacement relates to the rights of children recognised worldwide, especially the principle of the best interests of children,<sup>81</sup> which is recognised in Article 19 of the ACHR<sup>82</sup> and broadly developed in the Convention on the Rights of the Child,<sup>83</sup> and is expressly recognised in Mexican law,<sup>84</sup> in the

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<sup>77</sup> IACHR, *González et al. ("Cotton field") v. Mexico*, par. 258.

<sup>78</sup> *Cf.* Guiding Principles, Principles 4, 13, 17 and 23.

<sup>79</sup> See *Ibid.*, Principles 11. 2 and 13.1

<sup>80</sup> See *Ibid.*, Principle 17.3.

<sup>81</sup> See Human Rights Council, Report of Special Rapporteur on the Human Rights of Internally Displaced Persons, A/74/261, par. 8; Nunes, "Protection of Internally Displaced Children and the Guiding Principles of Internally Displaced Persons," in *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead*, p. 421-424.

<sup>82</sup> *Cf.* IACHR, Advisory Opinion OC-17/2002, *Status and Human Rights of the Child*, pars. 56-61.

<sup>83</sup> *Cf.* Committee on the Rights of the Child, General Comment No. 14 *on the right of the child to have his or her best interests taken as a primary consideration*, Article 3, par. 1.

<sup>84</sup> See Chamber of Deputies of the H. Congress of the Union, General Law on the Rights of Children and Adolescents; President of the United Mexican States, Regulation of the General Law on the Rights of Children and Adolescents; and SCJN, *Protocol to Judge with the Childhood and Adolescence*

General Law on the Rights of Children and Adolescents<sup>85</sup> as in Article 4 of the Political Constitution of the United Mexican States, which provides:

All decisions and actions of the State shall ensure and comply with the principle of the best interests of children, fully guaranteeing their rights. Children have the right to fulfilling their food, health, education and healthy leisure needs for their comprehensive development. This principle should guide the design, implementation, monitoring and evaluation of public policies for children.

According to the above, the principle of the best interests of children requires that, in any case where a decision is taken that affects the rights of children and adolescents, authorities should include in their analysis the possible impact the decision has on the rights of children and adolescents, to whom they should ensure their participation in decision-making.<sup>86</sup> The SCJN has argued that the principle of the best interests requires authorities to perform

a systematic interpretation which, in order to give meaning to the rule in question, takes into account the duties of protection of minors and their special rights under the Constitution, international treaties and laws protecting children. In the case of legislative or administrative measures affecting the rights of minors, the best interests of the child require jurisdictional bodies to carry out much stricter scrutiny in relation to the necessity and proportionality of the measure in question.<sup>87</sup>

Similarly, in the case of migrant children and adolescents, the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasised that, in

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*Perspective.*

<sup>85</sup> Cf. General Law on the Rights of Children and Adolescents, Articles 1, 2 and 3; and SCJN, Direct Amparo in Review 1187/2010.

<sup>86</sup> Cf. Convention on the Rights of the Child, Articles 3 and 12, par. 1; and General Law on the Rights of Children and Adolescents, Articles 2 and 13.V.

<sup>87</sup> SCJN. Tesis 1a./J. 18/2014 (10a.), *Interés superior del Niño. Función en el ámbito jurisdiccional*. Available (in Spanish) at <https://sjf2.scjn.gob.mx/detalle/tesis/2006011>.

order to realise the best interests of children, authorities must analyse in each case the vulnerability circumstances of each child or adolescent or group of children and adolescents, for example, age, gender, membership of ethnic or minority groups, social and cultural context.<sup>88</sup>

For its part, the IACHR has noted that forced displacement increases the vulnerability of children and adolescents, who belong to one of the groups “least prepared to adapt or respond to said situation and, sadly, it is they who suffer its abuse in a disproportionate manner.”<sup>89</sup> In this regard, the UN Special Rapporteur on the Human Rights of Internally Displaced Persons has stated that displaced children and adolescents are more vulnerable because of multiple factors involving this phenomenon;<sup>90</sup> and that this situation is largely due to the loss of their protective environments: their family and community.<sup>91</sup>

The IACHR has also observed that displaced children and adolescents may be forced to be responsible for the care of their younger siblings, lose their identity and become part of a different culture;<sup>92</sup> be recruited by paramilitary, drug trafficking or guerrilla groups;<sup>93</sup> be victims of sexual violence; suffer from malnutrition; have limited access to educational services; and live in precarious conditions.<sup>94</sup>

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<sup>88</sup> Cf. Joint General Comment No. 3 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on *general principles regarding the human rights of children in the context of international migration*, pars. 31 and 32, subsection a.

<sup>89</sup> IACHR, *Santo Domingo Massacre v. Colombia Colombia*, par. 239; “*Mapiripán Massacre*” v. *Colombia Colombia*, pars. 155 and 156.

<sup>90</sup> Cf. Human Rights Council, Report of Special Rapporteur on the Human Rights of Internally Displaced Persons... quot., pars. 14, 35, 36, 43, 45, 48, 50 and 61.

<sup>91</sup> Cf. *Ibid.*, pars. 35 and 36.

<sup>92</sup> IACHR, *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guatemala*, par. 202.

<sup>93</sup> See IACHR, “*Mapiripán Massacre*”... quot. par. 175.

<sup>94</sup> See IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 330.

In the case of *Alvarado Espinoza et al. v. Mexico*, the IACHR highlighted the impact of forced internal displacement on the Alvarado family, as well as on the lives and integrity of each member, including many children, particularly, because they had to move from their places of origin and disintegrate as a family, without the State providing them with decent and safe conditions for their return or relocation.<sup>95</sup> At the national level, NHRC has established that forced internal displacement greatly affects children and adolescents, representing a large part of the population affected by this problem, and “a significant presence of minors under the age of 12 was documented, and in many cases breastfeeding children.”<sup>96</sup> In addition, NHRC has stressed the importance of serving children and adolescents that have been forced to remain in abandoned communities,<sup>97</sup> and has highlighted the particular impact of displacement on the exercise of the right to education, mainly due to the absence of identification documents and barriers to access medical and psychological care.<sup>98</sup>

Regarding the right to education, the General Law on the Rights of Children and Adolescents states that authorities are obliged to take affirmative action to ensure education access for all children and adolescents, especially for those facing specific vulnerability situations.<sup>99</sup> Specifically, regarding displaced children, the Committee on Economic, Social and Cultural Rights has determined that all children, including undocumented ones, have the right to access education; the exercise of this right cannot be undermined due to being an IDP.<sup>100</sup>

<sup>95</sup> IACHR, *Alvarado Espinoza et al. v. México*, pars. 281-284.

<sup>96</sup> NHRC, *Special Report on Internal Forced Displacement in Mexico*, pars. 209 and 211.

<sup>97</sup> *Cf. Ibid.*, par. 548.

<sup>98</sup> *Cf. Ibid.*, pars. 400 and 410.

<sup>99</sup> General Law on the Rights of Children and Adolescents, Art. 57.

<sup>100</sup> Committee on Economic, Social and Cultural Rights, General Comment 20 of 2009, *Non-discrimination and economic, social and cultural rights (Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights)*, par. 34.

In Colombia, the Constitutional Court, through Order 251 of 2008, specifically developed different ways in which forced displacement violates children and adolescents' rights. First, it establishes the impacts that babies and children may have:

- Vulnerability of babies and children due to the temporary or definitive absence of their relatives and adult caregivers.
- Lack of appropriate, adequate and regular nutrition, that particularly affects children under six.
- Prevalence of preventable diseases arising from unhealthy conditions and poor nutrition.
- Lack of access to education and recreation.<sup>101</sup>

Secondly, the Constitutional Court analysed the violations aspects in adolescents:

- Differential impact on adolescents of increasing risks of domestic violence, sexual violence, trafficking in persons, sexual exploitation, forced recruitment by illegal armed actors.
- Lack of access to nutrition in children and adolescents due to the belief that they can obtain their own food.
- Invisibility of adolescents' needs who must become the head of the household.
- Barriers in education access and aggravation of drop-out rates.
- Lack of psychosocial care for children and adolescents affected by the forced displacement changes.
- Lack of recreation, socialization and participation spaces.<sup>102</sup>

Finally, the Constitutional Court of Colombia has concluded that authorities often impress minors' situation in cases of displacement, generating inadequate State action to respond to this problem. Because of this, it has highlighted the

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<sup>101</sup> See Constitutional Court of Colombia, order 251 of 2008.

<sup>102</sup> *Id.*



urgency of implementing an age-based approach in public policy that addresses the differential way in which displacement affects this population group.<sup>103</sup>

In Guatemala, some of the main identified violations to which displaced children and adolescents are exposed are these: malnutrition, stigmatization due to their displaced persons status, post-traumatic stress and anxiety, barriers to access their right to education and forced evictions from areas where they have settled.<sup>104</sup>

Considering all this, it is pertinent to outline some recommendations that the State could implement to address the specific needs of children and adolescents victims of displacement:

- Take measures to place children and adolescents in safe protection environments, considering their age and the possibility of finding adult caregivers from their household.
- Take action to ensure access to appropriate, adequate and regular nutrition in accordance with their nutritional requirements.
- Implement measures that allow access to health.
- Ensure education access in accordance with principles of equity and equality.
- Establish special care mechanisms and routes to prevent cases of sexual violence or other specific forms of violence.
- Take action to enable children and adolescents to actively participate in decisions made to resolve displacement problem.

### 3. LGBTIQ + persons

Within internal displacement framework, Guiding Principles state that all displaced persons -including LGBTIQ+ ones- have the right to access and enjoy

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<sup>103</sup> *Id.*

<sup>104</sup> Counsel for Human Rights, Instituto de Investigación y Proyección de las Dinámicas Globales and Rafael Landívar University, *op. cit.*, p. 68-70.

rights and freedoms without discrimination. At international level, *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*- the Yogyakarta Principles- enshrine States duty to promote and guarantee the human rights of all persons, regardless of their sexual orientation or gender identity.<sup>105</sup> In addition, the Yogyakarta Principles +10 recognised, in the recitals, that LGBTIQ+ people face an increased risk of violations of their rights due to their orientation and identity.<sup>106</sup>

The IACHR has repeatedly established that Article 1.1 of ACHR, that prohibits discrimination, in the clause “any other social condition”, includes the category that prohibits discrimination by reasons of a person’s sexual orientation or gender identity.<sup>107</sup> In addition, the IACHR has determined that any act limiting or restricting a person’s rights constitutes discrimination if implicitly or explicitly justified in sexual orientation.<sup>108</sup>

The inter-American court has also emphasised that sexual minorities are in a particularly vulnerable situation, as they have suffered structural and historical discrimination.<sup>109</sup> Because of this, States must take the necessary measures to eradicate violence against this population. In addition, the IACHR has analysed, through an intersectional approach, how a person’s vulnerability due to their sexual orientation is exacerbated by the confluence of other discrimination factors, and therefore, it states that this generates a single discriminatory category due to the intersection of multiple vulnerability factors.<sup>110</sup>

For its part, Article 1 of Political Constitution of Mexico prohibits discrimination based on a person’s gender or sexual preferences. This has been

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<sup>105</sup> Yogyakarta Principles, Principles 1.c and 1.

<sup>106</sup> Yogyakarta Principles, +10, p. 7.

<sup>107</sup> Cf. IACHR, Advisory Opinion OC-24/17; pars. 68-78; *Atala Riffo and daughters v. Chile*, pars. 84, 85 and 91; *Duque v. Colombia*, pars. 104 and 105; *Flor Freire v. Ecuador*, par. 118.

<sup>108</sup> IACHR, *Atala Riffo... quot.*, par. 94.

<sup>109</sup> Cf. *Ibid.*, pars. 92 and 267.

<sup>110</sup> IACHR, *Ramírez Escobar et al... quot.*, pars. 275 and 276.

ratified by the Federal Act to Prevent and Eliminate Discrimination in its Articles 1 and 9 and sanctioned by the Federal Criminal Code in Article 149 TER, that considers discrimination based on sexual preferences as a crime against people's dignity.<sup>111</sup> Considering this, it is pertinent to note that:

Of 32 federal states, 30 consider anti-discrimination clauses in their state constitutions (Aguascalientes and Tamaulipas do not have these clauses). However, Baja California, Guerrero and Tabasco do not expressly refer to sexual orientation, nor to gender identity and expression as an aspect to prohibit discrimination. Most constitutions explicitly refer to discrimination prohibition on the basis of "sexual preference" (own translation.)<sup>112</sup>

At regional level, Guatemala makes it possible to analyse the differentiated impact of forced displacement on LGBTIQ+ people, especially since these people are forced to move because of the increase in acts of discrimination and stigmatization that prevent them from accessing basic services and labour sector, as well as the rising of domestic and community violence they suffer due to their sexual orientation, gender identity and gender expression.<sup>113</sup> In addition, the Counsel for Human Rights of Guatemala mentions that LGBTIQ+ displaced persons claim to be victims of multiple acts of discrimination, such as the inability to file complaints about civil servants' prejudice, denial of health services, among others.<sup>114</sup>

In addition, in El Salvador, it has also been documented that LGBTIQ+ internally displaced persons are victims of some form of discrimination or violence by their neighbours, authorities and gangs.<sup>115</sup> Reported discrimination

<sup>111</sup> Federal Criminal Code, Art. 149 TER.

<sup>112</sup> NHRC, *Informe especial sobre la situación de los derechos humanos de las personas lesbianas, gay, bisexuales, travestis, transgénero, transexuales e intersexuales (LGBTI) en México, resumen ejecutivo*, p. 22-23.

<sup>113</sup> Cf. Counsel for Human Rights, Instituto de Investigación y Proyección de las Dinámicas Globales and Rafael Landívar University, *op. cit.*, p. 46.

<sup>114</sup> Cf. *Ibid.*, p. 71.

<sup>115</sup> Cf. Asociación Comunicando y Capacitando a Mujeres Trans con VIH (COMCAVIS TRANS),

acts range from insults to extortions, beatings, sexual violence, death threats and targeted homicides.<sup>116</sup>

UNHCR has mentioned that the vulnerability situation because of discrimination faced by LGBTIQ+ people is aggravated in forced displacement context, “where the nature of the discrimination they encounter can be particularly virulent, their isolation from family and community profound, and the harm inflicted on them severe”<sup>117</sup> since a composite or multidimensional discrimination involving reasons additional to sexual orientation, such as age, ethnicity, educational level, disability or other reason, may occur.<sup>118</sup>

Similarly, the IACHR and UNHCR have recognised that discrimination based on sexual orientation and gender identity, apart from the interrelationship of this discrimination with other causes, such as xenophobia, violence, lack of access to basic services, poverty, among others, are among forced displacement causes.<sup>119</sup> These signs of discrimination are also experienced by LGBTIQ+ displaced persons in their new places of residence.<sup>120</sup> For example, the IACHR has observed that LGBTIQ+ internally displaced persons are selectively targeted by armed groups for their sexual orientation, gender identity and gender expression.<sup>121</sup>

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*Estudio sobre el desplazamiento forzado interno de la población LGBTI en El Salvador*, p. 18 et seq.

<sup>116</sup> *Id.*

<sup>117</sup> UNHCR, *UNHCR Policy on Age, Gender and Diversity*, p. 19. Available at <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5bb628ea4&skip=0&query=age+gender+policy>.

<sup>118</sup> Cf. UNHCR, *LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions. Discussion Paper -Prepared for a UNHCR-UN IE SOGI Global Roundtable on Protection and Solutions for Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in Forced Displacement*, pars. 3 and 32.

<sup>119</sup> Cf. *Ibid.*, p. 36; IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, par. 376.

<sup>120</sup> Cf. UNHCR, *Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons in Forced Displacement*, p. 4.

<sup>121</sup> Cf. IACHR, *Violence against Lesbian... quot.*, par. 296.

Because of all this, the IACHR has recommended that States:

- take measures to protect this population from stigma and violence based on gender or sexual orientation
- implement actions to prevent torture, murder or sexual exploitation of this community
- train state authorities responsible for assisting LGBTIQ+ displaced persons
- take measures to improve access to basic services, housing and employment rights for LGBTIQ+ people<sup>122</sup>

The measures taken by the State to address the needs of LGBTIQ+ displaced persons should not only respond to structural vulnerability aggravated in displacement contexts, but also understand the intersectionality of this phenomenon with other discrimination factors, since it is a minority group that requires measures to break the exclusion and poverty cycle making its members more vulnerable to acts of violence.<sup>123</sup>

#### 4. Indigenous peoples and other groups with a special dependency on their lands and territories

Principle 9 of the Guiding Principles states 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.”

At international level, Convention No. 169 of the General Conference of the International Labour Organization (ILO) states that indigenous peoples must not be forcibly displaced from the lands they occupy, since they have an

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<sup>122</sup> Cf. *Ibid.*, pars. 290-293.

<sup>123</sup> Cf. *Ibid.*, pars. 285 and 371.

ancestral relationship with their lands.<sup>124</sup> Similarly, the United Nations Declaration on the Rights of Indigenous Peoples enshrines that indigenous peoples should not be discriminated against on the basis of their origin and establishes a prohibition of forced displacement against these communities.<sup>125</sup>

Considering all this, the IACHR has developed a broad jurisprudential line on the special protection of indigenous communities under the particularities and social characteristics that make them especially vulnerable,<sup>126</sup> determining that the social position they hold states the duty of States to guarantee the indigenous people's rights to remain in their territories because of communal ownership over their lands.<sup>127</sup>

The IACHR has understood that the indigenous people's internal displacement constitutes a violation against the "close relationship of indigenous peoples with the land (...) acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations."<sup>128</sup> Because of this, in the case of indigenous communities, displacement also affects the historical and ancestral identity of the individual.<sup>129</sup> Therefore, during the study of cases in which indigenous communities forcibly moved, the IACHR determined that, in these contexts, the impact on rights should be analysed in terms of the connection between people in the community and their territory,<sup>130</sup> in order to adopt effective protection measures to address their situations.<sup>131</sup>

With order 004 of 2009, the Constitutional Court of Colombia has determined that forced displacement in the case of ethnic peoples has a two-dimensional

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<sup>124</sup> Cf. ILO, Convention 169, Art. 16.

<sup>125</sup> Cf. UN, *United Nations Declaration on the Rights of Indigenous Peoples*, Arts. 2 and 10.

<sup>126</sup> Cf. IACHR, *Saramaka People v. Suriname*, par. 178; *Sawhoyamaya Indigenous Community v. Paraguay*, par. 83.

<sup>127</sup> Cf. IACHR, *Saramaka People... quot.*, par. 178.

<sup>128</sup> IACHR, *Yakye Axa Indigenous Community v. Paraguay*, par. 131.

<sup>129</sup> Cf. *Ibid.*, pars. 147, 154, 203 and 216.

<sup>130</sup> Cf. IACHR, *Moiwana Community v. Suriname*, par. 195.

<sup>131</sup> Cf. IACHR, *Massacres of Río Negro v. Guatemala*, par. 177.

impact: on the one hand, the individual dimension, which concerns damage to the person; and on the other, the collective dimension, which refers to the impact on the rights to autonomy, identity and territory as an entire ethnic group. Both dimensions are intertwined and connected, and depend on the specific situation and characteristics of each ethnic group.<sup>132</sup> Additionally, this Court has reaffirmed the importance of understanding that forced displacement can even become an act of cultural or physical extermination of many indigenous peoples, as it breaks the community apart and affects the economic process of a group, resulting in food insecurity and loss of self-sustenance.<sup>133</sup>

The Colombian Court, therefore, has identified the specific risks that the ethnic groups face as a result of forced displacement:

- difficulties accessing a diet that complies with minimum nutritional requirements
- lack of humanitarian aid
- barriers to their rights arising from sociolinguistic differences in places of destination
- increased risk of becoming victims of crimes such as human trafficking, sexual violence, begging, among others
- lack of security in places of destination, where acts of violence and discrimination are common
- lack of measures allowing safe return to their places of origin<sup>134</sup>

In the case of Mexico, the NHRC has documented that the main factor leading to the displacement of ethnic groups is the deployment of development and infrastructure megaprojects,<sup>135</sup> since they “have resulted in the [internal forced displacement] of entire communities, including indigenous peoples.”<sup>136</sup>

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<sup>132</sup> See Constitutional Court of Colombia, Order 004 of 2009.

<sup>133</sup> See *Ibid.*

<sup>134</sup> See *Ibid.*

<sup>135</sup> See NHRC, *Special Report on Internal Forced Displacement... quot.*, pars. 183 et seq.

<sup>136</sup> *Ibid.*, par. 183.

However, the NHRC highlighted the important work of former National Commission for the Development of Indigenous Peoples (CDI, by its Spanish acronym),<sup>137</sup> which was responsible for ensuring the implementation of the Proyecto para la Atención a Indígenas Desplazados, a law aimed at taking measures for the relocation or return of displaced communities<sup>138</sup> and considered to be “the only federal program that specifically targets the displaced population in Mexico,”<sup>139</sup> which responds to the particular vulnerability of displaced persons of ethnic groups.<sup>140</sup>

The CMDPDH has identified that the phenomenon of forced displacement occurs mostly in rural and indigenous areas, and that since 2017 indigenous populations have accounted for an average of 41 % of those displaced each year, mainly due to territorial conflicts of organised crime, militarization and paramilitary incursions.<sup>141</sup> The CMDPDH also determined that 10 out of 24 episodes of displacement that occurred in 2020 involved indigenous people.<sup>142</sup>

In addition to the foregoing, the IACHR, through several resolutions of precautionary measures, has referred to the impact of forced displacement on indigenous peoples in Mexico, stating that this is a severe, urgent and irreparable situation, as their right to life and personal integrity is affected.<sup>143</sup> The State has therefore been requested to take measures to ensure safety and prevent acts of harassment and violence against the persons concerned,<sup>144</sup> as

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<sup>137</sup> National Institute of Indigenous Peoples (INPI, by its Spanish acronym) as of 2018.

<sup>138</sup> Cf. NHRC, *Special Report on Internal Forced Displacement... quot.*, par. 252.

<sup>139</sup> *Ibid.*, par. 462.

<sup>140</sup> See *Ibid.*, par. 548.

<sup>141</sup> CMDPDH, *Episodios de desplazamiento interno forzado masivo en México... quot.*, p. 13.

<sup>142</sup> Cf. *Ibid.*, p. 60.

<sup>143</sup> Cf. IACHR, Precautionary Measure No. 882-17, *Comunidades indígenas tsotsiles de Chalchihuitány Chenalhó respecto de México*, par. 3; IACHR, Resolution 35/2021, Precautionary Measure No. 284-18, *Familias indígenas tsotsiles de doce comunidades identificadas de Aldama, Chiapas respecto de México*, par. 55.

<sup>144</sup> *Id.*



they represent a group with particular vulnerability, since forced displacement creates a situation of lack of protection of rights.<sup>145</sup>

Due to the fact that indigenous people and other groups with special dependence on their lands and territories face several vulnerability factors, the State has a duty to take measures to address this displaced population and to include long-term actions to address their different inequality conditions. See chapter six of this Manual for more information on the content of the State's obligations regarding internal displacement in relation to members of indigenous peoples and other groups with special dependence on their lands and territories.

## 5. People with disabilities

Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD) claims that States must take special measures to help people with disabilities deal with situations of risk and humanitarian emergencies in accordance with international humanitarian law and international human rights law. In this sense, the Guiding Principles enshrine a special standard of protection for people with disabilities and determine that they should have priority access to health care.<sup>146</sup>

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities has defined disability as “a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.”<sup>147</sup> At the international level, there has been an emphasis on the

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<sup>145</sup> IACHR, Precautionary Measures No. 882-17 and 284-18, *Familias tsotsiles de veintidós comunidades identificadas en los municipios Chalchihuitán, Chenalhó y Aldama en el estado de Chiapas respecto de México*, par. 67.

<sup>146</sup> See Guiding Principles, Principle 19.

<sup>147</sup> OAS, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons

importance of understanding that disability is normally connected with other needs related to age, sexual identity, gender, ethnicity, religion, displacement and other elements of the individual's identity, known as *intersectional forms of discrimination*.<sup>148</sup>

Both the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and the CDPD claim that States must take the necessary legislative, administrative, social, educational, labour and other measures to eliminate the discrimination that persons with disabilities face. Among them are some measures similar to those recommended by the UN, such as those related to the provision or supply of goods, services, facilities, programs and activities, among others.<sup>149</sup>

This standard has been ratified by the IACHR in its case law on persons with disabilities,<sup>150</sup> in which it has established the obligation of States to take measures in favour of persons with disabilities in a diligent and uninterrupted manner, and as required by the situation of the person.<sup>151</sup> To achieve this, the IACHR has recommended that States provide training and design tools such as publications, posters and videos about the rights of persons with disabilities and the obligations of the authorities to provide the necessary support, in a clear and accessible manner.<sup>152</sup>

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with Disabilities, Art. 1.

<sup>148</sup> Cf. Report of Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jiménez-Damary, *Persons with disabilities in the context of internal displacement*, A/HRC/44/41, pars. 15, 17 and 19; Coalition México for the Rights of People with Disabilities, *Informe especial sobre migración y discapacidad, una mirada desde la Interseccionalidad*, p. 12; OAS, *Report on Poverty and Human Rights...* *quot.*, par. 432; UN, *Shining a Light on Internal Displacement: A Vision for the Future. UN Secretary-General's High-Level Panel on Internal Displacement*, p. 4.

<sup>149</sup> OAS, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, Art. 3.1; UN, CDPD, Art. 4.

<sup>150</sup> IACHR, *Furlan and Family v. Argentina*, par. 135; and *Guachalá Chimbo et al. v. Ecuador*, par. 87.

<sup>151</sup> See IACHR, *Gonzales Lluy...* *quot.*, par. 255.

<sup>152</sup> See IACHR, *Guachalá Chimbo...* *quot.*, par. 282, items 12, 13 and 14.

Moreover, the IACHR has determined that, when addressing disability from a social model, it must be recognised that it is not exclusively a physical, mental, intellectual or sensory impairment, but rather it is related to the barriers or limitations of people with functional diversity to exercise their rights effectively, such as physical, architectural, communicative, attitudinal or socio-economic barriers.<sup>153</sup>

For this reason, the agencies of the Inter-American System of Human Rights have determined that persons with disabilities are subject to special protection because of their vulnerable situation, resulting from the historical discrimination they have faced,<sup>154</sup> and are therefore beneficiaries of special protection by the State in response to their condition.<sup>155</sup> The IACHR established that, in the case of *Guachalá Chimbo v. Ecuador*, disability is a category protected by the ACHR. This implies that no rule, decision or practice of domestic law, whether by state authorities or by private individuals, may discriminately diminish or restrict a person's rights because of their disability.<sup>156</sup>

In this sense, Article 1 of the Constitution of Mexico enshrines the prohibition of any discrimination against persons with disabilities. This prohibition has been elaborated in Article I of the General Act on the Inclusion of Persons with Disabilities, which provides a comprehensive policy framework on the promotion and protection measures that the State must take to ensure the full exercise of the human rights and fundamental freedoms of persons with disabilities.

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<sup>153</sup>IACHR, *Furlan and Family... quot.*, par. 133; *Ximenes Lopes v. Brazil*, par. 104; *Gonzalos Lly... quot.*, par. 237; and *Guachalá Chimbo... quot.*, par. 85.

<sup>154</sup>IACHR, Report No. 175/20 Case 12.861, *Informe de Fondo Luis Fernando Guevara Díaz - Costa Rica*, par. 79.

<sup>155</sup> IACHR, *Furlan and Family... quot.*, par. 134.

<sup>156</sup> IACHR, *Guachalá Chimbo... quot.*, par. 79.

At the regional level, since 2009, the Constitutional Court of Colombia has identified the specific risks that persons with disabilities face in the context of forced displacement:

- Aggravation of discrimination and exclusion due to attitudinal barriers and lack of training.
- Physical, communication and access barriers to information that prevent access to assistance services for displaced persons.
- Risks arising from loss of family and social networks as a result of displacement.
- Lack of measures that allow access to the education and labour system under the conditions that this population requires.
- Barriers to access the right to health and proper nutrition.
- Poor conditions of basic sanitation and access to housing.
- Lack of psychosocial care.
- Barriers to exercising their right to association and participation.
- Increased risk of human rights violations, such as begging and exploitation.<sup>157</sup>

According to the foregoing, displaced persons with disabilities are more vulnerable to abandonment, stigmatization and violence.<sup>158</sup> In the context of forced displacement, persons with disabilities face particular risks and increased levels of stigma and discrimination related to barriers to access to humanitarian assistance, education, health care, livelihoods, legal services, among others.<sup>159</sup> It has been identified that, during forced displacement, IDPs with disabilities face not only the same difficulties as other displaced persons, but also other difficulties because of the multiple barriers they must overcome, in addition to the marginalization resulting from the stigma of being considered

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<sup>157</sup> See Constitutional Court of Colombia, Order 006 of 2009.

<sup>158</sup> Cf. Report of Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jiménez-Damary, *Persons with disabilities in the context of internal displacement*, pars. 56-57.

<sup>159</sup> Cf. UNHCR, *Working with Persons with Disabilities in Forced Displacement*, p. 4.

aid beneficiaries. At the same time, their potential to be active agents in proposing and contributing solutions to address displacement is denied.<sup>160</sup>

In line with the foregoing, the UN has established some recommendations that States should adopt in the framework of internal displacement of persons with disabilities:

- Allow the active participation of people with disabilities in decision-making processes that aim at durable solutions for the displacement crisis they face.
- Upgrade training for agents and organizations of persons with disabilities that allows them to recognise the needs of this population group during forced displacement contexts.
- Implement the use of digital media and other communication tools, both for the collection of information on the characteristics and needs of this population and for the promotion of the rights and mechanisms of participation of displaced persons with disabilities.
- Adopt measures that allow the exercise of their political rights on an equal basis.
- Implement warning and evacuation systems tailored to the needs of persons with disabilities that allow safe evacuation.
- Create mechanisms for access to justice that address specific needs, as well as the difficulty of reporting cases of abuse by their caregivers.
- Provide health, psychosocial and assistance care to address medical needs, as well as problems in accessing educational and employability services.
- Guarantee that essential services and facilities meet the conditions of persons with disabilities.
- Ensure that this population does not face barriers that affect their

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<sup>160</sup> Report of Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jiménez-Damary, *Persons with disabilities in the context of internal displacement*, pars. 18 and 20.

food security, either because of economic difficulties or because of an ineffective service that ignores their difficulties to access food or because they do not contemplate particular nutritional needs of some people.

- It should be noted that all measures taken to address the special needs of the displaced population with disabilities correspond to the parameters of the principle of accessibility and non-discrimination.<sup>161</sup>

## 6. Older adults

The Guiding Principles enshrine the obligation of States to follow an ethic approach that addresses the special needs of older persons.<sup>162</sup> At the inter-American level, the Inter-American Convention on the Protection of the Human Rights of Older Persons notes that an older person, or elderly person, is “a person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years.”<sup>163</sup>

Furthermore, the Inter-American Convention on the Protection of the Human Rights of Older Persons provides that older persons must be protected against all forms of discrimination based on their age. It also recognises that measures taken by States to protect older persons should include an approach that includes “multiple discrimination” against older persons who are part of other vulnerable groups, such as women, persons with disabilities, persons of different gender identities, migrants, people of African descent, persons

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<sup>161</sup> Human Rights Council, Report of Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jiménez-Damary, *Persons with disabilities in the context of internal displacement*, quot. pars. 35, 37, 38, 41, 43, 49, 52, 56, 57, 68, 70, 71, 72, 73, 81 and 82; RIADIS and UNHCR, “Disability and Human Mobility.” *Regional study on the situation of refugees, displaced people, and migrants with disabilities in Latin America*, p. 91, 92, 407 and 408.

<sup>162</sup> Guiding Principles, Principle 4.

<sup>163</sup> OAS, Inter-American Convention on the Protection of the Human Rights of Older Persons, Art. 2.

pertaining to indigenous peoples, among others.<sup>164</sup>

This instrument expressly indicates that States shall adopt specific measures in situations of risk and humanitarian emergencies, including those arising from armed conflicts and disasters, where the Convention states the duty to apply the norms of international human rights law and international humanitarian law, in order to address the needs of older persons through specific assistance.<sup>165</sup>

Despite the existence of these regulatory parameters, older persons not only belong to a particularly vulnerable group *per se*, but also this situation is drastically intensified in internally forced displacement due to their health problems (it is estimated that, worldwide, 46 % of people aged 60 years or above live with a disability, and that approximately 1.4 million older persons with disabilities have been forcibly displaced),<sup>166</sup> the increased risk of violence they face,<sup>167</sup> and the many forms of violence and discrimination they encounter, which contributes to their situation of particular vulnerability, invisibility and exclusion in society.<sup>168</sup>

In Mexico, Article 3 of the Ley de los Derechos de las Personas Adultas Mayores (Law on the Rights of Older Adults) states that older adults are all “persons who are sixty years of age or older and who are domiciled or in transit in the national territory” (own translation.) This law establishes a comprehensive list of rights for older adults, including those relating to the guarantee of the right to life, health, education, employment, social assistance, a life free from

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<sup>164</sup> Cf. *Ibid.*, Art. 5; *Comisión Permanente de Promoción y Protección de los Derechos de las Personas Mayores de las Reunión de Altas Autoridades de Derechos Humanos et al. Personas mayores: hacia una agenda regional de derechos*, p. 31-32.

<sup>165</sup> Cf. OAS, *Inter-American Convention on Protecting...* *quot.*, Art. 29.

<sup>166</sup> Cf. UNHCR, *Working with Older Persons in Forced Displacement*, p. 7.

<sup>167</sup> Cf. UNHCR, *Working with Older Persons in Forced Displacement*, p. 4; Inter-American Court of Human Rights, *Case of Poblete Vilches et al. vs. Chile*, par. 131; and IACHR, *Human Rights of Migrants and Other Persons...* *quot.*, par. 76.

<sup>168</sup> Cf. IACHR, *Compendium on Equality and Non-discrimination. Inter-American Standards*, par. 98.

violence, access to justice, non-discrimination, and access to basic services and goods.

In particular, the SCJN has interpreted, for example, that the right of older adults to receive free advice in administrative or judicial proceedings:

Is intended to give them the same level of opportunity for enjoying and exercising their human rights, and therefore sets out a principle that pervades the rest of the legal system components, by operating in a transversal and prevalent manner in the other subjects or specialties of legal order, so that it imposes on the authorities the duty to satisfy this benefit by subjecting older adults to administrative or judicial proceedings, in coordination with the rules laid down for them, which implies a variation to due legal process that will allow them to fulfil the purpose pursued by the protection law.<sup>169</sup>

Despite the special protection that the elderly has in Mexico, according to the latest report *Episodios de desplazamiento interno forzado masivo en México. Report 2020.*, presented by the CMDPDH, in which 24 episodes of mass forced internal displacement due to violence were reported this year, it was identified that, in 12 of the 24 episodes, records showed that older adults were present, which corresponds to an incidence by this population in 50 % of cases of forced displacement in 2020.<sup>170</sup>

On the particular situation of vulnerability of older adults, the Constitutional Court of Colombia has stressed that displacement generates devastating consequences among this population, because

It strips them of what they had built for years, with the additional problem that they do not already have the same time nor the same vital conditions to

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<sup>169</sup> SCJN, Tesis I.1o.A.E. 1 CS (10a.), *Derechos de las Personas Adultas Mayores. El Artículo 5º, fracción II, inciso c), de la ley relativa, al proteger valores constitucionales y derechos fundamentales, debe observarse por todas las autoridades del Estado mexicano.* Available (in Spanish) at <https://sjf2.scjn.gob.mx/detalle/tesis/2010840>.

<sup>170</sup> CMDPDH, *Episodios de desplazamiento interno forzado masivo en México... quot.*, p. 58.



rebuild what they had achieved. If an older displaced adult also has a physical, sensory, mental or intellectual deficiency, the risk factors described, such as abandonment, worsening of his or her health conditions, loss of family and social environments, risks to his or her integrity and personal safety, restrictions on participation, psychosocial effects, to name but a few, tend to be particularly severe.<sup>171</sup>

UNHCR has therefore made some recommendations for States to address the phenomenon of forced displacement from a human rights-based approach involving special measures for the elderly:

- Adopt accessible and inclusive measures for this population with a participatory approach to generate solutions to the situation of internal forced displacement.
- Collect specific data incorporating qualitative information such as age, sex, and specific characteristics and needs.
- Create programs that allow this population to live independently and with dignity.
- Ensure that older persons have decent housing suitable to their needs.
- Ensure access to the right to food security according to the nutritional conditions required by each person.
- Ensure that older persons are assisted and cared for, either by identifying traditional support systems, with carers known to the person or with foster families.
- Take the necessary measures to prevent and address the multiple forms of abuse that older persons may face, including access to justice and trained officials.
- Ensure the right to access health and basic services.<sup>172</sup>

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<sup>171</sup> Constitutional Court of Colombia, Order 006 of 2009.

<sup>172</sup> Cf. UNHCR, *Working with Older Persons...* quot., p. 7-11 and 13-14; IACHR, *Case of Poblete Vilches et al...* quot., pars. 130-132; and *Working with Older Persons in Forced Displacement*, p. 19.

The recommendations set by UNHCR are in line with the States parties to the 2012 San José Charter on the Rights of Older Persons in Latin America and the Caribbean, which sets out specific measures to address the situation of particular vulnerability of this population.<sup>173</sup> They should therefore be a guiding parameter for the State to take the most appropriate measures to address the needs of persons with disabilities who are victims of forced displacement.

## 7. Journalists

The *Ley para la Protección de Personas Defensoras de Derechos Humanos y Periodistas* (Law for the Protection of Human Rights Defenders and Journalists) establishes the obligation of the State and federal entities to implement urgent prevention and protection measures necessary to guarantee the right to life, integrity, freedom and safety of persons at particular risk as a result of being journalists.<sup>174</sup> Despite the existence of this law, Mexico is considered one of the most dangerous countries for those who work as journalists.<sup>175</sup>

Against this, the IACHR, in the recent *Case of Digna Ochoa and Family Members v. Mexico*, recognised the context of violence against human rights defenders, including journalists.<sup>176</sup> In addition, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the IACHR Special Rapporteur for Freedom of Expression have stated that internal displacement of journalists has also become a

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<sup>173</sup> See Economic Commission for Latin America and Caribbean, San José Charter on the Rights of Older Persons in Latin America and the Caribbean.

<sup>174</sup> Cf. Chamber of Deputies of the H. Congress of the Union, *Ley para la Protección de Personas Defensoras de Derechos Humanos y Periodistas*, Art. 1, 30-45.

<sup>175</sup> IACHR and Office of the United Nations High Commissioner in Mexico, *Ampliando el espacio democrático: Reports about Mexico related to the official mission of the UN Special Rapporteur on the situation of human rights defenders, Mr. Michel Forst, and the joint official mission of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. David Kaye, and the IACHR Special Rapporteur for freedom of expression, Mr. Edison Lanza, in 2017*, par. 59.

<sup>176</sup> IACHR, *Case of Digna Ochoa and Family Members v. México*, pars. 44-48.

predominant feature of the situation in the country [Mexico].<sup>177</sup>

Journalistic work is one of the ways in which the right to freedom of thought and expression enshrined in Article 13 of the ACHR is realised, since it states that “this right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.”<sup>178</sup> Additionally, at inter-American level, the Declaration of Principles of Freedom of Expression was promulgated, which determines that freedom of expression is not only a “fundamental and inalienable” right,<sup>179</sup> but an indispensable requirement for the very existence of a democratic society,<sup>180</sup> therefore, the Declaration expressly determines that

The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression.

It is the duty of the State to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.<sup>181</sup>

The IACHR has established in its jurisprudence that the profession of journalists involves all activities that embrace the right to freedom of expression defined in Article 13 of the ACHR, and emphasises that it is an activity

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<sup>177</sup> IACHR and Office of the United Nations High Commissioner in Mexico, *op. p.* 52; Reporters without Borders, *More forced displacement of journalists seen in Mexico*; Cf. NHRC, Recommendation No. 39/2017 on the Case of 2038 persons recognised as victims of internal forced displacement in the state of Sinaloa, par. 104; NHRC, *Protocolo para la atención y protección de las víctimas de desplazamiento forzado interno en México*, p. 4.

<sup>178</sup> OAS, ACHR, Art. 13.

<sup>179</sup> IACHR, Declaration of Principles of Freedom of Expression, Principle 1.

<sup>180</sup> *Id.*

<sup>181</sup> *Ibid.*, Principle 9.

specifically guaranteed by this instrument.<sup>182</sup> For this reason, the IACHR has determined the important obligation of States to adopt specific measures aiming at protecting journalists, who may experience a special risk in the exercise of their profession.

Accordingly, States have an obligation to adopt, *inter alia*, the following measures in favour of persons exercising journalism:

- Implement special measures to protect life and integrity, especially those who are threatened due to the type of information they disseminate and investigate.
- Prevent and address threats and harassment against this group of persons as these acts constitute obstacles to the full exercise of the right to freedom of expression,<sup>183</sup> since they have an intimidating effect.<sup>184</sup>

## 8. Human Rights Defenders

The IACHR has established that the work of human rights defenders is fundamental to the rule of law and that the exercise of the defence of human rights can only take place “when those who carry out this work are not victims of threats or physical, mental or moral attacks or other acts of harassment.”<sup>185</sup> In recent years, violence against human rights defenders and journalists has intensified in Mexico.<sup>186</sup> They are subjected to harassment, secret surveillance, threats and defamation because of their investigation and reporting,<sup>187</sup>

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<sup>182</sup> IACHR, *Case of Fontevecchia and D'amico v. Argentina*, par. 46.

<sup>183</sup> IACHR, *Case of Vélez Restrepo and Family v. Colombia*, Decision of 3 September 2012 (Preliminary objection, merits, reparations and costs), paras. 194 and 209.

<sup>184</sup> *Cf. Ibid.*, par. 212.

<sup>185</sup> *Ibid.*, par. 209.

<sup>186</sup> *Cf. IACHR, Annual Report 2020*. Chapter V. *Follow-up on the recommendations issued by the IACHR in its report on the Human Rights Situation in México*, par. 321.

<sup>187</sup> IACHR and the Office of the United Nations High Commissioner in Mexico, *op.*, p. 17, 18, 22 and

situations that have forced their internal displacement.<sup>188</sup> In this regard, in its 2015 report *The Human Rights Situation in Mexico* the IACHR noted that “the witness evidence and abundant information received by the Commission during its visit, showed how violence has had a particularly severe impact in causing the forced displacement of groups such as indigenous peoples, human rights defenders and journalists.”<sup>189</sup>

In the case of female human rights defenders, the intersectionality between their status as women and their advocacy work creates particular obstacles to access to justice; this is largely due to the stigmatization of women who defend human rights.<sup>190</sup> Likewise, defenders of indigenous human rights are victims of differentiated retaliations for their advocacy work and face linguistic and geographical barriers, which prevent them from benefiting from protection measures and make it difficult to access to justice.<sup>191</sup>

In response to the risks faced by human rights defenders, the IACHR has determined that the State has an increased obligation to guarantee their right to life and integrity.<sup>192</sup> To fulfil this obligation, the State must

- Ensure legal, formal and factual conditions to carry out their activities freely.
- Ensure that defenders subject to threats, harassment or any other type of violation due to their function are able to report such acts and receive effective protection measures.
- Adopt an intersectional and differentiated approach to addressing the

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<sup>188</sup> Cf. Pérez Vázquez, *Las víctimas olvidadas de México*, p. 8.

<sup>189</sup> IACHR, *Situation of Human Rights in Mexico*, par. 286.

<sup>190</sup> IACHR, *Case of Digna Ochoa and Family Members...* *quot.*, pars. 125, 128 and 129. Quoting CEDAW Committee, General Recommendation No. 35... *quot.*, par. 1.

<sup>191</sup> IACHR and the Office of the United Nations High Commissioner in Mexico, *op.*, p. 27.

<sup>192</sup> IACHR, *Case of Human Rights Defender et al. v. Guatemala*, par. 142; and *Yarce y otras vs. Colombia*, pars. 181 and 183.

threats to human rights defenders.<sup>193</sup>

## IV. Conclusions

The intersection of factors such as gender identity, sexual orientation, age, belonging to a group of indigenous people or another group that particularly depends on their lands and territories, having a disability or performing tasks such as human rights advocacy or journalism, can lead to differentiated barriers to access to assistance mechanisms for IDPs. As a result, the State response to forced displacement cannot consist solely of generic measures, as the experiences and vulnerabilities of the displaced population cannot be generalised.

In this sense, the basic assistance measures provided by the State must meet the specific needs of the displaced population.<sup>194</sup> Such assistance should include at least conditions of hygiene, access to health care and essential basic services, among other elements.<sup>195</sup> Examples of differentiated measures are those ordered by the IACHR in the case of *Pobladores desalojados y desplazados de la Comunidad Laguna Larga respecto de Guatemala*, in which the Commission determined that immediate basic assistance measures in displacement contexts should include provisions focusing on children's and adolescents' nutritional needs, access to education and care services for girls and boys, access to specialised health services for persons with chronic diseases, women's health and maternal health.<sup>196</sup>

Another example of the adequacy of assistance measures due to the vulnerabilities of displaced persons is the decision of the Colombian

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<sup>193</sup> Cf. IACHR, *Digna Ochoa and Family Members...* *quot.*, pars. 100-101.

<sup>194</sup> IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, pars. 323 and 324; IACHR, *Internal Displacement in the Northern Triangle of Central America. Public Policy Guidelines*, par. 128.

<sup>195</sup> IACHR, *Afro-descendant Communities...* *quot.*, par. 329.

<sup>196</sup> IACHR, Precautionary Measure No. 412-17, *Pobladores desalojados y desplazados de la Comunidad Laguna Larga respecto de Guatemala*, par. 4.

Constitutional Court in Decision C-278 of 2007. Through this decision, the Colombian Constitutional Court declared unenforceable the deadline for the delivery of humanitarian assistance, since it estimated that

humanitarian aid cannot be subject to an inflexible fixed period. Even though it is convenient that there exists a temporary reference, it should be flexible, subject to real reparation and effective and continuous means, in accordance with the characteristics of the case, until the affected population comes out of its condition of the vulnerability, especially in this first stage of care, in which they must be guaranteed decent living conditions that make the grievance possible, towards a final solution through the implementation of serious and continuous programmes of economic and social stabilization. (own translation)<sup>197</sup>

The Constitutional Court of Colombia has reaffirmed that the maximum period to provide humanitarian assistance to displaced persons will depend on an individual assessment and the following conditions:

- (i) they are in a situation of particular vulnerability or extraordinary urgency;
- (ii) they are not in a position to support themselves through a project of stabilization or socio-economic recovery; and (iii) they are subject to reinforced constitutional protection or protection with a differentiated approach such as children and adolescents, elderly people, heads-of-household women (own translation.)<sup>198</sup>

This confirms that, in order to take action in favour of displaced persons, authorities must take into account the vulnerability situation that a person faces and their belonging to a special protection group. In this regard, Donny Meertens proposes that each phase of care for the displaced population should take into account the aspects of historical inequality or discrimination suffered by certain groups of displaced persons —for example, displaced rural

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<sup>197</sup> Constitutional Court of Colombia, Decision C-278 of 2007.

<sup>198</sup> Constitutional Court of Colombia, Decision 1-004 of 2018.

women—, and therefore, programmes should include affirmative actions to guarantee the rights of all displaced persons and transform those social norms that generate discrimination.<sup>199</sup>

The Guiding Principles state that authorities shall make their best effort to ensure women's full participation in the planning and distribution of basic supplies.<sup>200</sup> While these principles especially refer only to the participation of women, as expressed by the Special Rapporteur on the Human Rights of Internally Displaced Persons and the IACHR, all displaced persons should be given the opportunity to participate in the adoption, implementation and evaluation of assistance actions taken by the State;<sup>201</sup> this implies that authorities make the necessary legal and physical adjustments to ensure that all persons can participate actively without discrimination.<sup>202</sup>

Consequently, the adoption of measures that address the specific needs of IDPs requires authorities to carry out an analysis of the interaction of discrimination factors that may together affect such persons. Once these forms of discrimination have been identified, authorities must take differential affirmative measures to adequately address the particular vulnerabilities of the displaced population, and must, in turn, develop mechanisms of involvement ensuring that all displaced persons have an active role in the measure adoption processes aimed at the prevention of displacement, as well as assistance, protection and the generation of durable solutions for IDPs.

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<sup>199</sup> Meertens, “La dimensión de género en el desplazamiento interno: respuestas institucionales en el caso colombiano,” in *Anuario de acción humanitaria y derechos humanos*, p. 41-52.

<sup>200</sup> Guiding Principles, Principle 18.

<sup>201</sup> IACHR, *Internal Displacement in the Northern Triangle of Central America... quot.*, par. 130.

<sup>202</sup> Human Rights Council, Report of Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jiménez-Damary, *Persons with disabilities in the context of internal displacement, quot.* pars. 33 and 35.



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**Internal displacement and its impact on indigenous persons, communities and peoples, ethnic minorities and other groups with a special relationship with their lands and territories.**

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**Internal displacement and its impact on indigenous persons, communities and peoples, ethnic minorities and other groups with a special relationship with their lands and territories.** I. Introduction; II. Differentiated impact; III. Human rights of indigenous persons, communities and peoples, ethnic minorities and other groups with a special relationship with their lands and territories in situations or risk of internal forced displacement; IV. Specific prevention, care, protection and solution measures; V. Intra-community conflicts.

## I. Introduction

This chapter addresses the differentiated impact of forced internal displacement on indigenous persons, communities and peoples, ethnic minorities and other groups with a special relationship with their lands and territories. It aims at raising readers' awareness on why internal displacement occurs. This is in accordance with principle 9 of the Guiding Principles on Internal Displacement of the United Nations —Guiding Principles— and Article 4.5 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa —Kampala Convention— stating the need for prevention, care, protection and durable solutions with a cross-cutting and differentiated approach. This analysis addresses the scope, content and impacts of the internal displacement phenomenon on human rights, that are usually the most frequently violated. Finally, this chapter ends reflecting on the conflict between the right to self-determination of indigenous peoples and communities, and that of freedom of movement and residence.

It is important to note that the right to property by members of indigenous peoples protects their close connections with their lands, as well as with the

natural resources of the ancestral territories and the intangible elements from them arising; as indicated by the Inter-American Court of Human Rights — IACHR— and also, as provided for in Article 21 of the American Convention on Human Rights —ACHR. This extends to other tribal communities or peoples, such as people of African descent and other groups with a special relationship with their lands and territories. Due precisely to that intrinsic connection that indigenous and tribal peoples have with their land, the protection of the right to property, use and enjoyment thereof is necessary to ensure their survival.<sup>1</sup> Therefore, although this chapter addresses issues relating to members of indigenous communities, it should be interpreted that minimum human rights standards herein stated are applicable to other groups with special relationships with their lands and territories, without obstructing a case by case analysis of relevance.

## II. Differentiated impact

From 1987 to 1989, during the adoption and revision process of Convention No. 169 indigenous and tribal peoples in independent countries, the International Labour Conference of the International Labour Organization — ILO— noted that in many parts of the world these peoples do not enjoy the rights to the same extent as the rest of the population of the States in which they live. It also mentioned that these communities have often suffered erosion in their values, customs and perspectives and that, in addition, indigenous and tribal peoples in Latin America presented the worst socio-economic and labour indicators. This is because discrimination based on ethnic or racial origin is a factor that radically aggravates, for example, economic income gaps.<sup>2</sup>

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<sup>1</sup> IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 346.

<sup>2</sup> Cf. ILO, Regional Bureau for Latin America and Caribbean, Convenio Núm. 169 de la OIT sobre pueblos indígenas y tribales en países independientes. Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas., p. 7. Available (in Spanish) at [https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms\\_345065.pdf](https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_345065.pdf).

When an indigenous person, community or people is in a situation or at risk of displacement, it is more evident that they do not equally enjoy the rights as the rest of the population. The distinctive nature of this phenomenon, that negatively affects these communities, lies on the mixture of individual and collective impact aspects. That is, this difference has destructive impacts both on individual rights of the persons of the ethnic groups affected, and on the collective rights of each ethnic group to autonomy, identity and territory. Individual and collective aspects intertwine and interact with each other in the displacement phenomenon.<sup>3</sup>

In this regard, the IACHR considers that:

Forced displacement of indigenous peoples from their communities or their members can leave them in a situation of particular vulnerability creating a clear risk of cultural or physical extinction of indigenous peoples because of its destructive consequences on the ethnic and cultural ties. Therefore, it is essential that States adopt specific protection measures considering indigenous peoples' specific characteristics, as well as their customary law, values, customs and practices to prevent and reverse the effects of this situation (own translation.)<sup>4</sup>

Among the differentiated impacts caused by forced displacement in indigenous peoples is the loss of control over the territory and the effective exercise of territoriality principle. This, the territory, is subject to abandonment, appropriation, and also to the productive decline affecting indigenous populations that stay on it.<sup>5</sup> Furthermore, displaced individuals lose the opportunity to participate in the activities, rites, spirituality and learning cycle of the community. They are deprived of speaking their language and wearing

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<sup>3</sup>See Constitutional Court of Colombia, Order 004/09, part 4, p. 12. Available (in Spanish) at <https://www.corteconstitucional.gov.co/relatoria/autos/2009/a004-09.htm>.

<sup>4</sup>IACHR, *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guatemala*, par. 176.

<sup>5</sup>*Cf.* Constitutional Court of Colombia, *op.*, p. 14.

their clothing, as well as practicing their traditional work.<sup>6</sup> All these deteriorate the fundamental principles of life and coexistence, which are the foundations of identity building processes, autonomy internal systems, control and government, production circuits and enculturation dynamics.<sup>7</sup>

In addition, this phenomenon generates a feeding problem, as the rupture of cultural patterns and the possible lack of access to their traditional food lead to cultural and, sometimes, physical rejection of the scarce foods they have access to, thus, causing hunger. Emergency humanitarian aid is usually inadequate and does not address displaced persons' cultural characteristics.<sup>8</sup>

Displaced indigenous persons and communities usually face a major challenge when faced to urban life. Being out of their communities entails increased risk exposure due to intolerance, racism and ignorance in host sites. These risks include falling into illicit trade networks; being forced to begging; suffering sexual violence, exploitation and, especially, discrimination. At the same time, insecurity in host places forces involuntary returns in unsafe conditions, or leads to new displacements.<sup>9</sup>

Frequently, these groups move to other indigenous communities' territories, that often receive them during considerably long periods of time. Indigenous peoples' displacement to other communities can lead to inter-ethnic conflicts, or between host and displaced communities, even though they belong to the same ethnic group. This results in the cultural breakdown of the host indigenous community, that is not obliged to bear such conflicts.<sup>10</sup>

The lack of guarantee that return will be favourable to members of indigenous communities severely affects traditional community, cultural, and religious

<sup>6</sup> Cf. IACHR, *op. cit.*, par. 196.

<sup>7</sup> Cf. Constitutional Court of Colombia, *op. cit.*, p. 12.

<sup>8</sup> *Ibid.*, p. 13.

<sup>9</sup> *Id.*

<sup>10</sup> *Ibid.*, p. 18.

practices; family and social structure; identity markers and indigenous peoples' language. This is due to the rupture of ancient culture and historical connection with the territory and social practices, community ties weakening and communal cohesion reduction. All this implies a loss of part of indigenous culture. In this regard, the IACHR has highlighted the differentiated impact internal displacement has on ethnic and cultural identity of indigenous community's members, placing them in a situation of special vulnerability.<sup>11</sup>

## 1. Indigenous women

Indigenous women are part of societies where ancestral territory is an essential element of their existence and culture.<sup>12</sup> They suffer from multiple and intersectional discrimination based on sex, colour, ethnicity and displaced status.<sup>13</sup>

They significantly experience change caused by internal displacement. For example, if displaced to urban centres, they face new challenges in raising their children, since the city is not their usual raising context. Despite the effects on their psychological state—as a result of the event causing their displacement—they take charge of their family accepting untraditional activities for their culture. Regarding survival in displacement conditions, they are forced to do domestic or sexual work,<sup>14</sup> while in their community of origin they usually work at home.

On the other hand, when indigenous women become victims of sexual abuse, they break marital and social ties because of social isolation and shame before their community. In indigenous peoples, women often play a specific role; given its characteristics, they are affected by the stigma on indigenous women

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<sup>11</sup> Cf. IACHR, *op. cit.*, par. 197.

<sup>12</sup> IACHR, *The Armed Conflict Aggravates the Discrimination and Violence Suffered by Colombian Women*, Press Release No. 27/05.

<sup>13</sup> United Nations Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Coomaraswamy, pursuant to Commission on Human Rights resolution 2001/49, pars. 28 and 42.

<sup>14</sup> Constitutional Court of Colombia, *op. cit.*, p. 15.

who are victims of sexual violence. This stigmatization causes the horror of family or community rejection, thus causing their own exodus. Victims can move to another community so as not to live the shame of being pointed as “raped woman”, they survive the fear of “being discovered” and the panic of others blaming them. All this, in addition to the very impact of being a sexual violence victim, has harmful effects on women, such as loneliness, overwhelmedness, and low self-esteem.

## 2. Indigenous children and adolescents

For the full and harmonious development of their personality, indigenous children require training and growth aligned with their worldview, preferably, in their community and culture. Indigenous children have a distinctive identity connecting them with their land, culture, religion and language.<sup>15</sup>

As a displacement process effect and within the survival strategies framework, indigenous children can continuously be exposed to labour exploitation, trafficking and begging. Often, they become heads of household or take care of their siblings since their parents need to go elsewhere to work. Indigenous children and adolescents are more often affected by higher levels of hunger and malnutrition than other displaced children. Their right to education is particularly obstructed by the lack of education plans appropriate to their cultures and needs in the educational schools they access in host places, and by the increased incidence of open discrimination and mistreatment situations by peers and teachers. In turn, all this causes complex psychological pain situations in which cultural shock and strangeness regarding the host society play a decisive role.<sup>16</sup>

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<sup>15</sup> Cf. IACHR, *Chitay Nech et al. v. Guatemala*, par. 169.

<sup>16</sup> Cf. Constitutional Court of Colombia, *op. cit.*, p. 16-17.

In addition, indigenous children and adolescents play a fundamental role in the preservation and reproduction of their cultures, so forced displacement generates a destructive impact because of their irreversible effects. Indeed, uprooting and displacing children and adolescents from their community cultural environments results in a rupture in the process of transferring cultural knowledge and patterns, associated with a frequent loss of respect for their families, their elders and their own cultures, in many cases.<sup>17</sup>

### **III. Human rights of indigenous persons, communities and peoples, ethnic minorities and other groups with a special relationship with their lands and territories in situations or risk of internal forced displacement**

The United Nations Declaration on the Rights of Indigenous Peoples is particularly relevant for the prerogatives it contains, establishing the right to self-determination in borders, migration and displacement contexts. This statement includes the following: recognition of the right to land, not to be forcibly displaced from their lands or territories and not to be relocated without their free, prior and informed consent —Articles 10, 25, 26, 27, 30, and 32—; the right to non-discrimination, to human rights and fundamental freedoms, as a collective or as individuals —Articles 1, and 2—; the right to enjoy economic, social, cultural and labour rights —Articles 17, 20, 21, 23, and 44—; the right not to be subjected to forced assimilation or the destruction of their culture —Article 8—; the right to participate in the decision-making and to express their free, prior and informed consent and to preserve and protect their environment —Articles 10, 11, 19, 28, 29, and 32—; the right to protection of and access to historical and cultural sites —Articles 11, and 12—; the right to find their own identity —Article 33—; and the right to restitution and compensation —Article 28—.<sup>18</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Cf.* United Nations Expert Mechanism on the Rights of Indigenous Peoples, *Indigenous peoples'*

Article 7 is particularly important given the recent and comprehensive interpretation of the Human Rights Committee on the right to life, also contained in Article 6 of the International Covenant on Civil and Political Rights (ICCPR). According to the Committee, States have the duty to address not only the general conditions that could pose a direct threat to life, but also the conditions that could prevent persons from enjoying their right to live with dignity. These conditions include environmental degradation caused by pollution and climate change, deprivation of lands, territories and resources of indigenous peoples, access to food, water, health care, and housing and other issues that have a direct impact on the lives of indigenous peoples, particularly in the context of migration.<sup>19</sup>

The most common effects and content of violations of the human rights of individuals, communities, and indigenous peoples in the context of forced internal displacement are listed, but not limited to, below. These damages are interrelated because when one of these rights is violated, the others are inevitably violated as well. Thus, the consequences in some of them can have the same effect. For example, the deprivation of certain economic activities of members of indigenous communities or the dispossession of land affect both food and the physical conditions of their livelihoods, as well as the cultural references on which the collective identity has been formed —background knowledge and techniques, the system of social relations and kinship, the sacred conception of the land, the religious rites of reciprocity and contribution to nature. And vice versa: the violation of cultural rights, the repression of culture or identity signs, the impediment to religious practices or celebrations hinder the practice of social relations, the kinship network, the smoothness of economic practices, and disrupt the sense of belonging to a collective.

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*rights in the context of borders, migration and displacement*, par. 11. Available at <https://digitallibrary.un.org/record/3899170?ln=en>.

<sup>19</sup> *Ibid.*, par. 10.



## 1. Right to cultural identity

Two international instruments that have particular relevance in recognising the right to cultural identity of indigenous peoples are: the ILO Indigenous and Tribal Peoples Convention No. 169<sup>20</sup> and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>21</sup> Several UNESCO international instruments also develop the content of the right to culture and cultural identity.<sup>22</sup> The IACHR in analysing the scope of Article 21 of the ACHR in relation to said Convention,<sup>23</sup> the African Commission on Human and Peoples' Rights in addressing the alleged violations of Articles 17.2 and 17.3 of the African Charter on Human and

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<sup>20</sup> ILO, *op. cit.*, Art. 2.2 (b): “[Governments, with the participation of the peoples, must develop coordinated and systematic action, including measures] promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;” Art. 4.1: “Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned;” Art. 5: “In applying the provisions of this Convention, a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected; b) the integrity of the values, practices and institutions of these peoples shall be respected.”

<sup>21</sup> United Nations Declaration on the Rights of Indigenous Peoples, Art. 8.1: “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture”; Art. 8.2: “States shall provide effective mechanisms for prevention of, and redress for: (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities [...]”; Art. 11: “Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature;” Art. 12.1: “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites.”

<sup>22</sup> See UNESCO, Universal Declaration on Cultural Diversity, 2001; *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it*; Convention for the Safeguarding of Intangible Cultural Heritage. See also UNESCO conventions and recommendations concerning culture or cultural identity that mention indigenous peoples: *Recommendation on the Safeguarding of Traditional Culture and Folklore*; and *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

<sup>23</sup> *Cf.* IACHR, *Yakye Axa Indigenous Community v. Paraguay*, par. 136. In this case, the Court claimed that States must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

Peoples' Rights,<sup>24</sup> as well as the Committee on Economic, Social and Cultural Rights (CESCR)<sup>25</sup> and, to some extent, the European Court of Human Rights (ECHR) in cases related to<sup>26</sup> minorities have addressed the right to cultural identity and the collective dimension of the cultural life of native, indigenous, tribal and minority communities and peoples.

Recognition of cultural identity is part of and the channel to the cross-sectional analysis aimed at conceiving, respecting and guaranteeing the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the ACHR and in accordance with Article 29 (b) of the Convention, as well

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<sup>24</sup> Cf. African Commission on Human and Peoples' Rights, Communication No. 276/2003, par. 241 stated:

protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity [... The commission] notes that Article 17 of the [African] Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics.

<sup>25</sup> CESCR Committee, General Comment No. 21, par. 36.

The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

<sup>26</sup> Cf. ECHR, *Chapman v. The United Kingdom*, No. 27238/95 ECHR 2001-1, par. 83. The Court acknowledged that Art. 8 protects the right of a minority (Gypsies) to maintain their identity; *Gorzelik et al. v. Poland*, No. 44158/98, par. 92; the European Court noted that the need to protect cultural identity is also important for the proper functioning of a democracy. See References to all cases referred to in this paragraph in ECHR Research Division, "Cultural Rights in the case-law of the European Court of Human Rights," p. 9-12.

as domestic legal systems.<sup>27</sup> Likewise, ILO Convention No. 169<sup>28</sup> recognises that indigenous peoples can “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.” Article 27 of the ICCPR recognises the right of minorities to enjoy their own culture or to profess and practise their own religion and to use their own common language with other members of their group.

As to the nature of that right, it is a collective right in indigenous communities and must be respected in a multicultural, pluralistic and democratic society.<sup>29</sup> The culture of members of indigenous communities corresponds to a particular way of life, a specific way of being, seeing and acting in the world, developed on the basis of their close relationship with their traditional territories and the natural resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.<sup>30</sup>

The IACHR has recognised that the displacement of members outside their indigenous community can cause “a rupture with their cultural identity, which affected their ties with their relatives, their language and their ancestral past.” Thus, according to the Inter-American Court, in order to guarantee this right, States must adopt “specific measures of protection considering the particularities of indigenous peoples, as well as their customary law, values, uses and customs in order to prevent and reverse the effects” of internal forced displacement.<sup>31</sup> Among the effects of the forced displacement of indigenous peoples or some of their external members is the disruption of their cultural identity as it affects their ties with their relatives, their language and their ancestral past. Certainly, territories have a material and symbolic importance to

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<sup>27</sup> IACHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, par. 213.

<sup>28</sup> ILO, *op. cit.*, fifth recital.

<sup>29</sup> IACHR, *op. cit.*, par. 217.

<sup>30</sup> IACHR, *Case of the Yakye Axa Indigenous Community... quot.*, par. 135.

<sup>31</sup> *Ibid.*, pars. 146-147.

the cultural identity and worldview of indigenous peoples and communities. This is because they are part of the collective subjectivity and allow to consolidate the strong bond that exists between the elements of nature and culture and the dimensions of the self of each member of these localities. The foregoing denotes the profound effects on social and spiritual relations that displaced community members can have when losing contact with their territory and the elements that make it up.

The exodus of the population from their habitual residence implies the loss of their relationship with nature; with the celebration of traditional holidays that are associated, for example, with agriculture and water; with their main sacred places and cemeteries that are usually cultural references of ancestors and the history of their people; as well as with material elements for artisanal and musical production. Moreover, internally displaced persons suffer the destruction of their social structure, as relations with other persons are redefined. This situation mainly affects children, since it influences the forms of transgenerational transfer of their culture, that is, they can lose their spiritual guides and community leaders, who ensure compliance with the principles of culture. Also, the violation of the right of identity affects the rituals for the dead due to the impossibility of burying them in their sacred places. This escalates the suffering and anguish of relatives, because in the indigenous worldview, there is usually a ritual of farewell, preparation and gratitude to the people who pass away that characterises their uses and customs. In addition, as they are not able to bury their deceased in that sacred place, relatives, friendships and acquaintances may be unable to bring flowers or food or perform any other type of ritual for those who have passed away. Little by little, displaced indigenous persons stop practicing the rituals of burial and ceremony to their dead, which implies a loss of their culture.

The case of forced displacement as a result of mega-projects on indigenous territory is the result of the destruction of sites of particular importance in the spiritual life of community members; its effects on the migration of animals, mountains, trees, forests, water sources, caves, underground rivers, or any area

of high environmental, cultural and food subsistence value for the indigenous community or people or on sites violate the worldview and beliefs of communities. Having to stop cultural ancestral rituals and ceremonies of the indigenous people or community can affect the harmony and spirituality of their members and can have an impact on the teaching of cultural traditions and rites to children, as well as the perpetuation of spiritual knowledge.

In the new survival strategies that displaced persons adopt, identity markers are often made invisible. Frequently, during their transfer from their habitual residence to the new site, they are detached from their traditional clothing, and tend to adopt the clothing and language of the new place; that is, displacement is also a mimetisation process.

## 2. Right to land, territory and other resources traditionally owned in the context of the right to property

It refers to the laws, customs, traditions and land tenure systems of the indigenous people that determine the mode and form of traditional property or other traditional occupation, use and acquisition of lands, territories and resources they own.

The United Nations Declaration on the Rights of Indigenous Peoples establishes the right of members of the community to their lands, territories and resources and the protection of the environment in which they are located (Articles 25 to 27, 29, 30, and 32) and obliges States to legally recognise and protect these lands; which is an important factor in preventing internal forced displacement. Article 13 of ILO Convention 169 is devoted to the protection of indigenous territories, adding in Article 16 the exceptional relocation of peoples from their lands and in Article 17 the duty to respect the modalities of the transmission of rights to indigenous land. The Political Constitution of the United Mexican States (CPEUM) states, in Section VII of Article 27, that “the law shall protect the wholeness of the indigenous groups’ lands.”

As mentioned above, in the context of indigenous peoples' property rights, Article 21 of the ACHR protects the close links that indigenous peoples have with their lands, as well as with the natural resources of the ancestral territories and the incorporeal elements that emerge from them. Due precisely to the intrinsic connection that members of indigenous peoples have with their territory, the protection of the right to property, use and enjoyment of territory is necessary to ensure their survival.<sup>32</sup>

As to the scope and content of this right, the CESCR Committee refers to the following:

The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.<sup>33</sup>

It should be emphasised that the right to land and territory of indigenous peoples has two components; the first involves the defence of their integrity based on an outward approach, i.e., in the face of dispossession, irregular appropriation, forced displacement or exploitation without peoples' consent; the second is an inward approach, involving the possibility of the community

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<sup>32</sup> *Ibid.*, par. 346.

<sup>33</sup> CESCR Committee, General Comment No. 21; *Right of everyone to take part in cultural life (Art. 15, par. 1 [a]), of ICESCR*, par. 36.

to define the individual or collective use, and the inner modalities of appropriation, transfer, use, and exploitation of land and its resources, as well as the symbolic and spiritual uses of certain sites.<sup>34</sup>

It is also important to point out that the concept of “property” enjoys a broad scope in the Inter-American Human Rights System, not only in terms of its object, but also regarding the subjects to whom the right is recognised. As regards the “subjects” of property, such system has recognised the collective right to property, even when its holders lack a license or formal deed of ownership thereto, on the basis that it is a core part of the culture, religion, economy, integrity, and spiritual life of indigenous communities and tribal peoples.<sup>35</sup>

On the possession of the lands of indigenous persons, communities and peoples, the IACHR has stated the following:

(1) Traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.<sup>36</sup>

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<sup>34</sup> Cf. SCJN, *Protocolo de actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas*, p. 21.

<sup>35</sup> Cf. IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, par. 484.

<sup>36</sup> Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, par. 128.

However, bearing in mind that the relation of indigenous peoples with their territory is essential for maintaining their cultural structures and their ethnic and material survival, it can be concluded that forced displacement of members of a community outside the territory can place them, as mentioned above, in a situation of particular vulnerability. This situation can cause destructive sequelae on the ethnic and cultural fabric, and pose a clear risk of cultural or physical extinction of indigenous peoples.<sup>37</sup>

Indeed, displacement of members of an indigenous community impacts the relationship of the original people with their territory, as well as the community, traditional, cultural and ancestral ties of the group as such. This is so because transfer breaks the historical links that the affected population had with their territory, with the land and with the social practices that governed daily life. Dismantling of community fabric, which leads to the rupture of social relations occurring within each community to organise coexistence is among the usual effects. This is due to the sudden loss of traditional channels for transfer of knowledge between generations, cultural logic, productive practices, and land use. Communal cohesion is reduced since, among internally displaced persons, there are those who served as traditional authorities or community leaders, and who were then stripped of their leadership. Therefore, community organizations weaken.

The Inter-American Commission on Human Rights (IACHR) has stated that, during the period of internal displacement until their return to their lands, indigenous displaced persons may not enjoy “access to, and use of, personal and community property, lands and natural resources found there.” For its part, “their right to property [may also be affected] due to the neglect and deterioration of their lands and both their moveable and immovable, community and individual property.”<sup>38</sup>

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<sup>37</sup> *Ibid.*, par. 147.

<sup>38</sup> IACHR, Report No. 64/11, Case 12,573; *Marino Lopez et al. (Operation Genesis) (Colombia)*, par. 348.



Likewise, the IACHR has determined that forced displacement “disadvantages them in the possibility for work,” which, in turn, causes loss of earnings for displaced indigenous people. Those who find “their right to property affected whenever during the time of the displacement they [...] cannot] access the right to the use and enjoyment of the natural resources on their traditional lands [...] among other resources traditionally used by members of the [...] [indigenous] communities.”<sup>39</sup>

Also, lack of access to territories may prevent indigenous communities from using and enjoying the natural resources necessary for their livelihood, including activities to access traditional health systems and other socio-cultural functions linked to resources and territory. This can expose them to precarious and inhuman living conditions and to greater vulnerability to diseases and epidemics, and it can subject them to situations of extreme absence of protection.<sup>40</sup>

### 3. Right to Free, Prior, Informed, Culturally Appropriate and in Good Faith Consultation

The following articles provide for the human right to prior consultation of indigenous persons and peoples: Article 2 (B), sections 2 and 9 of the CPEUM; 1, 6, No. 1, 15, No. 2, 22, No. 3, 27, No. 3 and 28 of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries; also, in No. 18 of the United Nations Declaration on the Rights of Indigenous Peoples, based on Article 25 of the ICCPR, which guarantees all citizens the right to “take part in the conduct of public affairs.”

The content of these legislations shows that the right to prior consultation of indigenous communities is a fundamental prerogative; the purpose of which is

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<sup>39</sup> *Id.*

<sup>40</sup> IACHR, *op. tit.*, par. 354.

to ensure, through *culturally appropriate, informed* and *in good faith* procedures, the opportunity for community members to express their opinions, doubts and concerns to the public authority. This must be done prior to adopting an administrative or legislative measure that could affect this vulnerable group, thus combating social exclusion to which they have historically been subjected.<sup>41</sup>

Prior consultation means: (i) involving indigenous peoples as early as possible, i.e., consultation and participation should be undertaken at the conceptualization and design phases and not launched at a late stage in a project's development, when crucial details have already been decided; (ii) providing the time necessary for indigenous peoples to absorb, understand and analyse information and to undertake their own decision-making processes.<sup>42</sup>

The notion of *informed* implies the following: that the information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear; it should be presented in a manner and form understandable to indigenous peoples; the substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity; it must also include the reasons for the project, the areas to be affected, social, environmental and cultural impact assessments; as well as the kind of compensation or benefit-sharing schemes involved and all the potential harm and impacts that could result from the proposed activity.<sup>43</sup>

In *good faith* consultation requires the absence of any kind of coercion by the State or its agents (or individuals) and that they should act under the authorization or acquiescence of peoples. The consultation should also take place in an atmosphere free of hostility that forces indigenous communities or

<sup>41</sup> Tesis XXVII.3o. 19 CS (10a.), *Gaceta del Semanario Judicial de la Federación*, book 62, volume 4, p. 2268, Digital Registration: 2019078.

<sup>42</sup>United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach*, par. 21.

<sup>43</sup>*Ibid.*, par. 22.

peoples to make a vicious or hasty decision; therefore, the process requires establishing an atmosphere of mutual trust between the parties.<sup>44</sup>

On the *culturally appropriate* element, the Third Collegiate Court of the Twenty-Seventh Circuit of the Federal Judiciary, in the precedent of the isolated thesis *Derecho humano a la consulta previa a las personas y pueblos indígenas, su fundamento constitucional y convencional en materia de biodiversidad, conservación y sustentabilidad ecológicas*,<sup>45</sup> stated that State duty to consult indigenous communities or groups must be fulfilled in accordance with their customs and traditions, considering at all times the traditional methods they use in making their decisions.

In this sense, decisions taken by indigenous communities according to the exercise of their uses and customs must be respected at all times. Members of an indigenous community are fully free to choose the forms of internal decision, as well as the persons, groups or institutions that will represent them during the consultation process; therefore, the State shall not be able to object to the way in which they make their decisions. On the other hand, culturally appropriate consultation is one where the authorities conduct it through suitable means and tools for indigenous communities, so that, *inter alia*, the access to information technologies does not impair the enjoyment of this right.

In addition to the above parameters, the notion of *free* consent should be added. As affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, decisions to grant or withhold consent must be free. This term is used and understood as addressing both direct and indirect factors that can hinder indigenous peoples' free will.<sup>46</sup> This means that States are obliged to consult with indigenous peoples on matters affecting them in different contexts. The law applies to any administrative or legislative action that may

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<sup>44</sup> Precedent of Tesis XXVII.3o.19 CS (10a.), *Gaceta del Semanario Judicial de la Federación*, Tenth Period, book 62, volume 4, p. 2268, Digital Registration: 2019078.

<sup>45</sup> *Id.*

<sup>46</sup> Cf. United Nations Human Rights Council, *op. cit.*, pars. 20-23.

have an impact on the rights or interests of indigenous peoples. In this regard, prior consultation of indigenous peoples must take place not only to weigh the use of the natural resources of their territories, but for any measure that may directly affect these communities.<sup>47</sup> Thus, a number of generic situations considered to significantly impacting on indigenous groups have been identified without limitation: (i) the loss of territories and traditional land; (ii) the eviction of their lands;<sup>48</sup> (iii) possible resettlement; (iv) depletion of resources necessary for physical and cultural subsistence; (v) destruction and pollution of traditional environment; (vi) social and community disorganization; (vii) negative health and nutritional impacts, among others.<sup>49</sup>

The United Nations Human Rights Council has indicated that large-scale development projects located on indigenous lands and that have a significant impact on their critical cultural heritage, or use cultural heritage, including knowledge, innovation or practices for commercial purposes, require the consent of peoples with the parameters described above.<sup>50</sup> Furthermore, indigenous peoples have the right to participate fully throughout the development process, as well as to propose alternatives that the authorities must give due consideration to.

Displacement by large-scale development projects which are not justified by compelling and overriding public interests is described as a form of arbitrary

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<sup>47</sup> Cf. SCJN, *op. cit.*, p. 23.

<sup>48</sup> In this regard, the IACHR recalled in Precautionary Measure 860-17 that indigenous peoples are disproportionately affected by the practice of forced evictions and in cases where families are dispersed in various communities and villages as a result of eviction from the place they were living. This eviction affects the group's social cohesion and impacts on its cultural identity, results in breaking down the social fabric, community weakening and fragmentation, and in the most serious cases, results in complete loss or serious deterioration of its ethnic and cultural identity.

<sup>49</sup> See Tesis 2a. XXVII/2016 (10a.), *Gaceta del Semanario Judicial de la Federación*, book 31, volume 2, p. 1213, Digital Registration: 2011957.

<sup>50</sup> Cf. United Nations Human Rights Council, *op. cit.*, pars. 36-38.

displacement and considered a type of human rights violation, according to Principle 6 of the Guiding Principles.<sup>51</sup>

The limitation of this human right as regards large-scale development projects, that is, the decision to carry out the activity after the consent has not been obtained, must be accompanied not only by the necessary safeguards (including redressing balance-of-power issues, environmental and socio-economic impact assessments, mitigation measures, compensation and benefit sharing), but also by remedial measures taking into account any communities' rights violations. In some cases, including threats to human life, sacred sites and cultural practices, it may be difficult or impossible to establish a monetary value to rights violations. So, among other reasons, it is vital that any tensions arising in relation to a project within indigenous communities in the process of seeking free, prior and informed consent should be resolved in accordance with their own laws, traditions and customs, and through their own representative institutions.<sup>52</sup>

Finally, in terms of the impact of not guaranteeing that human right, the IACHR has considered that the lack of consultation of indigenous peoples and communities in relation to planned mega-projects in their lands and territories, affect their cultural identity. Therefore, there is no doubt that intervening and destroying their cultural heritage implies a lack of respect and a serious attack on their social and cultural identity, customs, traditions, view of the world, and way of living.<sup>53</sup>

Lack or corruption of elements necessary to guarantee the human right to consultation may be a reason for judicial proceedings.<sup>54</sup> This process can be demanded by any member of the indigenous community or people, whether or

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<sup>51</sup> Cf. State Commission for Human Rights in Chiapas, *Relatoria sobre Desplazamiento Interno en Chiapas*, p. 20-21. Available (in Spanish) at <https://cedhchiapas.org/cedh/3742-2/>

<sup>52</sup> *Ibid.*, pars. 38-41.

<sup>53</sup> Cf. IACHR, *op. cit.*, par. 220.

<sup>54</sup> Cf. SCJN, *op. cit.*, p. 23.

not it is a legitimate representative appointed by the community.<sup>55</sup> This procedure may, for example, result in legislative, administrative or other measures being enacted to recognise and ensure the right of the indigenous community to be effectively consulted, in accordance with its traditions and customs. The procedure should enable the right to give or withhold their consent to the mega-project in question that may affect their territory, and to reasonably share the benefits of such projects with the indigenous people, should these be carried out due to their free, informed and prior consent.<sup>56</sup>

It is important to repeat the following, the exercise and defence of the human right to consultation belongs to indigenous communities collectively or individually. Certainly, if one of the members of an indigenous community individually decides to exercise this right, considering that a certain measure has a significant impact on its environment and affects them personally and collectively in their way of life, this person's legitimate interest to claim through the corresponding means must be recognised.<sup>57</sup>

In this regard, the collegiate circuit courts have determined that the common exercise and protection of the right to consultation —about an administrative or legislation measure that could affect indigenous peoples, or have a significant impact on their environment— is in the legitimate interest of persons who describe themselves as members of a particular ethnic group. Therefore, members of a community may claim through an amparo trial, for example, for an administrative measure on the conservation and sustainable use of biodiversity with significant impact on the environment.<sup>58</sup> Thus, indigenous peoples do not require demonstrating a concrete act of application or

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<sup>55</sup> See Tesis 1a. CCXXXV/2013 (10a), *Gaceta del Semanario Judicial de la Federación*, Book XXIII, Volume I, p. 735, Digital Registration: 2004169.

<sup>56</sup> Cf. IACHR, *Pueblo Saramaka v. Suriname*, par. 194.

<sup>57</sup> See Tesis XXVII.3o. 157 K (10a.), *Gaceta del Semanario Judicial de la Federación*, Tenth Period, Book 62, Volume IV, p. 2269, Digital Registration: 2019117.

<sup>58</sup> See Tesis: XXVII.3o.70 A (10a.), *Gaceta del Semanario Judicial de la Federación*, Tenth Period, Book 62, Volume IV, p. 2271, Digital Registration: 2019119.

subsequent implementation, since the grievance generated by the omission of the right to consultation involves them as direct or indirect recipients in their compliance.<sup>59</sup>

#### 4. Right to Work

The following articles refer to the right to work: Articles 17, 20, and 21 of the United Nations Declaration on the Rights of Indigenous Peoples; Articles 4, 7, 20, 23, and 30 of ILO Convention No. 169; Article 7 of the ICESCR; Article 2, Section B, Subsection VII; Articles 5 and 123 of the CPEUM; and Articles 2, 3, 28-B, 56, and 133 of the Federal Labour Act.

The core of these articles dictates the right to earn a living from a job that is freely chosen or accepted, to have access without discrimination to training and vocational guidance programmes provided by the State, as well as to have access to public policies to obtain employment or livelihood. The right to work must be guaranteed without discrimination in accessing employment, that is, the Government must adopt public policies that ensure equal opportunities, respect for employers and the implementation of programmes that protect the right to work for vulnerable groups. States must ensure favourable, safe and healthy working conditions, fair wages and equal pay without distinction of any kind, the right to freedom of association, equal opportunities for promotion, adequate working hours and rest days and holidays. The right to work also protects people against forced labour and unjustified dismissal.<sup>60</sup>

Most indigenous peoples have developed specialised livelihood strategies, which are adapted to the specific conditions of their traditional territories and depend largely on access to land, territories and resources.<sup>61</sup> Traditional

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<sup>59</sup> See Tesis. XXVII.3o.71 A (10a.), *Gaceta del Semanario Judicial de la Federación*, Tenth Period, Book 62, Volume IV, p. 2270, Digital Registration: 2019118.

<sup>60</sup> Cf. State Commission on Human Rights in Chiapas, *op. cit.*, p. 46.

<sup>61</sup> Cf. ILO, *Eliminating discrimination against indigenous and tribal peoples in employment and occupation: A Guide to ILO Convention No. 111*, p. 4. Available at

occupations are linked to a number of activities related to the territory they inhabit, for example, agriculture, hunting, fishing, harvesting and traditional production, that meet the livelihood needs of an original community.

When indigenous people are displaced, the living conditions of the host place usually do not allow them to resume their traditional economic activities. Instead, they have to participate in economic activities that may not provide a stable income. This instability, among many others, contributes to the disintegration of the social structure, and cultural and spiritual life of the members of the displaced community. For example, for those indigenous people who have lived their entire lives in rural areas, moving to an urban or semi-urban context implies abandoning their particular jobs to be part of the labour force. In this way, members of displaced indigenous communities work as labourers, helpers, construction workers, dockers, maquila workers, household employees, day labourers and other types of work. These are usually temporary or seasonal and are poorly regulated jobs, leading to low compensation for the work performed, almost bondage hiring patterns, excessive hours, ill-treatment, abuse and lack of legal benefits.

The restriction of native territories, as a result of internal displacement, prevents indigenous people from accessing their traditional livelihood activities, exposes its members to situations of labour exploitation and even practices such as forced labour or debt bondage, similar to slavery.<sup>62</sup>

## 5. Right or Freedom of Movement and Residence

This human right has been extensively discussed in this handbook. However, for the purposes of this chapter, it is important to emphasise that the right to

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[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_097727.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_097727.pdf).

<sup>62</sup> IACHR, *Access to justice and social inclusion: The road towards strengthening Democracy in Bolivia*, Doc. OEA/Ser.LN/II, Doc. 34, par. 257-268, 297; Recommendation No. 8.



freedom of movement throughout the territory of the State and the freedom to choose one's own place of residence are particularly relevant to indigenous peoples. Subject to certain restrictions, the right to choose one's own place of residence includes protection against all forms of forced displacement.<sup>63</sup> Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples prohibits the forced expulsion of indigenous peoples on any grounds, and requires that relocation be carried out only with the free, prior and informed consent of the concerned indigenous peoples.

The State cannot guarantee this human right unless it is able to provide the means to enable members of an indigenous community to return voluntarily, safely and with dignity to their traditional lands, with which they have a special dependence and attachment. It is not possible to guarantee members of the community their right of movement and residence until it is certain that their human rights —particularly the rights to life and personal integrity— will be respected through, for example, an effective investigation and judicial process resulting in clarifying the facts and sanctioning those who caused the forced mobilization of displaced persons from their place of residence.<sup>64</sup>

In addition, as in the case of *Moiwana Community v. Suriname*, the IACHR states that in order ensure a dignified and safe return, we must also understand the ways the community does that. Displaced indigenous persons sometimes have religious and cultural rules they must abide by in order to return to their territory; for example, they must first purify their land through the corresponding rituals so that they do not suffer physical or psychological illnesses for not having done them according to their view of the world. These elements become indispensable for the safe and dignified return of displaced

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<sup>63</sup> See ICESCR, Art. 12; United Nations Expert Mechanism on the Rights of Indigenous Peoples, *op. cit.*, par. 13.

<sup>64</sup> *Cf.* IACHR, *Moiwana Community v. Suriname*, pars. 120 and 212.

persons, without which a restriction on their right of movement or residence would be updated.<sup>65</sup>

## IV. Specific Prevention, Care, Protection and Solution measures

Each case of exodus of members of indigenous communities has its own patterns of displacement and its specific condition. Both factors must be recognised in the full magnitude of their gravity to provide an appropriate response by the State. The following outlines, in a non-limiting way, measures of prevention, care, protection and solution with an intercultural approach that relevant authorities can use for specific cases and, as it will be described, some of them can be used as a measure of prevention and durable solution at the same time.

### 1. Prevention Measures

Prevention is a term that includes both the idea of warning the causes of forced displacement and the function of mitigating its effects.<sup>66</sup> Preventive action consists of initiatives that have the effect of preventing the occurrence and recurrence of conditions that force people to leave their place of habitual residence. The idea of prevention should never be confused with efforts to block the flight of threatened populations, or to prevent people from leaving.<sup>67</sup> Some prevention measures related to the displacement of members of an indigenous community include:

- Encouraging open dialogue and in the language understood by community members for the resolution of conflict as a method of mediation and conciliation.

<sup>65</sup> *Ibid.*, par. 212.

<sup>66</sup> Cf. Executive Committee of the High Commissioner's Programme, *Note on International Protection*, A/AC.96/799, par. 26.

<sup>67</sup> Cf. UNHCR, *Papel de ACNUR en la prevención de las situaciones que producen refugiados*.

- Faced with the possibility of loss of territories and traditional land, or eviction due to mega-projects,<sup>68</sup> preconditions should be established for getting, where appropriate, the free, prior and informed consent. As mentioned, these agreements must be reliable, in good faith; culturally appropriate methods of negotiation that should recognise and respect the inherent rights of indigenous peoples. The process must be formal and conducted in an environment of mutual respect. It shall be guaranteed that information regarding the potential impact of the project or measure is presented to indigenous peoples in a way they can understand, in a culturally appropriate manner in accordance with their inherent and independent traditions. If necessary, it should also be presented orally and in their corresponding languages.<sup>69</sup>
- Similarly, in cases of eviction due to development projects, the access of neutral persons serving as observers should also be allowed to ensure transparency and compliance with international principles. Likewise, access to justice must be guaranteed, including legal advice

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<sup>68</sup> UN, Basic Principles and Guidelines on Development-based Evictions and Displacement; the following measures are established as pre-eviction measures: (i) giving appropriate notice to all persons likely to be affected; (ii) effective and early dissemination by authorities, in particular on the proposed land registrations and comprehensive resettlement plans, with measures aimed especially at protecting vulnerable groups; (iii) reasonable time for public examination, the formulation of comments or objections to the proposed plan; (iv) access to justice including legal advice and representation; (v) judicial decisions should be announced in writing, in the language people understand and well in advance. The notice should contain the absence of reasonable alternatives, all the details of the proposed alternative and where there are no alternatives, all measures taken to minimise the adverse effects of displacement; (vi) individuals should be able to make an inventory to assess their personal property and to assess and document the non-monetary losses to be compensated; and (vii) a durable solution should be offered prior to eviction or the large-scale project to ensure people do not remain without adequate housing or in a situation of violation of other rights; (viii) neutral observers should be allowed access to ensure transparency and compliance with international principles during any eviction and there should be sufficient time for individuals to prepare and remove their belongings.

<sup>69</sup> Cf. United Nations Human Rights Council, *Free, Prior and Informed Consent...* quot., p. 20-21.

and representation. Judicial decisions must be announced in writing, in the language people can understand and well in advance.<sup>70</sup>

- Evaluation and attention to unmet needs in indigenous communities that may eventually lead to displacement processes from the analysis of a risen case.
- Guidance to members of indigenous communities who may be affected by displacement about the legal and institutional solution of conflicts that may generate such a situation. Help in generating documentation about the property rights, whether collective or individual.
- Training programmes for the general population, the private sector, relevant public servants, displaced persons and members of indigenous communities. Its content promotes respect for and knowledge of the human rights of displaced persons, the obligations of the State in this area, the promotion of legal recognition and respect for the right not to be targets of arbitrary displacement, and the resulting prohibition of arbitrary displacement. If necessary, this programme should be given in the relevant indigenous language.

## 2. Care Measures

Care measures can be described according to those contained in the Modelo Integral de Atención a Víctimas (Comprehensive Victim Care Model) under the concepts of “immediate help” and “assistance.” The idea of *immediate help* is understood as the provision of services and support to victims of displacement in a timely and quick manner, according to their needs in direct relation to the victimising act. This is in order to address and ensure the meeting of needs regarding emergency medical and psychological care, food, personal hygiene,

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<sup>70</sup> See UN, Basic Principles and Guidelines on Development-based Evictions... *quot.*

supplies management, emergency transportation and temporary accommodation in decent and safe conditions.<sup>71</sup> The second concept, *assistance*, is understood as the set of mechanisms, procedures, programmes, measures and resources of a political, economic, social and cultural order, among others, under the care of the State; aimed at restoring the effective validity of the rights of victims, providing them with conditions for living a dignified life and guaranteeing their incorporation into the social, economic and political life.<sup>72</sup>

The care measures that can be taken when there is an episode of internal forced displacement of members of an indigenous community include:

- During the time of displacement, indigenous children and adolescents must have intercultural programmes available in their native language. If possible, these programmes should be developed with traditional authorities of the community of origin so indigenous displaced children and adolescents can have access to culturally appropriate education.
- Teaching staff trained in intercultural and bilingual instruction in the education of displaced indigenous children and adolescents.
- Providing free and immediate medical and psychological treatment, culturally relevant to victims and with prior informed consent, for as long as necessary, including free provision of medicines. Such medical and psychological care should be culturally appropriate, for example, through healers of the relevant indigenous community, in accordance with their own health practices and through the use of traditional medicines. In order to achieve this, the State must agree with the victims how this measure will be carried out.

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<sup>71</sup> Cf. Modelo Integral de Atención a Víctimas, p. 53.

<sup>72</sup> *Ibid.*, p. 55.

- Sometimes, the damage suffered by the action that caused the exodus is not only limited to aspects of individual identity, but also to the loss of community links and ties. Therefore, it is appropriate to have a measure that seeks to reduce psychosocial suffering. When providing psychological treatment, the particular circumstances and needs of each person must be considered, so that collective, family and individual treatments could be provided, according to what is agreed with each of them and after an individual evaluation.
- With regard to the recovery of documents proving the ownership or possession of their land, methods should be established for those who have lost the documentation proving possession of their land and property to obtain or verify their possession in alternative ways. On this point, it is important to stress that the IACHR has stated that the following are appropriate means of identification: (i) an official document certifying the identity of the person; or (ii) a statement made before the relevant authority by a leader recognised by the members of the indigenous community where the indigenous displaced persons lived, together with the statement of two additional persons, clearly attesting to the identity of the person. This wide of criteria regarding identification is because many indigenous people have no formal identity documents or have never been registered in the civil registry.<sup>73</sup>
- Ensuring the protection of the specific nutritional needs and traditions of the displaced indigenous population, i.e., access to adequate nutritional and culturally appropriate food, as well as the provision of drinking water for the displaced population. All

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<sup>73</sup>IACHR, *op. cit.*, par. 178.

according to the levels considered acceptable by international organizations such as the World Health Organization (WHO).<sup>74</sup>

- To adequately address the displacement situation and to collect basic information on their assistance needs, socio-economic and, where appropriate, environmental studies of the indigenous community from which the victims were displaced, as well as of host communities should be developed. These should eventually include the full participation of displaced indigenous people in the planning and management of such studies. This diagnosis provides an insight into the economic, social and cultural conditions of the population and its displaced members to lay the foundations for the comprehensive development of care plans. This evaluation should imply exploring alternatives and strategies to minimise harm, consider differentiated impacts on vulnerable persons, and include disaggregated data collection.<sup>75</sup>
- Provide, if necessary, traditional clothing for displaced indigenous people.
- Work training programs aimed at achieving the full integration of the displaced indigenous persons to the municipality where they are located and the realization of his or her life project.
- Legal guidance for members of displaced indigenous communities on legal and institutional path to protect their lands and territories for as long as they are outside their habitual residence.

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<sup>74</sup> Cf. IACHR, Precautionary Measure No. 412-17, *Pobladores desalojados y desplazados de la Comunidad Laguna Larga respecto de Guatemala*, par. 4.

<sup>75</sup> Cf. Model Law of the African Union for the Implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Art. 16.

### 3. Protection Measures

*Protection* should be understood as all activities aimed at achieving full respect for a person's rights. Protection measures should create an environment encouraging respect for human beings, anticipate or reduce the immediate effects of specific abuses, and restore decent living conditions.<sup>76</sup> Some protection measures that can be dictated when there is an episode of internal forced displacement of indigenous communities' members are:

- In order for justice to be culturally and materially accessible to displaced indigenous persons, all trials and procedures to which they are a party, individually or collectively, must have interpreters and advocates knowing their language and culture.
- In any kind of trial or procedure to which indigenous persons are a party, individually or collectively, their cultural customs and particularities should be considered. For this right to be effective, at least, four issues must be identified in the field of criminal proceedings:<sup>77</sup>
  - ♦ Verify the exercise existence and validity of a *custom* in the terms alleged by the accused person. That is, confirming that an accused person' conduct is part of the practice from the community they come from; for example, the community custom of physically expelling its members for not fulfilling certain community tasks. For this, the judicial authorities may obtain anthropological evidence or other lawful means of proof, such as community minutes or councils of elders.

<sup>76</sup> Cf. Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons*, p. 540-541.

<sup>77</sup> See Precedent of Direct Amparo directo in Review 5465/2014, *Gaceta del Semanario Judicial de la Federación*, Book 61, Volume I, p. 365, par. 97.



- ♦ Considering the particular protection needs of the subject of law and the cultural context in which they develop and from which their behaviours derive. That is, the following must be done: (i) considering specific characteristics that differentiate members of indigenous peoples from general population and that make up their cultural identity when interpreting their rights; (ii) ensuring there is an advocate speaking the language and an interpreter of the indigenous language and culture to which the person, people or community concerned belongs; and (iii) facilitating a proper defence and promoting the participation of indigenous person, people or community by providing information, in their language and in accordance with their culture, on the status of the judicial process in which they take part.
- ♦ Determining whether the documented custom —like the community practice of physically expelling its members because they do not comply with community rules mentioned before— is valid. That is, it does not come into conflict with absolute human rights prohibitions, or it does not result in an illegitimate restriction that cannot be justified as necessary in a multicultural society. Thus, a customs and practices norm openly adverse to the respect for and the protection of the human rights of the indigenous person or other persons involved in the judicial process —whether or not they share indigenous status— shall not be applicable.
- ♦ Determining the custom role in the judicial process. For example, in case of criminal proceedings, it should be determined in which crime element the indigenous custom or particularity should be weighted. That is, deciding whether it constitutes an exclusion of responsibility, a mitigating factor or whether it should be assessed for passing sentence.

- Until the right to ownership of indigenous community members over their traditional territories is guaranteed, the appropriate authority must refrain from actions —whether by State agents or third parties acting with the permission or tolerance of the State— affecting the existence, value, use or enjoyment of property located in the geographical area where members of the indigenous community traditionally lived. At the same time, ensuring the protection of the items, properties and crops abandoned in the community before their displacement.<sup>78</sup>
- During the investigation and effective judicial process, in order to clarify the facts and sanction those responsible for the involuntary exodus and until its completion, only members of the indigenous community can decide when it would be appropriate to return to their community. When community members are satisfied with the actions needed for their return, the responsible authority must ensure their safety.
- According to this, provision should be made for safe access to the area where they previously lived for the collection of goods, belongings and crops required for the displaced indigenous population's subsistence.<sup>79</sup>
- If necessary, and in the light of the cause of forced displacement, when the victim is threatened in their personal integrity or life, or when there are substantial grounds for believing that these rights are at risk because of the crime or the human rights violation suffered, the federal, state or local authorities shall immediately take the

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<sup>78</sup> Cf. IACHR, *op. cit.*, p. 14, par. 4.

<sup>79</sup> *Id.*

measures needed to prevent the victim from suffering any injury or damage; in accordance with their powers and capacities.<sup>80</sup>

- When, because of internal forced displacement, the household has been divided, the appropriate measures for family reunification must be sought.

#### 4. Measures for Durable Solutions

Measures for durable solutions are those that serve to satisfactorily and permanently resolve internally displaced persons' situation, allowing them to have a normal life.<sup>81</sup> A durable solution is achieved when internally displaced persons no longer need specific assistance or protection linked to their displacement situation and can enjoy their human rights without being discriminated against because of that condition.<sup>82</sup>

Apart from measures set out in the prevention, assistance and protection sections—that also serve as measures for durable solutions—the following may be dictated to solve cases of forced internal displacement of indigenous communities' members:

- In cases of a damage to the cultural integrity of the displaced community, a program must be designed and implemented to rescue the culture of the community that suffered that episode, using the corresponding instrument. It must aim at rescuing, promoting, disseminating and preserving ancestral customs and practices, based on the values, principles and philosophies of the indigenous people. Likewise, this program must generate a space to promote the artistic, linguistic and cultural expressions of the community. This

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<sup>80</sup> See Ley General de Víctimas, Art. 40.

<sup>81</sup> Cf. Global Protection Cluster Working Group, *op. cit.*, p. 544.

<sup>82</sup> Cf. Joint IDP Profiling Services, *Durable Solutions Analysis Guide. A Tool to Measure Progress towards Durable Solutions for IDPs*, p. 12.

programme design and implementation should include the active participation of community members who experienced displacement episodes.

- Adequate security conditions must be ensured so that displaced indigenous persons can return to their places of residence, if necessary and if they so wish.
- In cases they return to their lands and territories, projects of farming, livestock, handicrafts or any other activity —self-sustaining or with economic remuneration— used prior to displacement should be designed and implemented.
- The appropriate authority should establish the basic requirements of what it is considered to be a voluntary and safe return for indigenous peoples regarding the place of origin conditions. This may include land restitution, focusing on such restitution being addressed respecting indigenous peoples' rights and considering their particularities. It should also aim at reconciling, taking into account indigenous culture and traditions, with peoples participating in and shaping peace processes, inclusion-related issues, and ways of dealing with marginalization.<sup>83</sup> These considerations should also be taken into account when the solution measure is the local integration or relocation of displaced persons.
- A housing programme must be implemented, providing adequate housing for those internal forced displacement victims who so require.
- To solve the displacement situation, a diagnosis of the indigenous community and its displaced members should be made to gather

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<sup>83</sup> Cf. United Nations Human Rights Council, *Indigenous peoples' rights... quot.*, p. 22.

basic information on their return or relocation. This assessment should include, when appropriate, their full participation in planning and management. This diagnosis provides an insight into the economic, social and cultural conditions of the population to lay the foundations for the comprehensive development of care plans. Thus, reparation measures can be implemented with an intercultural approach, such as housing construction, economic compensation allocation, health measures, education, justice, or historical memory.

- Regarding indigenous communities at risk of extinction due to the exodus, rescue programmes must be implemented for the traditional *modus vivendi* of the people.
- As an exceptional measure,<sup>84</sup> if there are no conditions for returning, the appropriate authority should provide the necessary and sufficient resources to ensure that forced displacement victims can integrate into the host community or relocate elsewhere under conditions similar to the place where they were before the events leading to their forced mobilization. Displaced indigenous persons must be able to choose a national place freely and voluntarily. However, it should be noted that choosing to relocate or integrate into a community does not imply giving up the right to return to their place of origin when safe, voluntary and dignified conditions exist.
- To assess moral damage suffered by indigenous displaced persons when they had to leave their community, according to the specific case, two dimensions must be considered: pain and effects caused by situations experienced by displaced persons from an *individual* perspective, as well as from the *family* and *community* ties. The psychosocial harm caused by the events leading to their forced

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<sup>84</sup> It is called exceptional measure since displaced indigenous people's resettlement may imply losing community's relationship with their culture, natural resources, properties and language.

mobilisation includes, but is not limited to, the following: (i) dismantling of the community; (ii) destruction of family roles; (iii) loss of community cultural identity and a cultural vacuum caused by the death of community personalities; (iv) alteration of the community mourning; (v) replacement of traditional rules and values by other norms and under other authorities, in addition to changing traditional community social ties; (vi) deterioration of community trust relations; and (vii) where appropriate, damage to a community life project due to the lack of justice.<sup>85</sup>

- Judges can collect more information —through cultural or legal-anthropological expertise, or other means of proof, such as community minutes or councils of elders— that allows them to discern if the conduct treated is mandatory under the community's regulatory system or, if it is an unlawful conduct in any context. These tools are useful to show judges the persons' cultural context, or internal regulatory systems that oblige, empower or prohibit behaviours to individuals in the community.<sup>86</sup>
- The measures design and implementation should recognise internally displaced persons as participants and partners in their own recovery.

## V. Intra-community conflicts

It must be mentioned the unavoidable dilemma arising when cases of internal displacement originate in indigenous peoples as a collective punishment to exercise their right to self-determination.

CPEUM recognises the right of indigenous peoples and communities to self-determination and, consequently, to autonomy in deciding their internal

<sup>85</sup> Cf. IACHR, *Plan de Sanchez Massacre v. Guatemala*, par. 77, Subsections e) and f).

<sup>86</sup>SCJN, *op. cit.*, p. 26.

coexistence forms and social, economic, political and cultural organization. It also recognises the right to implement its own regulatory systems in the managing and solving their internal conflicts, according to the general principles of the Constitution, respecting human rights, their guarantees and, mainly, women's dignity and integrity.<sup>87</sup>

In Mexico, indigenous communities often resolve to physically expel certain members from their community because they carried out some action contrary to their traditions. This is decided in the community assembly, the highest decision-making authority in the exercise of the right to self-determination of its institutions. Therefore, to create some rules to resolve arising conflicts, various indigenous communities collectively punish those who do not follow communal rules, displacing them from their community.<sup>88</sup> These cases arise because of religious intolerance, political affiliations, non-compliance with community rules or positions, territorial conflicts, etc.

While indigenous peoples and communities have the right to promote, develop and maintain their institutional structures and their own customs —spirituality, traditions, procedures, practices and, where they exist, their own legal systems— they must follow international human rights standards.<sup>89</sup> This, then, creates an unavoidable dilemma between the right to self-determination of indigenous peoples and communities, and the rights of individuals to their freedom of transit and residence.

Indeed, according to the pro-person interpretative principle, indigenous customary law rules could be applied to specific cases, including in the central State jurisdiction. As long as these rules provide for the widest protection for a certain right and as clearly stated in the Constitution, they do not contravene

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<sup>87</sup> CPEUM, Art. 2, Part A, Sections I and II.

<sup>88</sup> State Commission on Human Rights in Chiapas, *op. cit.*, p. 109.

<sup>89</sup> United Nations Declaration on the Rights of Indigenous Peoples, Art. 34.

the constitutional provisions and the constitutional framework for the protection, respect and guarantee of human rights.<sup>90</sup>

This means that the rules of indigenous customary law will at all times be subject to constitutional, conventional and legal review to decide on their adequacy and applicability in specific cases in relation to human rights; as are the rest of the provisions that make up the Mexican legal regime. But the necessary intercultural dialogue will always be considered to define the meaning and content of rights. The mere existence of a standard of customs and practices does not imply its immediate applicability. The recognition of certain cultural uses and practices of indigenous peoples and communities may affect the human rights of those who are part of or relate to the indigenous community.<sup>91</sup>

Therefore, according to the CPEUM, the standards of customary indigenous law that directly infringe on human rights relating to the domain of *ius cogens*, such as torture, enforced disappearance, slavery and discrimination, as well as the rules that definitively eliminate the possibilities of access to justice, without this preventing the addition of a culturally inclusive interpretation to the content and scope of these rights and the meaning of these behaviours. With regard to equality and non-discrimination, the application of indigenous customs and practices cannot be an excuse for intensifying oppression, even within indigenous communities, of those members traditionally excluded, such as women, children or persons with disabilities, among other groups historically disadvantaged.<sup>92</sup>

It is therefore reasonable to consider that the right to self-determination of indigenous peoples and communities may be legitimately limited when an original community, in exercising it, decides or acts with the intention of

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<sup>90</sup>Precedent of Direct Amparo in Review 5465/2014... *quot.*, par. 83.

<sup>91</sup>*Ibid.*, par. 86.

<sup>92</sup>See Tesis 1a. CCCLII/2018 (10a.), *Gaceta del Semanario Judicial de la Federación*, Book 61, Volume I, p. 365, Digital Registration: 2018747.



expelling its own members from that locality, or any other action affecting the human rights of any of its members.

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## Reparation measures

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**Reparation measures** I. Summary; II. The right to reparation; III. The years of forced displacement and the applicable remedies; IV Differences and complementarities between reparations, humanitarian and social assistance; V The right to effective access to reparation; VI. The right to participation; VII. Conclusions.

## I. Summary

This Chapter outlines the content of the right to reparation and its scope for victims of forced displacement. It also shows the common damage caused by forced displacement, as well as the remedies available to victims and the obstacles they often face and how they can be remedied. Moreover, it establishes the differences and complementarities between reparation, assistance and social policies, as well as the essential role of ensuring victims their right to participation. The present text is based on international human rights instruments on access to an effective judicial remedy and the right to reparation, and illustrates problems and solutions with examples of comparative and international experience.

It aims at addressing the right to reparation for victims of forced displacement and it is divided in five sections. The first section provides a definition of the right to reparation, its foundation in the right to access justice, its constituent measures (restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence), its individual and collective scope, and the rules of responsibility for reparation. In the second section, the scope of the right in cases of forced displacement, the damage that victims generally suffer and some

special connotations of the repair measures that are usually applicable are explained. The third section presents the differences and complementarities between humanitarian and social assistance measures and reparations; it also addresses the recommended criteria for effective access to reparations and for overcoming the access barriers often faced by victims, especially with regard to the evidentiary challenges of harm caused by forced dispossession or abandonment. The last subparagraph sets out the rationale and importance of ensuring the right to victim participation in both the formulation and evaluation of reparation mechanisms and the definition of measures to be taken in each individual case.

## II. The right to reparation

Any violation of international human rights law (IHRL) or violation of international humanitarian law (IHL) gives rise to the right to reparation. The right to reparation is part of the right to an effective remedy, also called *right to judicial protection* or *access to justice*, which is an inherent obligation in the recognition of human rights that cannot be suspended, even in states of emergency.<sup>1</sup>

The right to an effective remedy has been understood as the right to have rights, and states that human rights violations must be taken as a serious matter that has legal consequences, and that victims cannot be left unprotected. This right obliges States to establish in their legislation simple, prompt and effective judicial remedies against human rights violations,<sup>2</sup> which translates into the obligation of those responsible to investigate, prosecute and punish the persons responsible, provide reparations to the victims and ensure the clarification of the truth. This obligation is an expression of the duty of guarantee of States, according to which they are responsible of ensuring the free and full exercise of

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<sup>1</sup>See Commission on Human Rights, General Comment No. 29, *on Article 4 of the International Covenant on Civil and Political Rights, states of emergency and suspension of rights*.

<sup>2</sup> Cf. ACHR, Art. 25.

human rights and freedoms recognised in international treaties to any person subject to its jurisdiction and without any discrimination.<sup>3</sup>

The duty of guarantee is reinforced in cases of violations that constitute international crimes, which in turn coincide with the facts that affect rights that cannot be restricted during states of emergency.<sup>4</sup> Among the non-derogable rights are, in addition to those outlined in the aforementioned rules, other acts such as the prohibition of forced displacement and forced transfer of the population.<sup>5</sup> The prohibition of such crimes is a mandatory rule of international *ius cogens*, and, therefore, the obligation to investigate, prosecute and punish those responsible and the duty to guarantee reparation to victims are non-derogable.<sup>6</sup>

The definition of the right to reparation was not uniform in international instruments. The ACHR refers to the duty of the Inter-American Court of Human Rights (IACHR) to order that the consequences of the measure or situation that has shaped the violation of rights be repaired and the payment of fair compensation.<sup>7</sup> The United Nations Special Rapporteur on the right of victims to truth, justice, reparation and non-recurrence has held that the right to reparation “refers to all measures that can be taken to remedy the various types of damage suffered by victims as a result of certain crimes” (own translation.)<sup>8</sup> The IACHR has pointed out that this provision contains a customary rule which constitutes one of the fundamental principles of contemporary international law on State responsibility.<sup>9</sup> Then, the focus of

<sup>3</sup> Cf. *Ibid.*, Art. 1.1; and ICCPR, Art. 2.1.

<sup>4</sup> Cf. *Ibid.*, Art. 4., and ACHR, Art. 27.

<sup>5</sup> See Human Rights Committee, *op. cit.*

<sup>6</sup> See International Court of Justice (ICJ), *Belgium v. Congo*, Criminal Tribunal for the Former Yugoslavia, *Kupresik Case*.

<sup>7</sup> Cf. ACHR, Art. 63.

<sup>8</sup> United Nations Organization (UNO), General Assembly, Report of the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, *granting reparation for victims in the aftermath of gross violations of human rights and serious violations of international humanitarian law*, A/69/518.

<sup>9</sup> IACHR, *Vereda La Esperanza v. Colombia*, par. 253.

repair is the damage caused by the facts, whether material or immaterial, “including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” (own translation.)<sup>10</sup>

In the most commonly accepted scope of international law, the right to reparation incorporates measures of compensation, restitution, rehabilitation, satisfaction and guarantees of non-recurrence. This scope is derived from the Reparations Principles and has been adopted by the jurisprudence of the IACHR and by the United Nations Rapporteur on the rights to truth, justice, reparation and guarantees of non-recurrence. However, the Rome Statute, for example, only mentions compensation, restitution and rehabilitation measures.<sup>11</sup>

Other international instruments also refer to the right to reparation or its components, such as the International Principles against Impunity, also known as the Joinet Principles, by the name of its author, updated by the expert Diane Orenlitcher;<sup>12</sup> the Guiding Principles on Internal Displacement, Guiding Principles;<sup>13</sup> the Principles on the Restitution of Housing and Heritage of Refugees and Displaced Persons, known as the Pinheiro Principles, by its author.<sup>14</sup> All these documents are international *soft law* instruments; however, many of these principles are not intended to create new obligations: their binding force stems rather from the fact that they systematise existing international obligations.<sup>15</sup>

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<sup>10</sup> UN General Assembly, *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*, hereinafter, Principles on Reparations, UN AG Res. 60/147, par. 8.

<sup>11</sup> *Cf.* International Criminal Court (ICC), Rome Statute, Art. 75.

<sup>12</sup> UN, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN E/CN.4/2005/102/Add.1.

<sup>13</sup> UN, Sub-Commission on the Protection and Promotion of Human Rights, Guiding Principles on Internal Displacement, E/CN.4/S/1998/53/Add.2.

<sup>14</sup> UN, Sub-Commission on the Promotion and Protection of Human Rights, Principles on housing and property restitution for refugees and displaced persons, E/CN.4/ Sub.2/2005/17.

<sup>15</sup> As emphasised in the Reparation Principles preamble, when it notes that “the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify

According to Reparation Principles, the various remedies are defined as follows:<sup>16</sup>

Restitution	“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty; enjoyment of human rights, identity, family life and citizenship; return to one’s place of residence; restoration of employment and return of property.” <sup>17</sup>
Compensation	“ <i>Compensation</i> should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: a) Physical or mental harm; b) Lost opportunities, including employment, education and social benefits; c) Material damages and loss of earnings, including loss of earning potential; d) Moral damage; e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.” <sup>18</sup>
Rehabilitation	“ <i>Rehabilitation</i> should include medical and psychological care as well as legal and social services.” <sup>19</sup>

mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.”

<sup>16</sup> UN, General Assembly, Reparation Principles, pars. 19-23.

<sup>17</sup> *Ibid.*, par. 19.

<sup>18</sup> *Ibid.*, par. 20.

<sup>19</sup> *Ibid.*, par. 21.

Satisfaction	<p>“<i>Satisfaction</i> should include, where applicable, any or all of the following: a) Effective measures aimed at the cessation of continuing violations; b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; c) The tracing for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; e) Public apology, including acknowledgement of the facts and acceptance of responsibility; f) Judicial and administrative sanctions against persons liable for the violations; g) Commemorations and tributes to the victims; h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”<sup>20</sup></p>
Guarantees of non-repetition	<p>“<i>Guarantees of non-repetition</i> should include, where applicable, any or all of the following measures, which will also contribute to prevention: a) Ensuring effective civilian control of military and security forces; b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; c) Strengthening the independence of the judiciary; d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; e) Providing, on a priority and continued basis, human rights and international humanitarian law</p>

<sup>20</sup>*Ibid.*, par. 22.

education to all sectors of society and training for law enforcement officials as well as military and security forces; f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”<sup>21</sup>

The holder of the right to reparation is the victim of the acts, who has suffered harm through human rights violations or violations of IHL, including the direct victim or his or her family. This has been established by the IACHR,<sup>22</sup> the Reparation Principles<sup>23</sup> and the Rome Statute,<sup>24</sup> among other international instruments.

The right to reparation is both individual and collective. In terms of harm, as indicated in the Reparation Principles, reparation should cover individual and collective harm caused by the acts, i.e., it should cover the effects on both individual and collective rights. This entails providing individual and collective remedies. As soon as they cover different types of harm, collective reparation does not subsume the individual. In terms of victims who are entitled to reparation, some legislation recognises as victims certain groups, including, for example, ethnic and peasant organizations, groups and communities, among others.<sup>25</sup>

<sup>21</sup> *Ibid.*, par. 23.

<sup>22</sup> *Cf.* IACHR *op. cit.*, par. 254.

<sup>23</sup> *Cf.* UN, General Assembly, Reparation Principles, par. 8.

<sup>24</sup> *Cf.* ICC, Rome Statute, Art. 75.

<sup>25</sup> The Colombian *Ley de Víctimas y Restitución de Tierras* (Victims and Land Restitution Law)

On this last point, the Executive Commission for Victim Assistance (CEAV) in Mexico, together with the national government and in accordance with the General Victims Law, issued the *Manual sobre reparaciones colectivas* (Handbook on Collective Reparations), addressed to the CEAV personnel, as well as victim groups and communities; it states, among other elements, that in human rights violations where there is an impact transcending the individual sphere, a new subject of a collective nature is recognised as the holder of the right to reparation.<sup>26</sup>

Regarding the question of who is liable for providing reparation, the Reparations Principles stipulate:

In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.<sup>27</sup>

The obligation to make reparation initially rests with the person directly responsible for the act causing harm, either the State or a natural or legal person, according to the ordinary rules of imputation of civil, criminal, state or international liability. The State has a direct obligation to make reparations when the acts directly compromise its responsibility. In that case, the obligation is based on the duty to respect human rights.<sup>28</sup>

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recognises organizations, groups and communities as collective victims. See Congress of the Colombian Republic, Law 1448 of 2011, *Ley de Víctimas* (Victims Law), Art. 152; President of the Colombian Republic, Ethnic Executive Orders 4633, 4634, 4635, Art. 3. The Mexican General Victims' Law also recognises collective reparation. In this regard, see Chamber of Deputies of the Honourable Congress of the Union, General Victims' Law, Art. 1, par. 4.

<sup>26</sup> Cf. Mexican Government and CEAV, *Manual de reparaciones colectivas*, p. 104.

<sup>27</sup> UN, General Assembly, Reparation Principles, par. 15.

<sup>28</sup> See OAS, ACHR, Art. 1.1; and ICCPR, Art. 2.1.



It should be noted that the right to full reparation for harm is recognised in Mexican law since the Political Constitution of the United Mexican States; thus, in its first article, third paragraph, it establishes that

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalise and rectify violations to Human Rights, according to the law.

For its part, Article 20 of the Constitution established an index of minimum rights of victims by perpetration of crimes, including recognition of the power to request redress for the harm. Likewise, paragraph C of the same article, section VII, recognised the right to contest resolutions of the Public Prosecution Service that affect his or her right to receive redress for the harm.

In accordance with the Constitution, Mexico also has a General Victims' Law of general observance, which states, in its Article 1, that integral reparation will include:

Measures for restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition, in their individual, collective, material, moral and symbolic dimensions. Each of these measures shall be implemented in favour of the victim, taking into account the gravity and magnitude of the punishable act committed or the gravity and magnitude of the violation of his/her rights, as well as the circumstances and characteristics of the victimising act.

### The Right to Reparation in Mexican Regulation

In terms of the right to reparation, the First Chamber of the Mexican Supreme Court of Justice of the Nation (SCJN) stated in its 2020 decision: “In this sense, reparation of harm resulting from the perpetration of a crime is intended to compensate for the harm caused to the victim, on the basis of economic, physical, mental or emotional harm or impairment, which is detrimental to his or her area of legal rights” (own translation.)<sup>29</sup>

In the same decision, the First Chamber recognised that the legal source of this right is contemplated in the American Convention and in Article 1, paragraph 3, of the Mexican Constitution. Hence, it is a constitutionally recognised right that it is also governed by the constitutional principles of fair and integral compensation, which, in any case, are consistent with the guidelines and principles established by international organizations in the field.<sup>30</sup>

In the same vein, the decision considers that both the General Victims’ Law and the jurisprudential development in the matter have provided for the adoption of the right to full reparation of harm in different areas (criminal, administrative, civil, and due to human rights violations). The Chamber also establishes that reparation parameters and components are as follows: restitution, compensation, rehabilitation, satisfaction measures, guarantees of non-repetition, among others.<sup>31</sup>

In terms of the subject obliged to guarantee the right, the Chamber noted that according to Article 20 (C) of the Constitution, and on the basis of a systematic interpretation of the General Victims’ Law, the State is obliged to respond when the harm occurred as a result of a human rights violation<sup>32</sup>.

Finally, as regards the nature of the procedure governed by the General Victims’ Law, the same order stated that “the model adopted in the Law is that of an administrative procedure which should deal as expeditiously as possible with the requests of hundreds of crime victims (including a very comprehensive index) and victims of human rights violations” (own translation.)<sup>33</sup>

<sup>29</sup> SCJN, First Chamber, Amparo ruling Guadalupe del Socorro, p. 17.

<sup>30</sup> *Cf. Ibid.*, p. 14.

<sup>31</sup> *Cf. Ibid.*, p. 23.

<sup>32</sup> *Cf. Id.*

### III. Harm by Forced Displacement and Applicable Remedies

Due reparation is one that stems from the diagnosis of individual and collective harm caused by the acts, by forced displacement.

The experience of each victim or community is unique in respect of the harm suffered, as it depends on the personal and collective characteristics of the victim, his or her context, culture, customs, heritage: the conditions in which the events occurred. Identifying or diagnosing harm requires considering these particularities, for which a gender, age and ethnic approach must be applied.

However, forced displacement often causes certain common harm to people and communities suffering from it. By definition, forced displacement affects the right to movement and residence.<sup>34</sup> Also, forced displacement generally results in loss of property rights (use, ownership or possession) over possessions, and the collective territorial rights of ethnic communities;<sup>35</sup> it generally results in unschooling of children and adolescents, violating their right to education;<sup>36</sup> adult persons are often affected in terms of their sources of income, which adversely affects their right to employment, and even on many occasions it impairs the right to an adequate standard of living or a vital minimum standard that affects the enjoyment of rights such as housing, food, clothing, etc.<sup>37</sup>

In accordance with the above, while reparation of forced displacement will depend on the acts and harm caused in each case, there are certain remedies that are generally applicable to them, such as those set out below.

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<sup>33</sup> *Ibid.*, p. 25.

<sup>34</sup> *Cf.* ICCPR, Art. 12; and ACHR, Art. 22.

<sup>35</sup> *Cf. Ibid.*, Art. 21; and International Labour Organization (ILO), Convention 169, Art. 14.

<sup>36</sup> *Cf.* ICCPR, Art. 13 and 14.

<sup>37</sup> *Cf. Ibid.*, Art. 11.

## 1. In Terms of Restitution of Rights

### *A. Restitution of Property Rights, Especially on Land, Territories and Housing*

The Guiding Principles state that authorities have the duty to assist 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 is not possible, persons shall be entitled to “appropriate compensation or another form of just reparation” or “competent authorities shall provide or assist these persons.” The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) declares the State obligation to

- (i) provide persons affected by displacement with effective remedies; (ii) establish an effective legal framework to provide just and fair compensation and other forms of reparation for damage incurred as a result of displacement; and (iii) be liable to make reparation to displaced persons when a State refrained from protecting and assisting displaced persons in the event of natural disasters.<sup>38</sup>

In this regard, the Pinheiro Principles refer to the right of refugees and displaced persons “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.”<sup>39</sup> This remedy should be prioritised and, if not possible, compensation should be granted. The Pinheiro Principles also stipulate that restitution of property rights is not prejudiced by return of refugees and displaced persons.

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<sup>38</sup> African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Art. 12.

<sup>39</sup> UN, Sub-Commission on the Promotion and Protection of Human Rights, Principles on housing and property restitution for refugees... *quot.*, Principle 2.1.

### *B. The Right to Return or Resettlement as a Measure to Restitute Freedom of Movement and the Right to Choose a Place of Residence*

Section V of the Guiding Principles declares that States should provide means to enable displaced persons to return, resettle and reintegrate. *Return* refers to coming back to the place where the person resided before being forcibly displaced. *Resettlement* or *relocation* is an alternative that displaced persons can choose. It refers to relocating in a place other than that of which they were displaced. Finally, *local reintegration* or *integration* offers displaced persons the opportunity to integrate into their reception site after forced displacement.

The Pinheiro Principles recognise the right to return or resettlement in conditions of voluntariness, security and dignity, including prior, detailed and thorough verification of the security conditions at the return or resettlement place; taking measures to ensure security prior to the location of persons on the place; providing complete, objective, up-to-date and accurate information, as well as ensuring a free decision on return or resettlement; and finally ensuring conditions of dignity for return, local integration or relocation. These conditions aim to ensure an adequate standard of living, i.e., access to essential food, drinking water, basic housing conditions, clothing and essential medical and sanitation services. The processes of return, local integration or relocation must be combined with and progress towards durable solutions, which implies that these processes must aim to ensure that, in the short and medium term, returnees or resettled persons have comprehensive conditions —not only basic— that guarantee their civil, political, economic, social and cultural rights, independently and without relying on the humanitarian assistance that the State should provide.

### Inter-American Jurisprudence

In the case of *Plan de Sanchez Massacre v. Guatemala*, the IACHR considered that the State should implement a housing programme whereby adequate housing was granted to those surviving victims living in the territory where the events occurred, provided that they so required. Likewise, the IACHR ordered the State to implement the housing programme in less than five years after the notification of the decision.<sup>40</sup>

## 2. In terms of Compensation

As stated above, compensation is a subsidiary alternative to restitution of property where such restitution is not possible. However, the Pinheiro Principles emphasise the importance of giving preference to restitution.<sup>41</sup> Additionally, compensation should not be used as a way to prevent the return or restitution of property. This means that compensation should only be applied where restitution is impossible. The people entitled to the right prefer compensation, and so it has been confirmed by an independent, legitimate and competent body, ideally a judicial official. However, an option that may be necessary in certain cases is the combination of restitution with compensation measures to make up for the economic damage suffered by forced displacement that persists despite the restitution of property and the return or relocation.

<sup>40</sup> IACHR, *Plan de Sanchez Massacre v. Guatemala*, par. 105.

<sup>41</sup> UN, Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons... quot., Principles 2.1 and 21.

### Comparative Experience

“It should be noted, for example, that although both restitution and compensation rights were enshrined in the peace accords ending the war in Bosnia-Herzegovina, the international community decided to focus solely on restitution and return and did not use the mechanism foreseen by the Dayton agreement which envisaged a fund for compensation of destroyed property. The envisaged compensation fund remained empty because of a fear among donors that compensation of the displaced would have served to consolidate ethnic cleansing. On the other hand, according to the procedures of the Iraqi Commission for the Resolution of Real Property Disputes which was established to address the large-scale unlawful confiscation and seizure of land, houses and properties under the Ba’athist regime of Saddam Hussein, claimants are given the choice between requesting restitution or compensation. Where victims opt for the latter option, compensation must be of equal value to the original house, land or property at the time the claim is submitted. The law further identifies the Iraqi State as responsible for paying out this compensation.”<sup>42</sup>

### 3. In terms of Rehabilitation, Satisfaction and Guarantees of Non-Repetition

Repair processes often emphasise restitution and compensation measures in the terms outlined above. However, it cannot be overlooked that forced displacement often results in serious emotional and mental health impacts, on an individual, family and collective basis. It is also often accompanied by other types of human rights or IHL violations that result in forced displacement, which usually occurs as the only alternative to survival or as a way to flee due to threats to life, integrity and freedom —such as the recruitment of children or adolescents or sexual violence. On other cases, such violations have already been perpetrated and people have no alternative but to flee. Forced

<sup>42</sup> Food and Agriculture Organization, Norwegian Refugee Council, United Nations Office for the Coordination of Humanitarian Affairs *et al.*, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the Pinheiro Principles*, March 2007, p. 27 and 28.

displacement disrupts the basic conditions in which people regularly perform or live their lives, causes uprooting, exposes them to different cultural contexts in which they are deprived of their livelihoods, children must change schools and social guides, among many other effects. Therefore, reparation should pay attention to this type of damage and address it through rehabilitation measures.

Reparations as regards forced displacement should also not overlook measures about remembrance, acknowledgements of responsibility and symbolic measures of any kind involving the determination of responsibilities<sup>43</sup> for forced displacement and damage caused, the rejection of the facts and dignifying of the victims by society and the State.

### Examples of Judicial Decisions on Damages and Reparations in Cases of Forced Displacement

In the decision of *Moiwana Community v. Suriname*, the IACHR concluded that “members of the Moiwana community had suffered emotionally, psychologically, spiritually, [sic] emotionally and economically due to the attack that forced them to flee and that it resulted in the destruction of their homes and community. The Court stressed that the former Moiwana Village residents lost their homes, possessions and means of subsistence when they were forced to flee. To this day, because they have received neither justice nor compensation in the intervening years, they remain in a precarious state with respect to their living conditions.”<sup>44</sup>

<sup>43</sup> See UN, General Assembly, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Disculpas por violaciones manifiestas de los derechos humanos y violaciones graves del derecho internacional humanitario*, A/74/147.

<sup>44</sup> IACHR, *Moiwana Community v. Suriname*, paras. 182 and 188.



In the decision of *Mapiripán Massacre v. Colombia*, the IACHR emphasised that “forced internal displacement, in addition to its serious psychological repercussions, has various harmful effects, such as loss of the land and of their houses, marginalisation, loss of the household, unemployment, deterioration of living conditions, more illnesses and higher mortality, loss of access to common property among the members of communities [*comuneros*], food insecurity, and social disintegration, as well as impoverishment and accelerated deterioration of living conditions” (own translation.)<sup>45</sup>

In Decision T-025 of 2004, Constitutional Court of Colombia declared the state of unconstitutional things (ECI, by its Spanish acronym) regarding forced displacement in Colombia and stated that “displacement affects (i) the right to life in dignified conditions, given the sub-human conditions associated with their mobilisation, the stay at the provisional place of arrival, and the frequent risks that directly threaten their survival; (ii) the right to choose the place of residence; (iii) the right to freely develop their personality, to freedom of expression and association, given the climate of intimidation that precedes displacement and the consequences borne by such migrations over the materialisation of the affected persons' life projects; (iv) economic, social and cultural rights, which refer to the conditions to secure dignified living standards, and access to education, healthcare, decent housing, work, minimum food, among other rights; (v) in no few cases, displacement entails a separation of the affected families, thus violating their members' right to family unity and to comprehensive protection of the family; (vi) it affects the right to personal security, given that displacement entails specific, individual, concrete, present, important, serious, clear, distinguishable, exceptional and disproportionate risks to several fundamental rights of the affected persons; (vii) the right to freedom of movement across the national territory and the right to remain in the place chosen to live; (viii) the right to peace, whose essential nucleus includes the personal guarantee not to suffer, insofar as possible, the effects of war; (ix) the right to legal personality due to the loss of identity documents during displacement that hinders access to their rights; (x) the right to equality because displacement is sometimes caused by discrimination,

<sup>45</sup> IACHR, *Mapiripán Massacre v. Colombia*, par. 175.

and often has the effect of discrimination at the place of reception” (see paragraph 5.2) (own translation.)<sup>46</sup>

The Constitutional Court of Colombia established a Follow-up Special Chamber to monitor the decision. Follow-up has continued to this day. In 2009, the Chamber began to follow up on the rights of truth, justice and reparation of displaced persons, which had not originally been represented in Decision T-025 of 2004.<sup>47</sup> In 2008,<sup>48</sup> the Court of Colombia had made it clear that the improvement of the ECI should be defined based on indicators of effective exercise of rights (IGED, by its Spanish acronym.) However, so far—and after at least three Government measurements, two from a Comisión de Seguimiento de la Sociedad Civil (Civil Society Follow-up Committee) and one from a monitoring body (General National Comptroller of Colombia)—the Court has not adopted the appropriate indicators for measuring. In 2019, the Court defined parameters that should be followed by indicators on land restitution, compensation and rehabilitation.<sup>49</sup>

In Decision 411-17 of 2018, the Constitution Bench of the Supreme Court of Justice of El Salvador declared the ECI due to forced displacement in that country. Among other considerations, the Chamber established that forced displacement had resulted in school dropout, restrictions on movement, effects on the exercise of residential voting, stopping of public transport and hindering economic and labour activities.<sup>50</sup>

In the decision of the International Criminal Court (ICC) on the case of *The Prosecutor v. Germain Katanga*, he was investigated, prosecuted and convicted for his involvement in 2003 in the attack on Bogoro in the Democratic Republic of the Congo, where militias under his command committed a number of war crimes and crimes against humanity. Many of the survivors of the massacre were forced to flee the territory and leave their homes and properties behind; hence the crime of forced displacement. In the decision, the Chamber found that the damage implies injuries or losses that materialise in three categories: material damage, physical damage and/or

<sup>46</sup> Constitutional Court of Colombia, Decision T-025 of 2004, paragraph 5.2.

<sup>47</sup> See Constitutional Court of Colombia, order 009 of 2009.

<sup>48</sup> See Constitutional Court of Colombia, order 116 of 2008.

<sup>49</sup> See Constitutional Court of Colombia, order 331 of 2019.

<sup>50</sup> See Supreme Court of El Salvador, Constitutional Chamber, Decision 411-17 of 2018.

psychological damage and, therefore, all of its meanings should be considered by the ICC at the time of the determination of the reparation measures. The Chamber determined that “forced displacement generated effects such as the loss of the standard of living, the loss of the opportunity to be educated and some kind of achievement of personal vocation. The Chamber emphasised that victims were forced to start again, far from their territory, without having the means or the material capacity to achieve it.”<sup>51</sup>

#### **IV. Differences and Complementarities between Reparations, Humanitarian and Social Assistance**

It is important to distinguish between the scope of complementary but distinct measures, such as humanitarian assistance and reparations.

Humanitarian assistance is aimed at addressing the immediate impacts of forced displacement, which must be urgently tackled. Displaced persons often lose their houses, incomes, livelihoods and food, access to healthcare, among others. Humanitarian assistance, referred to in Section IV of the Guiding Principles, is a right of displaced persons that must be provided in conditions of impartiality and without discrimination in order to ensure that persons who have suffered displacement have a vital minimum.<sup>52</sup> Humanitarian assistance usually means food, clothing, medicines and temporary shelters.

Repairs, unlike humanitarian assistance, are not focused on addressing the immediate impacts of forced displacement, but on compensating for the long-lasting damage. As noted, reparations, unlike humanitarian assistance, are an obligation arising from the responsibility of having caused harm through a serious violation of human rights or a violation of IHL, or from the State's duty

<sup>51</sup> ICC, *The Prosecutor v. Germain Katanga* (reparations decision), pars. 74, 136 and 137.

<sup>52</sup> On the legal matter of humanitarian assistance, see Stoffels, “Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps,” in *International Review of the Red Cross*, Vol. 86, No. 855.

to guarantee rights when the person directly responsible does not fulfil his duty as regards reparation. The report by Diane Orentlicher for the UN,<sup>53</sup> as well as the Reparations Principles, stipulate that reparation must be “quick.” Reparation must then be provided within a reasonable time, but not immediately.

Humanitarian assistance is not provided for the responsibility that a State or non-State actor may assume because of the facts; it serves immediate, urgent needs. For its part, reparation involves (i) determining responsibility — although not subject to such determination—, (ii) identifying damage caused and (iii) establishing appropriate measures to ensure that such damage is compensated.

Adequate and timely humanitarian care often reduces damage and its duration over time. The absence of a response as regards humanitarian assistance could lead to malnutrition, permanent damage to physical and mental health and other consequences so, therefore, both rights, humanitarian assistance and reparation, are complementary. In addition, a timely repair prevents forced displacement from extending and it allows the response not to be primarily assistance in the medium-term and long-term. While immediate humanitarian assistance is essential, reparation allows a timely restoration of decent living conditions of victims of displacement.

Article 3 of the Kampala Convention outlines that States are required to ensure that assistance to IDPs meets their basic needs. It also notes that States should promote self-reliance and sustainable livelihoods among IDPs, if such measures are not used to neglect protection and assistance. Thus, an adequate complement between initial assistance measures and stabilization and repair measures —including return, relocation or local integration with a durable solutions approach— tend to provide a comprehensive response to reduce the

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<sup>53</sup> Cf. UN, Economic and Social Council, Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, E/ CN.4/2005/102, par. 58.

impacts of forced displacement in the short, medium and long term.

However, States must be careful not to confuse reparations with social or humanitarian assistance. Reparation is an autonomous right and one should avoid the temptation to care for displaced persons with the social offer of the State, to which they could have accessed even without being victims of displacement, only because they were in vulnerable conditions.

Colombian experience has distinguished between the obligation to repair — focused on the damage caused— and the social measures of the State. Decision 1-085 of 2009 of the Constitutional Court of Colombia stated that persons who have been subjected to human rights violations have the right to full reparation, which differs from social assistance, which the State has “the obligation to provide as a matter of priority because they are displaced persons in a state of inequality and vulnerability” (own translation.)<sup>54</sup> As stated by the Court, “the provision of the social services that the State must permanently ensure to all citizens, without attending to their status and the temporary humanitarian care provided to victims in critical situations, cannot be mistaken with the reparation to the victims of such crimes, that includes ensuring not only that the perpetrator should, in the first instance, compensate the victims, but also, that, subsidiarily, the State must assume such compensation in case of unwillingness perpetrator or inadequacy of the reparation provided” (own translation.)<sup>55</sup>

From the above normative budget, it is stated that none of the specific actions of the assistance measures repairs the consequences or damages generated by a human rights or IHL violation, such as forced displacement. Hence, the Colombian Court has highlighted that “the State assistance measures for people

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<sup>54</sup> Constitutional Court of Colombia, Decision T-085 of 2009.

<sup>55</sup> *Ibid.*, p. 26.

displaced by violence precisely aim at improving the minimum living conditions and not at any reparation obligation” (own translation.)<sup>56</sup>

The Colombian Constitutional Court has also specified that, even though assistance measures can have a restorative effect, “they do not replace or substitute reparation measures. Therefore, the State cost or expenditures on providing assistance services will, in no case, be deducted from the administrative or judicial compensation to which the victims are entitled” (own translation.)<sup>57</sup>

In this way, the decision made a clear distinction between reparation measures themselves and government assistance measures, that—in some cases and according to certain criteria— can have a restorative effect. This position was confirmed in Decision SU-254 of 2013, in which the Colombian Court emphasised that the State offers humanitarian assistance in the event of disasters or extraordinary situations, while reparation is entitled to the commission of an unlawful act, the occurrence of unlawful damage and the serious violation of human rights; this is why they cannot be replaced or assimilated, even if the same public entity is responsible for serve these functions.<sup>58</sup>

## V. The right to an effective access to reparation

Displaced people face significant difficulties in achieving an effective and timely reparation. In criminal proceedings, for example, victims must face, in many cases, the impunity accompanying the facts, since, frequently, the perpetrator has already died. According to the Reparations Principles, victim status is acquired “regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted.”<sup>59</sup> This implies that the right to

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<sup>56</sup> *Ibid.*, p. 27.

<sup>57</sup> *Id.*

<sup>58</sup> Constitutional Court of Colombia, Decision SU-254 of 2013.

<sup>59</sup> UN, General Assembly, Reparation Principles, Resolution 60/147, par. 9.

reparation is autonomous from criminal responsibility attribution in each case. In this way, the Reparations Principles establish a clause that prevents victim's reparation from depending on the criminal proceedings results.

In general, judicial proceedings, even the non-criminal ones, can be economically and emotionally demanding for victims. So, the former often involve security risks for them, require a legal representation, require evidence that victims do not always have and can take years before reparation is obtained.

Since the right to reparation was an expression of the State's guarantee responsibility, its satisfaction could not be a disproportionate burden on the victim, that is, the strenuous work of overcoming obstacles to access to reparation could not be left to victims alone. The State must provide an effective remedy even when it is not responsible for the facts and damages or when it is not possible to demand reparation from the direct perpetrator, either for legal or factual reasons. The State must provide the means needed to ensure that the victim can effectively access a remedy.

In these situations, especially in mass violence contexts, in international practice, the so-called *reparation programs* have been adopted, allowing for reparations granting in executive or government headquarters, that *is*, without the need for the victim to go to court.<sup>60</sup> In the words of the United Nations Special Rapporteur, Fabian Salvioli:

Reparation programmes are aimed at realizing the human right of victims to an adequate and effective remedy. They are administrative processes set up by States aiming to deal with a large universe of victims, and they identify who can claim to be a victim and what violations are to be redressed, and establish reparation measures (benefits) for the harm suffered. They are aimed at ensuring that victims are treated equally and in a consistent manner, as victims

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<sup>60</sup> UN, General Assembly, Reparation Principles... quot., par. 16.

who have suffered the same type of violation would benefit from the same forms of reparation.<sup>61</sup>

Regarding to property restitution measures, international doctrine has given priority to judicial proceedings in the restitution of property rights decision. This priority reinforces States' obligation to provide all necessary measures to make judicial reparation accessible to victims. In this context, it is advisable to establish specialised procedures, addressing the massive requests and the violations of property rights specificity.

“Even where the local judicial institutions function normally, however, the particular circumstances and caseload involved in restitution efforts following large scale displacement will often be such that resolving housing, land and property disputes through the courts is not a viable option. In Iraq, for example, the Commission for the Resolution of Real Property Disputes has so far received more than 130,000 restitution and compensation claims, with the filing deadline still one year away. Leaving the courts to deal with such a caseload would not only result in unacceptable delays for the claimants, but would also risk having a serious impact on the normal work of the court system thus endangering the return to the rule of law. While judicial proceedings are good in dealing with isolated cases of property restitution, they are usually much less well equipped to deal with tens or hundred thousands of such cases, which requires a more flexible and pragmatic approach.

Creating new mechanisms (both judicial and quasi-judicial in nature) to find ways of resolving such disputes is increasingly commonplace, as the experiences in Afghanistan, Bosnia and Herzegovina, Kosovo, Tajikistan, Iraq and elsewhere attest. These mechanisms can be purely local, as is the

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<sup>61</sup> UN, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/42/45, par. 31.



case for example in Iraq, international, as for example in Bosnia and Herzegovina, or a mixture of both. What is most suited in any given case will depend on the particular national and international context. But in many settings, competing claims on a dwelling or land parcel have no formal means of resolution or of being officially recognised and eventually registered by the governing authorities unless a special body is established to address these concerns.”<sup>62</sup>

Pinheiro Principles detail the characteristics that national restitution procedures, institutions and mechanisms should have and emphasise transparency, independence, efficiency and effectiveness, their non-discriminatory nature and the inclusion of specific measures of differential approach based on age and gender, among other aspects.<sup>63</sup>

In addition, Pinheiro Principles develop detailed criteria for the operation of procedures so that they are accessible. Among these are rules of evidence establishing that States must recognise the difficulty that displaced persons may face in proving their property rights or dispossession, as well as the resulting obligation to provide any documentary evidence held by the State.<sup>64</sup> The Principles even pre-empted (i) the possibility of adopting the conclusive presumption that persons fleeing their homes during a given period marked by violence have done so for these reasons and are, therefore, entitled to restitution; (ii) the alternative of considering null and void any housing, land and/or property transaction made under duress, or which was otherwise coerced or forced, either directly or indirectly.<sup>65</sup>

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<sup>62</sup> Food and Agriculture Organization, Norwegian Refugee Council, United Nations Office for the Coordination of Humanitarian Affairs *et al.*, *op. cit.*, p. 60.

<sup>63</sup> *Cf.* UN, Sub-Commission on the Promotion and Protection of Human Rights, Principles on housing and property restitution for refugees... *quot.*, Principle 12.

<sup>64</sup> *Cf. Ibid.*, Principles 13.

<sup>65</sup> *Ibid.*, Principles 15.7 and 15.8.

**International and comparative evidence experience****Colombia**

The Victims and Land Restitution Law of Colombia —Law 1448 of 2011— after the presumption of absence of consent or unlawful cause of transactions (i) in which one party is a person sentenced by belonging to or collaborating with illegal armed or extradited because of drug trafficking or related crimes; (ii) in areas in which vicinity has occurred acts of generalised violence or phenomena of collective forced displacement, or serious violations of human rights; (iii) on adjacent properties of those in which, later or concomitantly to the acts of violence or dispossession were committed, there would have been a phenomenon of concentration of the ownership of the land; (iv) in the cases in which the value formally enshrined in the contract, or the value actually paid, is less than 50% of the real value at the time of the transaction. The presumption is initiated by presenting summary evidence of the right —property, possession or occupation— and of forced displacement. Once initiated the presumption, the burden of proof is inverted, that is, it must be disproved by the party claiming ownership rights at the time of the restitution proceedings. The presumption is not disproved if there will be a subsequent court or administrative decision recognising the right of ownership of the property dispossessor.<sup>66</sup>

This regulation, apart from attending to Pinheiro Principles indications, sought to recognise that, in many cases and for different reasons, it was going to be very difficult for the victims to prove the dispossession. In Colombia, there is no complete rural cadastre, but a strong informality practice in land tenure, implying that, on many occasions, victims do not have proof of their property rights over the assets they abandoned or were usurped. Furthermore, in many cases, the necessary documents had disappeared or been lost due to forced displacement, as families had to urgently fled to protect their lives and left their belongings, including documents. Documents were also lost by the violence itself or by the same officials who participated in dispossession dynamics generating fraudulent decisions. In words of Sánchez León:

<sup>66</sup> Congress of the Republic of Colombia, Law 1448 of 2011, Victims Law, Arts. 77-78.

In theory there is no reliable information system facilitating the verification of properties geographical existence, the legal relations people held on these properties, and the traditions and transaction chains of the properties. Faced with this limitation, justice must develop a probative strategy allowing it to reach the best possible truth, based on the rational elements of judgement available.<sup>67</sup>

These difficulties are greater for women. As Guzmán and Chaparro state, the patriarchal dynamics of family relations are characterised by the fact that men often have simultaneous affective relationships sometimes generating economic relations that make it even more difficult for women to prove property rights and access restitution. In other cases, they have not been involved in the goods administration, so they also do not know the details necessary to present the evidence.<sup>68</sup>

Colombian Law 1448, prior to the presumption of victims' good faith, implying the victim can prove the damage by any means legally accepted and through summary evidence, that is, without the need of assessing it in judicial proceedings (Art. 5).<sup>69</sup> Under the principle of good faith, when the victim does not have the certificate of ownership, they can prove their right by any other means of proof accepted by civil law. In any case, the Colombian Victims Law created the Land Restitution Unit, an administrative entity that documents cases of land dispossession and abandonment free of charge. This is because a case documentation may be expensive and may require technical support or evidence gathering. The creation of the Restitution Unit allowed victims to be relieved of taking that burden, that, in many cases, could have made it impossible for them to advance the process.<sup>70</sup>

<sup>67</sup> Sánchez León, *Tierra en transición. Justicia transicional, restitución de tierras y política agraria en Colombia*, p. 223.

<sup>68</sup> See Guzmán Rodríguez and Chaparro González, *Restitución de tierras y enfoque de género*.

<sup>69</sup> Congress of the Republic of Colombia, *op. tit.*, Art. 5.

<sup>70</sup> To consult evidential challenges in restitution cases documentation, see Sánchez *et al.*, *La restitución de tierras y territorios. Justificaciones, dilemas y estrategias*. The section about evidential challenges is specially recommended, p. 124-130.

### Bosnia and Herzegovina

The Commission for Real Property Claims, established on the basis of the Agreement for Peace in Bosnia and Herzegovina, has recognised the difficulties faced by applicants in submitting evidence to support ownership of the property claimed; therefore, it incorporated in Article 18 of the procedure rules the possibility for victims to submit applications without attaching supporting documents. In these cases, burden of proof was somehow inverted, and the Commission initiated an alternative process of collecting evidence that would make it possible to decide the restitution application.<sup>71</sup>

### Mexico

Article 155 of General Victims' Law of Mexico states that "victim shall only be obliged to provide information, documentation and evidence in their possession. It is the responsibility of the Committee to achieve the integration of the respective folder" (own translation.)

Furthermore, Article 5 of the aforementioned law recognises the principle of good faith by stating: "Authorities shall presume victims' good faith. Public servants involved in the victims' rights exercise must not criminalise or hold them responsible for their victims' status and must provide them with assistance, care and help from the moment they require it, as well as respect and allow the effective exercise of their rights" (own translation.)

### South Africa

South Africa created a restitution programme for persons who had been dispossessed based on laws of *apartheid*, from 19 June, 1913. The Land Restitution Act 1994 —Restitution of Land Rights Act— created a system that contemplated a

<sup>71</sup> Bosnia and Herzegovina, Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Displaced Persons and Refugees, Arts. 18-33.

commission— The Commission on Restitution of Land Rights— and a court — Land Claims Court—. The commission received the claims, and, among other functions, it was able to collect the necessary evidence to advance the process, either in the public registry or by other means. The commission was empowered to receive evidence by any means and was not limited to rules of ordinary evidence.<sup>72</sup>

### Council of Europe

In 2010, the Parliamentary Assembly of the Council of Europe issued a document containing measures to be considered and implemented to address the problem of property and victims of displacement and refugees. Among others, the Assembly noted that the issue of proprietary documents and evidence was a problem in this context, as applicants were normally unable to access the documentation necessary to support their requests.<sup>73</sup>

However, the Assembly mentioned that this should not be an excuse to restrict guaranteeing the restitution of property rights. Consequently, in these contexts, he noted that restitution and reparation processes should contemplate flexible evidentiary standards and that commissioned authorities should strive to assist those who request it in the collection of evidence.<sup>74</sup>

In this context, the Assembly considered as a good practice the issuance of Law 5233 in Turkey, under which the right to compensation of internally displaced persons belonging to the Kurdish population is pre-empted. Therefore, the law designed a flexible process regarding the evidence to be incorporated by applicants in their petitions.<sup>75</sup>

<sup>72</sup> See Williams, “El derecho contemporáneo a la restitución de propiedades dentro del contexto de la justicia transicional,” in *Reparaciones a las víctimas de la violencia política*.

<sup>73</sup> Cf. Parliamentary Assembly of the Council of Europe, *Solving property issues of refugees and displaced persons*, 12106, par. 15.

<sup>74</sup> *Id.*

<sup>75</sup> *Ibid.*, par. 104.

### Inter-American Court of Human Rights

The IACHR has found that in these cases there is usually insufficient evidence to determine the unearned income, the ages or the activities of the majority of the victims; that is, the IACHR does not have a sufficient basis to establish compensation in favour of the majority of victims for material damage, so it has adopted a presumption of material damage to equitably establish the amounts corresponding to compensation.<sup>76</sup>

## VI. The right to participation

The Joint Principles, updated by Orentlicher, provide that victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes and ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparation programmes.<sup>77</sup> According to Diane Orentlicher's report, an important factor for successful programmes is the broad participation of citizens, including victims, in their development:

In designing policies for combating impunity, States should promote the broad participation of victims and other citizens. Deliberations in South Africa following the end of *apartheid* provide one model in this regard. South Africa's parliament held over 150 hours of hearings on the draft law establishing a truth commission, which was also explored in seminars, workshops and radio programmes throughout the country. Broad participation in deliberations concerning strategies for combating impunity serve several purposes. To begin, it is likely to inspire greater public support for the resulting policy. Such consultations also help ensure that national policies respond to victims' actual needs. Including victims also serves a

<sup>76</sup> Cf. IACHR and German Agency for International Cooperation (GIZ), "Personas en situación de desplazamiento," in *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos*, No. 3.

<sup>77</sup> UN, *Updated Set of principles... quot.*, Principle 32.

deeper aim: it can help reconstitute the full civic membership of those who were denied the protection of the law in the past. Their participation in public deliberations may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government.<sup>78</sup>

The United Nations Special Rapporteur on the rights of victims defined and emphasised the importance of national consultations, referring to the documentation of the Office of the United Nations High Commissioner for Human Rights, as “a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of transitional justice programmes.”<sup>79</sup>

With regard to restitution, the Pinheiro Principles (Principle 14.1) point out that States should ensure that restitution programmes are carried out once consultations with individuals and communities benefiting from the programmes have taken place. The second paragraph of the same principle emphasises the need to guarantee this right of participation especially for women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children.

As recalled by the handbook of application of the Pinheiro Principles,<sup>80</sup> Principle 14 recognises the importance of involving people potentially entitled to restitution rights as participants in the process and not as mere objects of restitution measures.

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<sup>78</sup> UN, Economic and Social Council, Commission on Human Rights, *Independent Study on Best Practices Including Recommendations to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity* by Professor Diane Orentlicher, Doc. E/CN.4/2004/88, par. 11.

<sup>79</sup> Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: National consultations on transitional justice,” in Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence, Fabian Salvioli, A/HRC/42/45, par. 62.

<sup>80</sup> Food and Agriculture Organization, Norwegian Refugee Council, United Nations Office for the Coordination of Humanitarian Affairs *et al.*, *op. cit.*, p. 70.

In the context of forced evictions, the Committee on Economic, Social and Cultural Rights (CESCR) stated, in its General Comment No. 7, that affected communities should have the right to a “real opportunity” to be consulted.<sup>81</sup>

Principle 28.2 of the Guiding Principles also argues that “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.”

Likewise, the IACHR has determined that reparation should be made after a proper consultation and the participation of the victims.<sup>82</sup> The participation of victims in the conclusion and execution of reparation measures is contemplated under the law, as a result of the Regulatory Reform of 2000, in which the representatives of victims were given the opportunity to demonstrate their conditions and request the most appropriate measures for reparation. As Calderón points out, this affected the analysis and accreditation of the damage and the debate regarding the best way of repairing it and its consequences.<sup>83</sup> Therefore, this power was included in Article 23 of the Regulations of the Inter-American Court of Human Rights.

In general, the IACHR considers in the orders of reparation the inclusion of victims in the design and implementation of measures. Likewise, reparation decisions generally consider the requests and outlines submitted by the judicial representatives of the victims. For example, in the case of *Vereda La Esperanza*, the Court ordered that the design and location to carry out the construction of the monument should be agreed with the victims or their representatives. In these terms, in the case of the *Moiwana Community*, the Court ordered an apology to be made to members of the community in an act in which the leader

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<sup>81</sup> UN, CESCR, General Comment No. 7, *The right to adequate housing (par. 1 of Article 11 of the Covenant): forced eviction*, par. 11.

<sup>82</sup> IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 470.

<sup>83</sup> Calderón Gamboa, *La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano*, p. 157.



of the N'djuka people should participate. With regard to processes of dignified and safe return to the habitual residence of displaced persons, the IACHR has reaffirmed that the obligation of States to protect their rights entails the duty to ensure the full participation of victims in the planning and management of their return or reintegration.<sup>84</sup>

The ICC, on the other hand, acknowledged in the decision against Thomas Lubanga that the victims of the crimes under conviction have the right to participate in the reparation process and must be supported by the Secretariat so that their participation is substantial and effective. This, in the view of the ICC, is based on the fact that the reparation stage is part of the judicial process as a whole, and since victims have the right to participate in it, restricting this exercise at the reparation stage would contradict the recognition of this power in the Rome Statute. The ICC Chamber pointed out that the guarantee of participation must include outreach mechanisms to facilitate communication between those affected and the Court, in order to ensure that reparation measures meet their local needs and identities.<sup>85</sup>

As expert on forced displacement and human rights issues María Suchkova claims, a participatory reparation model is fundamental for four reasons:

- Effective and adequate repairs are only possible if they effectively respond to the needs of the victims. Hence, their participation is vital, since only they can provide real information about their needs, the extent of the damage caused as a result of the crime and the priorities and expectations that individuals and/or communities have regarding reparations.
- According to the author, a participatory process generates a landed sense of repair policies. Involving victims in the design and implementation of repairs from the beginning of the process allows

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<sup>84</sup> IACHR and German Agency for International Cooperation (GIZ), *op. cit.*, p. 52.

<sup>85</sup> ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, par. 203.

to handle expectations about what the entity can or cannot do for them.

- A well-organised participatory process has the potential to generate restorative effects on victims and their communities: “Being consulted and treated as rights holders, whose dignity is respected, helps victims to move forward and be better integrated into society.”<sup>86</sup> In this regard, a participatory process is of particular importance when it comes to marginalised and systematically discriminated groups, as it becomes an empowerment tool.
- The participation of victims in these processes repairs the social fabric that has been torn as a result of the armed conflict.<sup>87</sup>

In cases where reparation is directed to ethnic communities, especially if they involve their territorial rights, ILO Convention 169 is applicable, which requires the participation of ethnic peoples and communities and their representatives in any matter concerning them, particularly those affecting their territorial rights.<sup>88</sup>

Participation is essential to make reparation satisfactory for victims. Not even the most participatory processes ensure that victims feel adequately repaired; however, no process that is not participatory has sufficient legitimacy or is suitable to guarantee the satisfaction of the victims.

## VII. Conclusions

As previously discussed, reparation is a right that is part of the right of access to justice for victims of serious human rights violations or violations of IHL, such as forced displacement. The right to full reparation consists of restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. The

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<sup>86</sup> Suchkova, *The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation*, p. 2-23.

<sup>87</sup> *Cf. op. cit.*, p. 2-15.

<sup>88</sup> ILO Convention 169, Art. 6.

right to reparation must incorporate individual and collective damage caused. The person who caused the damage is responsible for repairing it; however, even if the damage has not been caused by the State, the State is under an obligation to guarantee the right to reparation, for which it must have adequate mechanisms for victims to access timely, adequate and comprehensive reparation. Generally, in situations of mass violence, this obligation imposes a duty on States to establish specific repair mechanisms, since common mechanisms may be surpassed as they do not have the capacity to provide timely reparation. The mechanisms must have all the means necessary to enable victims to overcome access barriers, including evidentiary barriers, that prevent their access to reparation.

In the case of displaced persons, reparation generally includes land, territory and housing restitution measures, and, when repair is not possible, compensation may be offered for damage caused in this area. This does not prevent the mechanisms from contemplating additional restitution and compensation measures to compensate for all damage caused. Reparations should also restore the right of movement and choice of place of residence by means of measures enabling victims to resume, restore or integrate with safety and dignity at the place of their choice, after having received precise information about the safety and dignity they will have at their place of residence. This imposes an obligation for returns or relocations to occur under a durable solutions approach.

Displaced persons must also have access to rehabilitation, satisfaction and guarantees of non-repetition that address all the damage caused by displacement, including at the symbolic level. The State has a duty to determine who bears responsibility for forced displacement, even if reparation is not subject to such a declaration of responsibility.

Reparation should be complemented by, but also distinguished from, the humanitarian and social assistance measures to be provided by the State, so as to focus on the damage caused and its reparation, without providing as

reparation measures of another order to which displaced persons would have the right even if they had not suffered the violation of human rights.

Finally, for the success and legitimacy of any reparation mechanism it is essential to involve victims, both in the overall design and evaluation, and in the adoption of reparation measures of a particular, individual or collective nature. The duty to ensure participation implies, in the case of ethnic communities, the monitoring of the consultation rules of ILO Convention No. 169.

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## Durable Solutions

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**Durable Solutions.** I. Definitions and Principles; II. Planning and Implementation of Durable Solutions; III. Conclusions.

## I. Definitions and Principles

The scope of a durable solution to internal displacement implies that internally displaced persons (IDPs) have no further assistance and protection needs directly linked to their displacement and that they can enjoy their human rights without any discrimination as a result of their displacement.<sup>1</sup> A solution to internal displacement can be achieved through one of the following three modalities: 1) sustainable reintegration in the place of origin (hereinafter, *return*), 2) sustainable local integration in areas where IDPs have taken refuge (local integration); and 3) sustainable integration in another part of the country (settlement elsewhere in the country).<sup>2</sup>

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<sup>1</sup> UN, General Assembly, Framework on Durable Solutions for Internally Displaced Persons, A/HRC/13/21/Add.4. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/100/49/PDF/G1010049.pdf?OpenElement>.

<sup>2</sup> The Guiding Principles on Internal Displacement (hereinafter, Guiding Principles) address the issue of durable solutions in Principles 28-30. Particularly, Principle 28 refers to two solutions: “return” and “resettlement” in another part of the country. The latter option concerns settlement in a part of the country other than the place of origin. It includes the option for displaced persons to settle permanently in the first place they reached when they moved, as well as the possibility of moving to another part of the country. Since the term *resettlement* has a very specific meaning in the field of refugees (as it concerns their relocation outside the asylum country), the “Framework on Durable Solutions for Internally Displaced Persons” refers to sustainable integration in another part of the country (settlement in another part of the country).

There is no proper hierarchy between the three solution modalities, which can only be durable if they meet a number of conditions. All persons and agents involved must respect the IDP right to make an informed and voluntary decision on which durable solution they consider most appropriate. IDPs are also entitled to participate in the planning and management of durable solutions, strategies and programmes.

In general, the Framework on Durable Solutions for Internally Displaced Persons identifies eight criteria that determine to what extent a durable solution has been achieved; in particular, IDPs who have achieved a durable solution will enjoy without discrimination the following rights: (i) long-term safety, security and freedom of movement; (ii) an adequate standard of living, including access to adequate food, water, housing, health care and basic education; (iii) access to employment and livelihoods; and (iv) access to effective mechanisms that restore their housing, land and property or provide them with adequate compensation. In a number of contexts, it will also be necessary for internally displaced persons to benefit, without discrimination, from the following to achieve a durable solution: (v) access to and replacement of personal and other documentation; (vi) voluntary reunification with family members separated during displacement; (vii) participation in public affairs at all levels on an equal basis with the resident population; and (viii) effective remedies for displacement-related violations, including access to justice, reparations and information about the causes of violations.<sup>3</sup>

Achieving these criteria or conditions will often entail a gradual, long and complex process, which will require overcoming humanitarian, human rights, development and in some cases peace-building challenges. There may also be political or security factors (such as continuous armed conflict) that prevent durable solutions or result in situations of prolonged displacement, or even new internal displacement.

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<sup>3</sup> See UN, General Assembly, *op. cit.*

In terms of relevant jurisprudence regarding the eight human rights-based criteria applied to determine to what extent a durable solution has been achieved, consideration should be given to what has already been included in this handbook in chapters three “Rights of internally displaced persons and protection risks” and seven “Reparation measures”, respectively.

In line with Principle 29 of the Guiding Principles, IDPs seeking a durable solution shall not be discriminated against, particularly as a result of their having been displaced. Therefore, the items developed in chapter three above on discrimination and relative jurisprudence of the Inter-American Court of Human Rights (IACHR) and comparative law, are highly relevant also in the context of return, local integration or settlement elsewhere the country, as well as in other phases of displacement.

Measuring the achievement of durable solutions requires an in-depth review of the above conditions and criteria, as well as the process implemented to achieve them. In many contexts, achieving such conditions will take quite some time, and these may only be feasible through long-term reconstruction and development processes. It is therefore important to consider them as criteria for assessing the degree to which a durable solution has been achieved.

This assessment should be carried out at the national level or by IDP groups, depending on the causes or circumstances of displacement. It is important to consider that significance of the different criteria will vary from context to context, for example, obtaining redress may be less important or completely irrelevant to people displaced as a result of flooding. However, the fact that most IDPs have returned or settled in safety and with dignity in different parts of the country does not always mean that all IDPs have achieved a durable solution. Durable solutions are closely linked to the restoration of the human rights of IDPs, as well as their individual circumstances; therefore, an individual analysis will be required to verify the achievement of a durable solution by each individual.

By way of example, the Constitutional Court of Colombia, in its Decision T-025 of 2004, declared the existence of a state of unconstitutional things as regards internally forced displacement because it found that the rights of the displaced population in Colombia were being violated in a massive, systematic and serious manner.<sup>4</sup> In terms of durable solutions, the Court played a critical role, as it decided to retain its jurisdiction as a result of that decision, in order to follow up on verifying that authorities took appropriate measures to ensure the effective enjoyment of rights, despite gradual progress.

## II. Planning and Implementation of Durable Solutions

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) also establishes, in Articles 11.1 and 11.2, the State obligation to seek durable solutions, primarily by promoting and creating satisfactory conditions for “voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity.” It also indicates that States should enable IDPs to make a free and informed choice among the options of durable solutions, by consulting them on those and other options and ensuring their participation in finding sustainable solutions. Furthermore, Article 11.4 refers to the State obligation to establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of IDPs.<sup>5</sup> This is particularly relevant when discussing indigenous peoples.

Support for States and IDPs themselves in achieving durable solutions is a complex and heterogeneous challenge that requires a particular approach.

On the one hand, certain principles must be carefully observed, paying attention to the specific context in which IDPs are located. It is also essential to

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<sup>4</sup> See Constitutional Court of Colombia, Decision T-025/04.

<sup>5</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Available at <https://www.brookings.edu/wp-content/uploads/2016/07/Kampala-Convention-EN.pdf>.

adopt a rights-based and solution-oriented approach and to assist in their planning as soon as circumstances allow it. Finally, the various initiatives for durable solutions at both national and international levels should be well coordinated, as should the actors involved, including humanitarian, human rights, protection and development cooperation actors.

## 1. Respect for Essential Principles

All plans, programmes and activities aimed at achieving durable solutions for IDPs should be consistent with certain principles. The most important is the principle of State responsibility to respond to internal displacement, which implies the duty of authorities to establish conditions for achieving durable solutions. This is stated in Principle 28 of the Guiding Principles:

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.

The following are principles that should generally guide the tracing for durable solutions in accordance with the Inter-Agency Standing Committee's "Framework on Durable Solutions for Internally Displaced Persons:"

- The primary responsibility to provide durable solutions for IDPs needs to be assumed by the national authorities. International humanitarian and development actors have complementary roles.
- National authorities should grant and facilitate rapid and unimpeded access to humanitarian actors that assist internally displaced persons in achieving a durable solution.
- The needs, rights and legitimate interests of internally displaced persons should be the primary considerations guiding all policies and decisions on internal displacement and durable solutions.

- All relevant actors need to respect the IDP right to make an informed and voluntary decision on which durable solution is the most appropriate. They also have the right to participate in the planning and management of durable solutions, strategies and programmes.
- An internally displaced person who opts for local integration or settlement elsewhere in the country, in the absence of the option to return to his or her place of origin, does not lose the right to return should that choice later become feasible.
- Under no circumstances should internally displaced persons be encouraged or compelled to return or relocate to areas where their life, safety, liberty or health would be at risk.
- Likewise, populations and communities that integrate or reintegrate internally displaced persons and whose needs may be comparable, must not be neglected.
- Internally displaced persons who have achieved a durable solution continue to be protected by international and national human rights law and, where applicable, international humanitarian law.<sup>6 7</sup>

In this regard, the IACHR has pronounced, on numerous occasions, the State duty to ensure the return of displaced persons, or their voluntary resettlement elsewhere in the country, and the participation of those affected in the management of such return, or resettlement. In the following table, some orders where the IACHR has ruled on the above are included:

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<sup>6</sup> See UN, General Assembly, *op. cit.*

<sup>7</sup> See, for example, IACHR, *Matter of Pueblo Indígena de Kankuamo regarding Colombia*, Order of the Inter-American Court of Human Rights of 5 July 2004, having seen 1 and 2, items f) and g); Inter American Court of Human Rights, *Asunto de la Comunidad de Paz de San José de Apartadó*, Order of the President of the Inter-American Court of Human Rights of 9 October 2000, having seen 1 and 2.



### Examples of State obligations to ensure durable solutions and to include IDPs in their management

#### IACHR, Provisional Measures, *Matter of Pueblo Indígena de Kankuamo regarding Colombia*, order of 5 July, 2004<sup>8</sup>

Whereas 10. The situation that the Kankuamo indigenous people are experiencing, as described by the Commission, has curtailed their freedom of movement and has forced them to move to other regions. The State must, therefore, ensure that the beneficiaries of these measures are able to continue living in their habitual place of residence; it must also provide those who have been displaced from their people's land with the means necessary to return to their homes.

Operative paragraph 3. To call upon the State to ensure the security conditions necessary to ensure respect for the Kankuamo indigenous people's right to freedom of movement, and to ensure that those who have been forcibly displaced to other regions are able to safely return to their homes, if they so desire.

#### IACHR, *Moiwana Community v. Suriname*, Decision of 15 June, 2005 (Preliminary Objections, Merits, Reparations and Costs.)

113. It has been clearly shown that, until the community members are convinced that they will not be able to return to their ancestral territory while justice is not done for

<sup>8</sup> Document by the IACHR of 2 July 2004, by which it submitted to the IACHR, in accordance with Articles 63.2 of the American Convention on Human Rights and 25 of the Regulations of the Court, a request for interim measures in favour of the members of the Kankuamo indigenous people regarding the Republic of Colombia, with the aim of protecting their lives, personal integrity, cultural identity and special relationship with the ancestral territory. According to information supplied by the petitioners, the Kankuamo indigenous people's geographic location exposes its members to constant acts of violence and threats on the part of outlaw armed groups operating in the area. This meant that governors and the leaders of indigenous village governments were the victims of threats, assaults and assassinations. Also, a number of families have had to move to protect their lives; food supplies are being cut off and indigenous youth run the risk of being impressed into the service of these armed groups. Between 1993 and 2003, some 166 Kankuamo were killed by armed groups. From this figure, the number of victims up to August, 2003 was 44. See IACHR, *Matter of Pueblo Indígena de Kankuamo regarding Colombia*...quot., having seen 1 and 2, items f) and g).

the acts of 1986. Andre Ajintoena testified that after the attack he visited the area with others only to document and take pictures of the site. Once the group had finished, some of its members felt ill; according to Mr. Ajintoena, they realised that “things weren’t right, it wasn’t proper, because according to our culture you can’t go back to the place without making arrangements.” By having returned without “applying the religious [and] cultural rules” —that is, performing the necessary death rituals and achieving reconciliation with the spirits of those killed in the 1986 raid— Mr. Ajintoena and the others believed that they had seriously offended those spirits and, as a result, began to suffer physical and psychological maladies.” All of the community members who testified before the Court expressed a similar fear of avenging spirits, and affirmed that they could only live in Moiwana Village again if their traditional lands were first purified.

**IACHR, Provisional Measures, *Asunto de la Comunidad de Paz de San José de Apartadó respecto de Colombia*, Resolution of 2 February, 2006<sup>9</sup>**

Whereas 9. Since the situation in the Peace Community, its inhabitants have been forced to move to other regions of the country, so it is necessary for the State to ensure that the persons benefiting from the present measures can continue to live in their habitual residence and provide the necessary conditions so people from that community who have been forced to leave their homes could return.

<sup>9</sup> Document by the Inter-American Commission on Human Rights of 3 October, 2000, by which it submitted to the IACHR, in accordance with Articles 63.2 of the American Convention on Human Rights and 25 of the Regulations of the Court, a request for provisional measures in favour of the inhabitants of the San José de Apartadó Peace Community, municipality of Antioquia, Republic of Colombia, with the aim of protecting their lives and personal integrity, relating to case No. 12.325, pending before the Commission. That, in said document, the Commission stated that the residents of that community “have been subjected to serious acts of violence and harassment by paramilitary groups in the area,” for which members of the Colombian Army would also be responsible. In particular, the Commission informed the Court that it had been informed of the “killing of 47 members [of the community] within nine months.” See IACHR, *Asunto de la Comunidad de Paz de San José de Apartadó respecto de Colombia*, Order of the President of the IACHR of 9 October, 2000, having seen 1 and 2.

**IACHR, *Chitay Nech et al. v. Guatemala*, Decision of 25 May, 2010  
(Preliminary Objections, Merits, Reparations, and Costs)**

149. In this regard, in agreement with the international community, this Court reaffirms that obligation of guarantee of the States to protect the rights of displaced persons entails not only the responsibility of adopting prevention measures but also carrying out an effective investigation of the alleged violation of human rights and providing the necessary conditions to facilitate the safe and dignified return to the place of habitual residence or voluntary resettlement in other parts of the country. To this end, their full participation in the planning and management of their return or reintegration must be ensured.

Likewise, See *Case of Massacres of El Mozote and nearby places v. El Salvador* (Merits, Reparations and Costs), Decision of 25 October, 2012, par. 188 and *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* (Preliminary Objections, Merits, Reparations and Costs), Decision of 20 November, 2013, par. 220.

**IACHR, *Case of Human Rights Defender et al. v. Guatemala*, Decision of 28 August, 2014 (Preliminary Objections, Merits, Reparations and Costs.)**

167. Moreover, in agreement with the international community, the Court has reaffirmed that the obligation of guarantee of the State of origin to protect the rights of displaced persons entails not only the responsibility of adopting prevention measures but also providing the necessary conditions to facilitate the safe and dignified voluntary return to the place of habitual residence or voluntary resettlement in other parts of the country. To this end, their full participation in the planning and management of their return or reintegration must be ensured.

Considering the comparative law, we can see, for example, that the Constitutional Court of Colombia also—in the light of the general obligations of States in the field of human rights and international humanitarian law and in accordance with the legal framework of the Guiding Principles— identified a

list of minimum rights that make up the minimum positive obligations that the Colombian State must always satisfy in favour of the displaced population.<sup>10</sup>

This listing includes many rights that are an integral part of durable solutions,<sup>11</sup> but also explicitly includes the right of return and resettlement. In addition, in the Decision T-602 of 2003, the Constitutional Court determined that the State has a dual obligation “on the one hand to plan incentives for voluntary recovery and, on the other hand, to ensure relocation under conditions that contribute to increasing the quality of life of the displaced population.”<sup>12</sup>

## 2. Context Considerations

Any initiative on durable solutions, in addition to respecting the above principles, should be context-sensitive, and the following factors should be carefully considered:

- The causes of displacement: it is important to understand and address its causes, particularly where internally displaced persons attempt to restore their lives in their places of origin. In situations of armed conflict, this may require the restoration of sustainable security conditions and a peace process or peace-building measures. If this is not feasible in the short term and most IDPs would like to integrate locally, it is important that policies on durable solutions recognise the possibility of choosing primarily this solution.

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<sup>10</sup> Constitutional Court of Colombia, in the emblematic and already mentioned Decision T-025.

<sup>11</sup> 1. The right to life; 2. The rights to dignity and physical, psychological and moral integrity; 3. The right to family and family unit; 4. The right to basic subsistence; 5. The right to health; 6. The right to protection from discriminatory practices based on displacement —the right to equality—; 7. The right to basic education for children up to the age of 15; 8. The provision of self-sustaining support through the socio-economic stabilisation of displaced persons.

<sup>12</sup> Constitutional Court of Colombia, Decision T-602 of 2003.

In cases where the cause of displacement is related to discrimination, as in the case *Rabinal v. Guatemala*, it has been mentioned the importance of promoting the reevaluation of native cultures, spreading their history and wealth.

In situations of disasters, when places of origin present permanent risks, authorities can legitimately consider sustainable settlement in other areas of the country as a preferred solution.

- The duration of displacement: in situations of prolonged displacement, further efforts to foster the reintegration of displaced communities may be required, including, for example, assisting IDPs to acquire new skills to help them access the labour market. This is especially relevant when IDPs encounter particular obstacles to adapting to new economic, social and cultural environments where they wish to settle, either in their places of origin or in other parts of the country. At the same time, it is important to pay attention to the mechanisms developed by the same IDPs to adapt to and strengthen the new environment, particularly when a considerable number of these people were born at the place of displacement.

In this context, it should also be noted that the IACHR has identified displacement as a *de facto* violation of Article 22 of the American Convention on Human Rights (ACHR) by not creating conditions for return (with return being the durable solution chosen by displaced populations in the cases considered; see chapters two: “Conceptos y enfoques principales del desplazamiento interno” (Main Concepts and Approaches to Internal Displacement) and three: “Derechos de las personas desplazadas internas y riesgos de protección” (Rights of internally displaced persons and protection risks.) Below is a table with some cases that the IACHR has decided on in this regard:

**IACHR, *Moiwana Community v. Suriname*, Decision of 15 June, 2005  
(Preliminary Objections, Merits, Reparations and Costs)<sup>13</sup>**

In this case, the IACHR stressed that the Guiding Principles issued in 1998 by the representative of the United Nations Secretary-General about IDPs, that based on international regulations about international human rights law and international humanitarian law, were relevant for this case. The Court considered that several of these guidelines illustrate the content and scope of Article 22 of the Convention in the context of internal displacement, and for the purposes of this case, it emphasised the following principles:

1.1. Internally displaced persons shall equally enjoy the same rights and freedoms recognised by international and domestic law to other inhabitants of the country. They shall not suffer any discrimination in the enjoyment of their rights and freedoms merely because they are internally displaced.

5. All international authorities and agencies 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 the displacement of persons.

8. Displacement shall not be carried out in a way that violates the rights to life, dignity, freedom and security of those affected.

9. States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastors and other groups with a special dependency on and attachment */sic/* to their land.

14.1 Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.

28.1 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

<sup>13</sup>IACHR, *Moiwana Community v. Suriname*, par. 11 and 119.

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.

In this regard, the Court noted that Suriname has objected that members of the community have suffered restrictions on their movement or residence, so the State established that they could move freely through the territory of the country. Notwithstanding there could be a rule in Suriname establishing this right, on which the Court decided not to rule, in this case the freedom to movement and residence of members of the community circumscribed by a very precise, *de facto* restriction, originating from their well-founded fears described above, which excluded them from their ancestral territory.

Therefore, the Court noted that the State has failed to both establish conditions, as well as provide the means, that would allow the community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have a special dependency and attachment —as there is objectively no guarantee that their human rights, particularly their rights to life and to personal integrity, will be respected. By not providing such elements—including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack— the Court stated that Suriname has failed to ensure the rights of the survivors to move freely within the State and to choose their place of residence. It also indicated that the State has effectively deprived members of the community still exiled in French Guyana of their rights to enter and remain in their country.

**IACHR, *Chitay Nech et al. v. Guatemala*, Decision of 25 May, 2010  
(Preliminary Objections, Merits, Reparations, and Costs)<sup>14</sup>**

Therefore, if Guatemala has not restricted the freedom of movement and residence of the members of the nuclear family of Florencio Chitay Nech in a formal manner, the Court finds that in this case, said freedom is limited by a serious *de facto* restriction, that originates with the threats and harassments that have provoked their splitting up, as well as the well-founded fear generated by all that occurred to their

<sup>14</sup> IACHR, *Chitay Nech et al. v. Guatemala*, par. 150.

father, other family members, and the members of the community, combined with the lack of an investigation and procedure of those responsible for the facts, which have kept them away from their community. The State has not complied neither with its duty to guarantee this right, nor has it established the conditions or foreseen the means that could permit those members of the Chitay Rodriguez family to return in a safe and dignified manner to their community, with respect to which they have an important cultural link. Finally, the State has not granted an integral reparation that restitutes the vulnerable rights and guarantees, among other things, the non-repetition of such situation.

**IACHR, *Massacres of Río Negro v. Guatemala*, Decision of 4 September, 2012 (Preliminary Objection, Merits, Reparations and Costs)<sup>15</sup>**

172. Article 22.1 of the Convention recognises the right of movement and residence. In this regard, the Court has established in other cases that this article also protects the right not to be forcibly displaced within a State Party.

174. This Court has established that due to the phenomenon complexity of internal displacement and the wide range of human rights that it affects or puts at risk, and to the circumstances of special vulnerability and defencelessness, which displaced persons generally face as subjects of human rights, the situation could be understood as a *de facto* condition of lack of protection. This situation, according to the American Convention, obliges the States to adopt positive measures to reverse the effects of their condition of weakness, vulnerability, and defencelessness, even with respect to the *vis-á-vis* actions and practices of private third parties.

175. In this regard, the Court has pointed out that the right of movement and residence may be violated by *de facto* restrictions if the State has not established the conditions or provided the means by which it can be exercised, for example, when a person is victim of threats and harassment, and the State does not provide the necessary guarantees for them to move and live freely in a given territory, even when the threats and harassment are from non-state actors.

<sup>15</sup> IACHR, *The Río Negro Massacres v. Guatemala*, par. 172, 174 and 175.



On the other hand, the Court notes that the aforementioned Guiding Principles establish obligations for States concerning the return, resettlement and reintegration of internally displaced persons, *inter alia*.

Principle 28.1. 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.

[...]

Principle 28.2. Special efforts should be made to ensure the full and effective participation of IDPs in the planning and management of their return or resettlement and reintegration.

[...]

Principle 29.2. Competent authorities have the duty and responsibility to provide assistance to IDPs who have returned or resettled elsewhere, to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When such recovery is not possible, persons shall be entitled to appropriate compensation or another form of just reparation by competent authorities or they shall provide or assist these persons.

**IACHR, *Massacres of El Mozote and nearby places v. El Salvador*,  
Decision of 25 October 2012 (Merits, Reparations and Costs)<sup>16</sup>**

186. Article 22.1 of the Convention recognises the right of movement and residence.

In this regard, the Court has considered that this article protects the right not to be forcibly displaced within a State Party, and not to be obliged to leave the territory of the State in which a person is living legally. In addition, the Court has repeatedly indicated that freedom of movement is an essential condition for the free

<sup>16</sup> IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, par. 186 and 193.

development of a person. Similarly, in its General Comment No. 27, the Human Rights Committee of the United Nation has indicated in relation to the content of this right, that it consists, *inter alia*, in that: (a) everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence, which includes protection against all forms of forced internal displacement; and (b) the right to enter one's own country and remain there. The enjoyment of this right does not depend on any particular purpose or motive of the person wishing to move or remain in a place.

193. In the instant case, and as can be inferred from the testimony received, it has been proved that situations of mass displacement were caused precisely by the armed conflict and the lack of protection suffered by the civilian population because it was equated with the guerrilla and also, in the instant case, considered a direct consequence of the massacres that occurred between 11 and 13 December, 1981, and the accompanying circumstances, which have also been verified, of this being part of a state policy for devastated land, which forced survivors to flee their country by seeing their life, security or freedom threatened by widespread and indiscriminate violence. The Court concludes that the State is responsible for the conduct of its agents that caused internal forced displacement towards the Republic of Honduras. In addition, the State did not provide the conditions or means that would allow survivors to return in a dignified and safe manner. As the Court has previously established, the lack of effective investigation of violent acts can promote or perpetuate forced displacement. Therefore, the Court considers that in this case the freedom of movement and residence of the survivors of the massacres was limited by serious *de facto* restrictions that resulted from actions and omissions by the State, which represented a violation of Article 22.1 of the Convention.

**IACHR, *Case of Human Rights Defender et al. v. Guatemala*, Decision of 28 August, 2014 (Preliminary Objections, Merits, Reparations and Costs)<sup>17</sup>**

166. The Court has pointed out that the rights to freedom of movement and residence may be violated either formally or by *de facto* restrictions, if the State has

<sup>17</sup> IACHR, *Case of Human Rights Defender et al. v. Guatemala*, par. 166, 171, 172, 176 and 177.

not established the conditions or provided the means to exercise these rights. This occurs, for example, when a person is the victim of threats or harassment and the State does not provide the necessary guarantees to ensure that he or she can move around and live freely in the territory concerned, even when the threats and harassment originate from non-state actors. Similarly, the Court has indicated that the failure to effectively investigate acts of violence can propitiate or perpetuate exile or enforced displacement.

171. Finally, although the evidence does not indicate the specific period of time that they remained in Mexico, it is clear that B.A., the mother C.A., and the children L.A. and N.A., were in that country to initiate and follow up on the paperwork for their asylum applications, and that on 6 July, 2005, they obtained “non-immigrant refugee status,” granting them permission to remain in that country. Therefore, it is evident that they remained in Mexico for a period of time. Also, from the body of evidence it is clear that, by February 2006, C.A., B.A. and the children L.A. and N.A., had returned to the Municipality of Santa Lucía Cotzumalguapa, where they rented a house.

That is, after leaving village of Cruce de la Esperanza on 31 December, 2004, they did not return to their place of habitual residence.

[...]

172. Consequently, the Court considers that, after Mr. A.A.'s death, the State did not provide adequate measures of protection to ensure that the aforementioned members of family A would not be forced to move within Guatemala or to Mexico.

176. For the Court, two aspects are fundamental in relation to the alleged measures of security and protection offered by the State. First, the specific offer was made in 2008, that is, at least three years after family A was forced to leave. Therefore, during that period, it is clear that the State failed in its duty to provide the necessary conditions to enable those individuals to return voluntarily to their places of residence. Secondly, the information provided by the representatives makes it clear that in 2008 the State offered, at least, to “assign personal protection, protection in a fixed position and perimeter surveillance [...]” The evidence does not indicate how those measures were to be implemented in terms of time, means and place, as well

as their duration. Consequently, it is not possible to determine whether these measures were intended to facilitate a voluntary, dignified and safe return to their usual place of residence, or to guarantee their protection at the place where they stayed outside the village of Cruce de la Esperanza, or how they would guarantee the victims' full participation in planning and arranging their return or reintegration. Nor is it clear whether these measures were to be implemented only in favour of B.A., or whether they would include her mother C.A., her children L.A. and N.A., her sister E.A., and her sister's children, J.A. and K.A.

177. The lack of evidence to dispute the ineffectiveness of the State's alleged offer of measures of security and protection, together with B.A.'s statement and the absence of information by the State, [sic] allow the Court to conclude that the State did not adopt sufficient and effective measures to guarantee the members of family A, who were forcibly displaced, a safe and dignified return to their usual places of residence or voluntary resettlement in another part of the country, ensuring their full participation in the planning and management of a process of return or reintegration.

- The type of settlement —urban or rural, in camps or other situations—camps and collective centres rarely represent a solution for long-term housing. However, progress can be made in identifying a durable solution by ensuring freedom of movement and access to livelihoods for IDPs from the early stages.
- How displacement has affected different populations: displacement can lead to culture, productive means and social structures collapse, particularly —but not exclusively— in cases involving indigenous peoples and people with special attachment to their land. Durable solution interventions should aim at preserving and restoring such culture and its structures, as far as possible.

At the same time, displacement can also generate particularly serious risks for people with compounded vulnerabilities or traditionally excluded, such as women, children and adolescents, as well as minorities. Durable solution interventions should address all this

and may even represent an opportunity to reduce discrimination and promote the specific groups' empowerment. In general, plans and programmes for durable solutions should consider different people's particular needs based on age, gender and other diversity factors, such as ethnic origin and religion.

#### Example of regional jurisprudence on indigenous peoples

**IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Decision of 20 November, 2013 (preliminary objections, merits, reparations and costs.)<sup>18</sup>**

459. The Court indicates that, as a result of the State's failure to comply with its obligation to ensure the right to collective ownership [...], the communities of the Cacarica have suffered harm that goes beyond the mere detriment to their collective wealth. The body of evidence reveals that they have a special relationship with the lands they inhabit and that, consequently, they were profoundly affected not only by being dispossessed of these lands, but also by the fact that the illegal exploitation of the natural resources by third parties was permitted. Accordingly, in order to avoid a repetition of such acts, the Court orders the State to restore the effective use, enjoyment and possession of the territories recognised by law to the Afro-descendant communities assembled in the Cacarica Community Council.

<sup>18</sup> IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 459.

### Example on the topic against discrimination

#### *Members of Chichupac Village and Neighbouring Communities of the Municipality of Rabinal v. Guatemala.*<sup>19</sup>

320. The Court states, as a guarantee of non-repetition and given the very serious acts against Maya achí people described in this Decision, and given the possibility that discriminatory attitudes and feelings persist in society, that within a reasonable time, the State should improve and strengthen the fight against all forms of discrimination and, in particular, against racial and ethnic discrimination, by strengthening existing bodies or those that it will create for that purpose. These bodies must have the direct participation of people from vulnerable groups and will also promote the native cultures' revaluation, spreading their history and wealth.

### 3. A rights-based approach

Durable solutions mainly address IDPs' rights restitution. Any effort to achieve durable solutions must, therefore, have a human rights approach. Ultimately, this implies actively designing all durable solutions programmes in a way that promotes the enjoyment of human rights. Human rights standards—for example, those related to accessing economic and social rights, such as health, education and housing—should guide the durable solutions programmes, and these, in turn, should contribute to developing the State capacity to fulfil their obligations, as well as the capacities of the IDPs themselves to exercise their rights.

Adopting a rights approach is the responsibility of all humanitarian and development cooperation actors. National and international human rights actors must advocate and assist other relevant actors, particularly national and local authorities, in adopting this approach.

<sup>19</sup> IACHR, *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guatemala*, par. 320.

To that end, mechanisms to monitor IDPs' access to their rights is essential, and the information obtained through those mechanisms should guide the advocacy, planning and programming of protection and human rights actors. Particularly in countries with a significant level of institutional development, agencies implementing monitoring programmes should develop the capacity to analyse the adequacy and effectiveness of national public policies, and budget allocation and planning mechanisms, as well as the authorities' institutional performance to meet IDPs' needs and rights.

As already indicated, a relevant example about this is the follow-up monitoring applied by the Constitutional Court of Colombia to Decision T-025 of 2004, by which it declared a state of unconstitutional things regarding forced displacement. With regards to this, seeking the effective enjoyment of minimum rights of forced displacement victims, the Constitutional Court of Colombia determined various compliance levels for Decision T-025 of 2004 and, in Order 185 of that same year, announced those levels to examine the information referred to it. In this regard, it indicated:

Although the disappearance of each of the factors that make up the [sic] state of unconstitutional things requires a prudential period combined with the joint effort of the different public bodies, it is necessary to verify whether actions aimed at overcoming it have been adopted, implemented and completed, also guaranteeing minimum protection and providing mechanisms for such concrete and specific measures to involve a large part of the displaced population. Actions that must produce visible and sustained results in favour of victims, ensuring the effective enjoyment of rights by allowing them to access to the benefits conferred by international instruments and the internal regulations governing the matter.

In this way, the evaluation of compliance with orders issued by the highest Colombian Constitutional Court translates into different levels of compliance involving forced displacement particularities within the national territory.<sup>20</sup>

In many contexts, over time, it is difficult to differentiate the IDPs' situation from that of the rest of the local population. In such situations, the “prism of displacement” should be progressively replaced by a broader human rights perspective, as possible solutions would depend on legislative and social reforms, adequate access to social assistance services and systems, the adoption of policies to support people living in poverty, respect for civil and political rights, and the enjoyment of economic and social rights by the poorest segments of whole population.

In this regard, the Constitutional Court of Colombia has indicated that there are simple and complex enforcement orders. The principle of harmonious cooperation between the different bodies of the State structure was developed by the Court by the jurisprudence produced during internal displacement, to apply relevant measures and encourage the intervention of the institutions integrating the National System of Comprehensive Care for the Displaced Population (SNAIPD) to guarantee the full exercise of fundamental rights inherent to the population forced to move for violent causes:

A. Complex orders. They are action or abstention orders issued for improving the state of unconstitutional things requiring complex execution processes, since they involve several authorities and imply coordinated actions between the different branches of government. They seek to guarantee the rights of all the population victim of forced displacement, regardless of whether or not they have required guardianship, and also aim at ensuring that entities responsible for displaced population care establish, within a prudential period of time, and

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<sup>20</sup> Duran García, Parra Aldana, Bohórquez *et al.*, *Desplazamiento forzado en Colombia. Derechos, acceso a la justicia y reparaciones*, p. 27-28. Available (in Spanish) at <https://www.acnur.org/fileadmin/Documentos/Publicaciones/2009/6922.pdf?file=fileadmin/Documentos/Publicaciones/2009/6922>.



within the scope of their powers, the corrective measures necessary to overcome the problems of insufficient resources and precarious institutional capacity to implement the state policy of displaced population care.

Pursuant to Article 27 of Decree No. 2591 of 1991, the Court retained the competence to monitor compliance with it and sought, in that sense, State control agencies cooperation with UNHCR and other organizations linked to internal forced displacement. In this regard, the Court's orders on the subject were:

Budget, public policies generation and overcoming institutional shortcomings: communicate to the National Council for the Care of Displaced Population (CNAPD, by its Spanish acronym) the state of unconstitutional things (as the body competent to formulate policy and guarantee the budgetary allocation for its development) so that it determines how the insufficiency of resources and institutional shortcomings can be overcome:

Responsibilities of territorial authorities: The Ministry of the Interior and Justice will promote, among the governors and mayors, the adoption of the necessary measures to protect displaced population.

Institutional capacity failures: CNAPD must adopt, within three months of decision communication, an action programme with a precise timetable, aimed at correcting institutional capacity failures.

Protection of minimum rights: CNAPD must, within six months of decision communication, conclude actions aimed at protecting minimum rights of the displaced population.

Responsible authorities are obliged not to incur unconstitutional practices to access care (e.g., guardianship actions as a requirement).

[...]

B. Simple orders. These are action or abstention orders referring specifically to the files accumulated within the process of Decision T-025 of 2004. These can be developed by an authority without the assistance of others, since they only

involve the defendant authority and are necessary to respond to shareholders' requests, constituting the result of the application of the corresponding jurisprudential precedent.

As well as complex orders, monitoring the compliance with simple orders is carried out by Constitutional Court in accordance with Articles 27 and 36 of Decree 2591 of 1991. In this way, the Court's orders in this regard were [we draw the most relevant in relation to the topic "durable solutions"]:

a. Applications for accessing socio-economic stabilization programmes: in particular, entities involved in Decision T-721, T-602, T-669 and T-419, all of 2003, must respond within the month following the communication of Decision T-025 of 2004.

Applications for accessing health social security system and medicine delivery: Social Action and territorial entities health secretaries will make effective the access and delivery of medicines within 15 days, in the cases analysed in Decisions T-419, T-790 and T-645 of 2003.

Applications for accessing education system: Social Action and territorial entities education secretaries will expend efforts to guarantee access to the education system within the following month, for the cases analysed in Decisions T-268 of 2003 and T-215 of 2002.

Application for land, property and possessions protection: Social Action will include, as part of data requested from the displaced, information on abandoned properties, property title and basic characteristics for implementing Decree 2007 of 2001.

Requests to form territorial committees: there is no specific order since there is no fundamental right violated with that body formation. However, complex orders include such a request as each territorial entity must determine how it will fulfil its duty of displaced population protection.<sup>21</sup>

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<sup>21</sup> Duran García, Parra Aldana, Bohórquez *et al.*, *op. cit.*, p. 24-27.

Particular attention should be paid to post-conflict situations, as well as situations where displacement has occurred as a result of or is closely linked to serious human rights violations. In such cases, State responses to certain issues—such as the right to an effective remedy and reparation—and transitional justice can have a fundamental impact on achieving durable solutions.

Protection and human rights actors should actively advocate for the proper integration of issues affecting IDPs into these processes and assist Governments to that end. However, before starting to advocate in this regard or to develop programmes in this area, it is fundamental that international actors cautiously weigh the possible outcomes of these processes, political will and good faith behind them, as well as the preferences and plans of the IDPs.

#### 4. A coherent approach

Efforts to achieve durable solutions naturally involve a large number and diversity of actors, including national and local authorities, civil society, IDPs themselves and international agencies and organizations. Achieving an adequate level of coherence is essential for durable solutions, as disconnected and isolated actions will not reach the desired impact.

It is important to avoid falling into certain misconceptions. Particularly, there should be no rigid distinction between short-term humanitarian assistance programmes and long-term development programmes, and there is no exact moment when assistance should “turned over” to development. Ultimately, achieving durable solutions depends on broader structural processes, such as peace processes and rehabilitation and development programmes. In most cases, these processes have a higher political priority, more resources to invest and, in the long term, more likely to have an impact than specific programmes for IDPs with limited resources. At the same time, their ability to respond to these people’s specific needs may be limited and considerable time and resources may be required to ensure that they have the right approach. However, it is essential that the particular needs of IDPs and the main obstacles

to properly integrate durable solutions into these processes. The adoption of an early recovery approach and the prompt participation of development actors in IDPs' assistance and protection initiatives are important factors for this purpose.

In certain situations, internal displacement specific programmes may be needed, particularly if IDPs are a high proportion of the whole population, as well as when they have specific and more urgent needs. Examples:

- Housing programmes. In the case *Plan de Sanchez Massacre v. Guatemala*, the IACHR noted:

the Court considers that the State must implement a housing programme to provide adequate housing to the surviving victims who live in that village (...) and who require it. The State must develop this programme within five years of notification of this Decision.<sup>22</sup>

- Health programmes. In the case *Operation Genesis v. Colombia*, the IACHR determined:

the Court considers that the State must provide, free of charge, the appropriate and priority treatment that said persons require, after expressing their will, within six months of notification of this Decision, and for as long as necessary, including the provision of medicines. When providing psychological treatment, the particular circumstances and needs of each person must be considered, so that collective, family and individual treatments could be provided, according to what is agreed with each of them and after an individual evaluation.<sup>23</sup>

Another important consideration is the impact that a specific displacement strategy may have on the relationship between the IDPs and the host community and, where appropriate, on reconciliation processes. For example,

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<sup>22</sup> IACHR, *Plan de Sanchez Massacre v. Guatemala*, par. 105. Also see *Pueblo Bello Massacre v. Colombia and Massacres of El Mozote and nearby places v. El Salvador*.

<sup>23</sup> IACHR, *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, par. 453.

a housing and income generation project for IDPs that also benefits people who are in a situation of higher vulnerability in the host community will be better based on needs and will also contribute to social harmony.

In some cases, particularly in situations of IDP return or integration into poverty-stricken areas, such as conflict-affected rural areas or urban marginalised neighbourhoods, development programmes based on geographical areas will be required. However, even in these cases it is important to take into account the specific situation of the IDPs. For example, demand-driven, participatory local development projects must take into account the specific organizational structures that the IDPs have been able to carry out and even contribute to strengthening them; high concentration of displaced population can also be a selection criterion for programme implementation areas; in addition, social housing programmes may need to establish simpler access requirements for IDPs that have lost their personal documentation.

In any case, regardless of whether specific IDP programmes are established, their specific needs, rights and preferences should be integrated into needs assessments, projects and development and recovery strategies.

### III. Conclusions

The tracing for durable solutions is a gradual and multidimensional process, which is not always linear and can vary significantly from person to person.

The specific needs and human rights problems of IDPs do not automatically disappear when a conflict or disaster ends, or when people become safe from the ongoing conflict or disaster. People can return to their homes, but they cannot access services, either because they have lost the required documents or because services simply do not exist. A disaster or conflict may end, but people's homes and livelihoods may have been destroyed.

In such circumstances, it is not safe to say that a durable solution has been

reached.

Finding durable solutions to displacement is not simple, because they are often linked to broader struggles for peace, security, territorial control, equal treatment and equitable distribution of resources. However, ensuring solutions for IDPs is also in the interest of the State.

Leaving IDPs into continued marginalization can become an obstacle to the stability of peace, recovery and long-term reconstruction in countries emerging from crisis.

Experience shows that displacement resolution is a complex process. Achieving durable solutions for IDPs involves overcoming the protection and assistance needs linked to their displacement and the enjoyment of their rights without discrimination. The tracing for solutions by the IDPs is therefore a complex and gradual process, which must be supported from the beginning of the crisis, to avoid the risk of prolonged, multiple and recurrent displacement.

Durable solutions interventions are aimed at moving from an assistance and maintenance system to supporting the recovery, resilience and self-reliance of IDPs.

As people tend to remain displaced for years, displacement must first and foremost be seen as a development challenge with humanitarian and human rights components. Achieving durable and sustainable solutions requires:

- Strong government leadership and political will: States have the primary responsibility for establishing favourable conditions for durable solutions, which should be exercised through a government-wide approach, including national and local authorities.
- Participation of IDPs and host communities in the planning and management of durable solutions, as their legitimate rights and interests must be at the centre of any process of durable solutions. Inclusive area-based and community-based approaches are needed

to provide effective and sustainable responses to displacement.

Collective action by multiple political, humanitarian, development, human rights, peace and State-building actors, as well as multisectoral policy and programming approaches, are paramount to durable solutions. It is essential to coordinate all actions so that they contribute to the collective results of durable solutions, with the leadership of the authorities.

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## Arbitrary displacement as a crime\*

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**Arbitrary displacement as a crime.** I. Introduction; II. Arbitrary displacement; III. Arbitrary displacement as an international crime; IV Displacement as a crime in domestic legislation; V Elements for a correct approach to the crime of arbitrary displacement; VI. Related offences.

## I. Introduction

This chapter explores the criminal dimension of arbitrary displacement and analyses when the conduct of causing or inducing displacement constitutes a criminal offence. At first, it addresses the concept of *arbitrary displacement* from international law, defines its concept and recognises that not all types of internal displacement give rise to a crime in international and domestic law. Specifically, the chapter details cases in which internal displacement can shape international crimes and develop (i) war crimes, (ii) crimes against humanity and (iii) genocide.

Subsequently, cases in which arbitrary displacement does not reach the threshold for shaping an international crime are described, but as contrary to international law, it may be criminalised as an ordinary offence at the domestic level.

In this regard, from international humanitarian law (IHL), international criminal law (ICL) and criminal law, elements that are essential for the criminalization and investigation of internal displacement are analysed; among these factors are their character of permanent execution and autonomous crime, the active role that internally displaced persons must have during the

process of investigation and punishment of the crime, as well as the obligation of protection of the State against displaced persons.

Likewise, the chapter highlights the comparative experience of countries where displacement is criminalised in domestic legislation; and three federative entities of Mexico that have criminalised it were included in their respective criminal codes.<sup>1</sup>

Finally, the chapter examines crimes that are often committed in connection with arbitrary displacement, and highlights the importance of their being independently investigated.

## II. Arbitrary Displacement

International law recognises that, although the involuntary displacement of persons generates consequences that are not desirable, in exceptional circumstances it is permissible, and even necessary, to resort to it. Therefore, arbitrary displacement concerns specific forms of displacement that are not legally justified and thus constitute violations of international law.<sup>2</sup>

Article 6 of the Guiding Principles on Internal Displacement (Guiding Principles) recognises the right of every human being to be protected from arbitrary displacement, and lists, without limitation, some situations in which displacement will be considered arbitrary, as well as the exceptional circumstances in which displacement may be permitted. Specifically, the following are considered arbitrary displacements:

- Those based on policies of *apartheid*, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population.

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<sup>1</sup> Sinaloa, Sonora and Guerrero.

<sup>2</sup> Cf. UNHCR and Global Protection Cluster, *Making arbitrary displacement a crime: law and practice*, p. 14.

- Those generated from situations of armed conflict, unless the security of the civilian population involved or imperative military reasons so demand.
- In cases of large-scale development projects, which are not justified by compelling and overriding public interests.
- In cases of disasters, unless the safety and health of those affected requires their evacuation.
- When it is used as a collective punishment.

Exceptional situations in which displacement is not considered arbitrary include:

- In cases of armed conflict, when demanded by the security of the civilian population involved or imperative military reasons.
- When large-scale development projects, which are justified by compelling and overriding public interests. Moreover, displacement shall last no longer than required by the circumstances.

In the African context, the Kampala Convention<sup>3</sup> contains this list and even goes beyond the Guiding Principles, since it includes as arbitrary displacement “harmful practices,” which defines as “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of persons, such as but not limited to their right to life, health, dignity, education, mental and physical integrity and education.”<sup>4</sup>

Additionally, the Kampala Convention established that States Parties should incorporate their obligations into national legislation through enactment or

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<sup>3</sup> See African Union extraordinary summit, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Art. 4(4).

<sup>4</sup> Kampala Convention, Art. 1, Par. J.

amendment of laws on protection and assistance to internally displaced persons.<sup>5</sup>

The Special Rapporteur on the human rights of internally displaced persons, hereinafter the Special Rapporteur, and the United Nations Human Rights Committee consider that arbitrary displacement should not be treated as “contrary to law,” but should be interpreted more broadly, including elements of incorrectness, injustice and unpredictability, due process of law and respect for the principles of reasonableness, necessity and proportionality.<sup>6</sup>

Thus, the Special Rapporteur stressed that arbitrary displacement is a specific form of internal displacement, and for international standards to consider it arbitrary, three criteria must be assessed: (i) the reasons for displacement; (ii) the procedural guarantees and safeguards that must be respected during displacement; and (iii) the duration of displacement.<sup>7</sup>

The Special Rapporteur also noted that the right not to be displaced implies (a) the prohibition of arbitrary displacement and (b) the obligation of the authorities to prevent arbitrary displacement.<sup>8</sup> The obligation of States to prohibit arbitrary displacement therefore requires the ability to prevent and prohibit such conduct and to prosecute and penalise those responsible for causing it.

A recent study published by UNHCR and the Global Protection Cluster named *Making arbitrary displacement a crime* clarified that, in real terms, there is no international crime of arbitrary displacement *per se*, as there are several types of

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<sup>5</sup> See Kampala Convention, Art. 3.2.a.

<sup>6</sup> *Cf.* United Nations General Assembly, resolution A/76/169, p. 11, and Human Rights Committee, E/CN.4/1998/53/Add.1, *passim*.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

arbitrary displacement that can shape conduct criminally prosecutable under domestic and international law.<sup>9</sup>

The same study noted that “States can further fulfil their international obligations to prevent arbitrary displacement by establishing criminal offences for instances of arbitrary displacement that do not amount to international crimes, yet are prohibited under international law.”<sup>10</sup>

The cases in which arbitrary displacement qualifies as crimes prosecutable by the ICL and subsequently by ordinary criminal law will be detailed below.

### III. Arbitrary displacement as an international crime

This section addresses the three international crimes that provide for arbitrary displacement as a punishable act, in accordance with IHL and ICL: 1) war crimes, 2) crimes against humanity and 3) genocide. It also concludes with States' obligation to criminalise such crimes in domestic legislation in order to be effectively prosecuted and punished at the national level.

The ICL seeks to protect the most important legal assets for the international community: peace, security and the well-being of humanity. The attack on the interests and legal property of the international community makes a particular conduct take on an international dimension and become a crime under international law, as it is considered to affect the “international community as a whole.”<sup>11</sup>

Finally, the responsibility that the ICL investigates and prosecutes with international crimes is the individual responsibility, not the state responsibility of the State where the crime was consumed.

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<sup>9</sup> Cf. UNHCR and Global Protection Cluster, *op. cit.*, p. 11.

<sup>10</sup> *Ibid.*, p. 17.

<sup>11</sup> Statute of the International Criminal Court, Art. Z, preamble to par. 4 and 9. Cf. Former Yugoslavia Criminal Court, *Tadic*, AC, par. 59.



## 1. War crime

The Statute of the International Criminal Court (ICC), also known as the Rome Statute, and IHL state that war crimes can be shaped both in the framework of international armed conflicts (IAC) and non-international armed conflict (NIAC).

According to international jurisprudence and customary IHL, a war crime can be defined as “serious violations of IHL resulting in the individual criminal responsibility of the perpetrator under customary or conventional international law” (own translation.)<sup>12</sup>

In order for conduct to constitute a serious breach of IHL, it is imperative that an armed conflict exists as a contextual element, as well as that such conduct be linked to the conflict. Therefore, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that “what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment — the armed conflict — in which it is committed.” Additionally, the Tribunal held that such conduct must entail, under customary or conventional law, the individual criminal responsibility.<sup>13</sup>

Thus, within the IAC framework, deportation or illegal transfer can entail a war crime; and within the NIAC framework, ordering the displacement of the civilian population for reasons related to the conflict can also constitute a war crime.<sup>14</sup>

Both *deportation* and *transfer* are characterised by the involuntary and illegal movement of protected persons from their place of residence.<sup>15</sup>

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<sup>12</sup> Morello, “*Crímenes de guerra*,” in *Derecho penal internacional, evolución histórica, régimen jurídico y estudio de casos*, p. 184.

<sup>13</sup> *Cf.*, ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction*, par. 94.

<sup>14</sup> *Cf.* Rome Statute, Art. 8.2.b.viii and 8.2.e).viii.

<sup>15</sup> *Cf.* Werle and Jeßberger, *Principles of International Criminal Law*, p. 639 and 640.

However, the ICTY emphasised that the difference between *deportation* and *forced transfer of the population* is that the former occurs through expulsion or other forms of coercion across a *de jure* or *de facto* state border, while the latter takes place within national borders, although it does not require the intention to displace on a permanent basis.<sup>16</sup>

In the context of IAC, Article 8(2)(a) of the Rome Statute establishes as a war crime the conduct that entails grave breaches of the Geneva Conventions; and Article 8(2)(b), conduct that does not fall into that category.

In Article 8(2)(a), the Rome Statute criminalises as a war crime the “unlawful deportation or [sic] transfer or unlawful confinement.” This act relates to the prohibition of transferring civilian population to and from occupied territories found in Articles 45 and 49 of the Fourth Geneva Convention. It is important to note that each grave breach has to be analysed in the light of the Geneva Convention from which it comes, in relation to the type of protected persons to which it refers.<sup>17</sup>

In connection with this war crime, unlawful deportation or transfer is included in the list of grave breaches of the Fourth Geneva Convention. A grave breach exists only when the act in question is perpetrated against a person protected by that convention.<sup>18</sup> In particular, the category of *protected persons* under the Fourth Geneva Convention are civilian persons.<sup>19</sup> Transfers are forbidden

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<sup>16</sup> Cf., ICTY, Appeals Chamber, *The Prosecutor v. Stakic*, IT-97-24-A, par. 278.

<sup>17</sup> Cf. Morello, *op. cit.*, p. 208.

<sup>18</sup> Cf. Bothe, “War Crimes”, in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, p. 391.

<sup>19</sup> See Geneva Convention relative to the protection of civilian persons in time of war, Art. 4: “Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

except in cases where the safety of the protected persons may make them absolutely necessary.<sup>20</sup>

Under Article 8(2)(b), the Rome Statute criminalises as a war crime “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,”<sup>21</sup> since it is a serious violation of the laws and customs applicable in international armed conflicts, particularly the Fourth Geneva Convention. This provision is based on Article 85(4)(a) of Additional Protocol I.

This prohibition allows for certain exceptions, such as transfers strictly related to military operations, in particular to safeguard civilians (Article 51 of the Fourth Geneva Convention). Even in these circumstances, adequate accommodation must be guaranteed and conditions of safety and hygiene must be met.

This war crime could have similarities with the crime against humanity of deportation or forced transfer of the population. However, unlike the crime against humanity, in war crime it is not necessary for the protected person to be lawfully residing in the territory of which she or he is forcibly deported or transferred. Likewise, in war crimes, deportation or transfer of a single person satisfies the constituent elements of the criminal type.<sup>22</sup>

Within the NIAC framework, the Rome Statute establishes as another serious violation of the laws and customs applicable, “ordering the displacement of the

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<sup>20</sup> Cf. International Committee of the Red Cross (ICRC), *Commentary on the Fourth Geneva Convention*, Art. 147, p. 599.

<sup>21</sup> Rome Statute, Art. 8.2.b.viii.

<sup>22</sup> Cf. Werle and Jeßberger, *op. cit.*, p. 640.

civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”<sup>23</sup>

While Article 3 common to the four Geneva Conventions makes no specific mention to unlawful deportation or transfer, Rule 129 of the database on customary IHL states that “parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilian population involved or imperative military reasons so demand.”<sup>24</sup>

This is directly linked to Article 17 of Additional Protocol II,<sup>25</sup> which applies in cases of NIAC and provides for the following specific prohibition: “The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. [...] Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”

Other authors have mentioned that forced displacement can also be regarded as another type of grave breaches, such as cruel treatment and outrages upon personal dignity.<sup>26</sup> Parallelism could also be noted with Article 8(2)(b)(viii) (concerning IACs), which does not, however, cover nationals themselves in national territory not occupied by an adverse Party.<sup>27</sup>

Unlike what happens in IACs, in NIACs only the order of displacement is punishable and not the displacement itself, as long as this order is within the framework of the conflict. Displacement of civilians is also justified only in

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<sup>23</sup> Rome Statute, Art. 8.2.e.viii.

<sup>24</sup> ICRC, *Database on Customary IHL*, Rule 129, *passim*.

<sup>25</sup> Of which Mexico is not a member.

<sup>26</sup> Cf. Acquaviva, *Forced Displacement and International Crimes*, p. 10.

<sup>27</sup> Zimmermann and Geiss, “War crimes,” in *Commentary on the Rome Statute of the International Criminal Court*, p. 950.

exceptional cases, as stated in the Rome Statute and IHL, as it may be required by the security of the population or for imperative military reasons.<sup>28</sup>

Finally, according to the ICC Elements of Crimes, for the last two elements of war crimes, there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international. There is also no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international. The only requirement is that the perpetrator be aware of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with [the conflict].”<sup>29</sup> In this regard, for the specific case of the crime of displacing civilians, the ICC Elements of Crimes provide that:

- The perpetrator ordered a displacement of a civilian population.
- Such order was not justified by the security of the civilians involved or by military necessity.
- The perpetrator was in a position to cause such displacement by giving such order.
- The conduct took place in the context of and was associated with an armed conflict not of an international character.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

## 2. Crime against Humanity

In accordance with the Rome Statute, the conduct referred to in its Article 7 constitutes a crime against humanity when committed as part of “a widespread

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<sup>28</sup> Cf. Werle and Jeßberger, *op. cit.*, p. 642.

<sup>29</sup> Elements of Crimes, United Nations Organization, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, first session, second part.*

or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>30</sup>

The term “attack directed against any civilian population” should be understood as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>31</sup>

For its part, “widespread” is a quantitative element that implies massiveness, or a large-scale action, that is serious and directed against a multiplicity of victims. The widespread nature of the attack can also derive from its extension over a broad geographical scope, although this is not an essential issue for this requirement to be established, since the widespread attack can also consist of a single action whose victims are a large number of civilians.<sup>32</sup>

In turn, the classification of “systematic” is of qualitative nature and refers to the “organised nature of acts of violence and serves to exclude isolated events from the field of crime” (own translation.)<sup>33</sup>

The ICTY jurisprudence initially pointed out that *systematic* was understood as a preconceived plan or policy, even if they had not been formally adopted as the policy of a State.<sup>34</sup> However, in the decision of the Appeals Chamber in the case *Kunarac et al.*, the ICTY distanced itself from its previous declarations and no longer requires, for the attack to be systematic, that there be a plan or policy, but that the idea of a systematic attack suggests organised and methodical action, and that it will generally follow some kind of preconceived

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<sup>30</sup> Rome Statute, Art. 7(1).

<sup>31</sup> *Ibid.*, Art. 7(2)(a).

<sup>32</sup> *Id.*

<sup>33</sup> Werle and Jeßberger, *op. cit.*, p. 477 and 478.

<sup>34</sup> *Cf.* International Criminal Tribunal for Rwanda, Trial Chamber I, *The Prosecutor v. Jean-Paul Akayesu*, par. 580.

plan, which does not mean that the existence of a plan or policy is a necessary legal element.<sup>35</sup>

In the words of the ICC, “*widespread* adverts to the large-scale nature of the attack and to the number of targeted persons, whereas the adjective *systematic* reflects the organised nature of the acts of violence and the improbability of their random occurrence.”<sup>36</sup>

Establishing the crime against humanity requires “having been aware of such an attack” (own translation.) In this regard, there is no need for evidence that the perpetrator knows all the characteristics of the attack or precise details; it is required only that the perpetrator “knows that there is an attack on the civilian population, and knows that his or her actions have been part of that attack” (own translation.)<sup>37</sup>

Article 7(d) of the Rome Statute establishes as a crime against humanity the deportation or forcible transfer of population when committed as part of a widespread or systematic attack directed against any civilian population and with knowledge of such attack.<sup>38</sup> The Statute also defines *deportation or forcible transfer of population* as forced displacement of the persons concerned, by expulsion or other coercive acts, from the area in which they are lawfully present, without grounds permitted under international law. In order for the crime against humanity of deportation or forcible transfer of population to be established, the following elements must be present:<sup>39</sup>

- The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

<sup>35</sup> Cf. ICTY, *Kunarac et al.*, paras. 94 and 98.

<sup>36</sup> ICC, *Katanga*, *Judgment pursuant to Article 74 of the Statute*, par. 1123.C.

<sup>37</sup> Relva, “*Crímenes de lesa humanidad*”, in *Derecho Penal Internacional*, p. 119-181.

<sup>38</sup> Cf. Rome Statute, Art. 7(1)(d).

<sup>39</sup> See Elements of Crimes, *passim*.

- Such person or persons were lawfully present in the area from which they were so deported or transferred.
- The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>40</sup>

Thus, the Elements of Crimes establish that the expression *deported or forcibly transferred* is interchangeable by *forcibly displaced*.<sup>41</sup> Also, it clarifies that “forcibly” does not mean only physical force, but “may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”<sup>42</sup>

In this regard, the ICTY decided, in the Kmojelac case, that the fact that people were satisfied with their fate could not necessarily be interpreted as a free or genuine choice, since it was necessary to put it into context: whether there was fear of violence and other forms of coercion.<sup>43</sup>

According to Hugo Relva, the expression *the area in which they are lawfully present* must be understood as *in accordance with international law*,<sup>44</sup> since understanding it as *lawfulness* in national terms would make the ban absurd, since it would be enough for a national authority to declare the *unlawfulness* of a group to authorise deportation or transfer, which “cannot be the purpose of

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<sup>40</sup> *Id.*

<sup>41</sup> *Cf.* Elements of Crimes, No. 12.

<sup>42</sup> *Ibid.*, No. 12.

<sup>43</sup> *Cf. Ibid.*, quoting ICTY, Appeals Chamber, *The prosecutor v. Milorad Kmojelac*, paras. 229-233.

<sup>44</sup> *Cf.* Relva, *op. cit.*, p. 119-181.



the norm” (own translation.)<sup>45</sup> The nationality of the victims for these purposes is not relevant, nor is the nationality of the perpetrator. Also, the presence of a number of soldiers or combatants among the attacked civilian population does not change their civilian status.<sup>46</sup>

For its part, the expression *without grounds permitted under international law* excludes lawful grounds in international law, such as health reasons, public welfare, the security of the population or imperative military reasons in cases of armed conflict.<sup>47</sup>

Finally, unlike war crimes, crimes against humanity can be committed both in times of war and in times of peace.

### 3. Genocide

In accordance with the Rome Statute, any of the acts referred to its Article 6 must be perpetrated in order for the crime of genocide to be established. Such acts must be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>48</sup>

Among the conduct listed in Article 6 of the Rome Statute, forcibly transferring children of a group to another group is considered as genocide,<sup>49</sup> which, in order to be established, must be committed with the intent to destroy in whole or in part a national, ethnical, racial or religious group.

Similar to crimes against humanity, the Elements of Crimes in the Rome Statute add that the expression *forcibly* is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence,

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<sup>45</sup> *Id.*

<sup>46</sup> *Cf.* Werle and Jeßberger, *op. cit.*, p. 471.

<sup>47</sup> *Id.*

<sup>48</sup> Article 6 of the Rome Statute is based on the definition of genocide found in the Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>49</sup> *Cf.* Rome Statute, Art. 6 (e).

duress, detention, psychological oppression or abuse of power against such person or persons or another person, by taking advantage of an element of coercion.<sup>50</sup>

Finally, for the crime of genocide to be established, it is sufficient that the perpetrator has forcibly transferred one or more persons under the age of 18 belonging to this particular national, ethnical, racial or religious group.<sup>51</sup>

#### 4. Duty to Investigate and Prosecute the Crime of Displacement as an International Crime

States are primarily responsible for investigating and prosecuting potential perpetrators of the above-mentioned international crimes.<sup>52</sup>

In this regard, the preamble to the Rome Statute states that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,”<sup>53</sup> “recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>54</sup>

Likewise, Rule 158 on Customary International Law notes that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”<sup>55</sup> This rule applies to both IACs and

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<sup>50</sup> See Elements of Crimes, “Genocide.”

<sup>51</sup> *Id.*

<sup>52</sup> The Rome Statute was ratified by Mexico on 28 October, 2005.

<sup>53</sup> Rome Statute, “Preamble.”

<sup>54</sup> *Id.*

<sup>55</sup> ICRC, *Database on Customary IHL*, Rule 158, *passim*.

NIACs. For its part, Rule 157 establishes the right of States to vest universal jurisdiction in their national courts over war crimes.<sup>56</sup>

To support the effective investigation and punishment of such crimes, complementary mechanisms exist at the regular, regional and international levels. These include the ICC, which is complementary to national jurisdictions, and has competence among States that have ratified its Statute to prosecute persons for the “most serious crimes of concern to the international community as a whole,” including arbitrary displacement, as explained in the preceding paragraphs.<sup>57</sup>

Also, under Customary and Conventional International Law, there is a possibility of using universal jurisdiction over crimes committed outside its territory for certain crimes considered so serious that they affect the entire international community. This is what legitimises prosecution of offenders in national courts, even in the absence of any link between the crime committed and the State pursuing it.<sup>58</sup>

According to the above-mentioned study published by UNHCR and the Global Protection Cluster —*Making arbitrary displacement a crime*—, “For States to be able to exercise universal jurisdiction over arbitrary displacement, they need to have defined arbitrary displacement as a crime in their domestic legislation and explicitly provided for universal jurisdiction to be exercised over this crime<sup>59</sup>.”

For example, in Senegal, the 2007 law that typified arbitrary displacement as a crime against humanity and a war crime, also provided for universal jurisdiction over these crimes. It is on the basis of this principle that former Chadian President Hissène Habré was eventually tried by the Extraordinary African Chambers (EAC), a tribunal created by an agreement between the

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<sup>56</sup> *Cf. Ibid.*, Rule 157.

<sup>57</sup> *Cf.* UNHCR and Global Protection Cluster, *op. cit.*, p. 27.

<sup>58</sup> *Id.*

<sup>59</sup> *Ibid.*, p. 30.

African Union and Senegal to try international crimes committed in Chad from 1982 to 1990.<sup>60</sup>

## IV. Displacement as a Crime in Domestic Legislation

In this section, we will initially address the essential parameters that must contain the classification of the crime of displacement in domestic legislation, and then, considering comparative law, will analyse some classifications in Latin America. Finally, we will develop the Mexican experience in the process of classifying the crime of displacement.

### 1. Initial Parameters for the Classification of Displacement

For the proper fulfilment of international obligations, States need to incorporate both the behaviours that constitute international crimes described above and other possible conducts which do not reach the threshold but which may also be punishable by ordinary legislation.<sup>61</sup>

In this regard, the Special Rapporteur noted that, as part of the preventive measures, States have a duty to classify arbitrary displacement, or at least to create internally the criminal type to investigate, prosecute and punish crimes against humanity, war crimes or genocide.<sup>62</sup>

Thus, States should establish criminal types that clearly typify conduct relating to arbitrary displacement that will be considered crimes<sup>63</sup> according to the

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<sup>60</sup> *Cf. Ibid.*, p. 27.

<sup>61</sup> *Cf. Ibid.*, p. 16.

<sup>62</sup> *Cf. United Nations General Assembly, Resolution A/76/169, quot.*, par. 49.

<sup>63</sup> *Cf. UNHCR and Global Protection Cluster, op. cit.*, p. 16.

particular context. To this end, it is necessary to define the criminal type precisely, as well as to establish the corresponding penalties.<sup>64</sup>

To define ordinary crimes, it is necessary to establish definitions of forms of arbitrary displacement that respond to situations specific of the local context, including parameters that are easier to comply with than those established for international crimes.

According to UNHCR and the Global Protection Cluster' study, the following elements should be analysed and specified in order to typify arbitrary displacement as an ordinary crime:<sup>65</sup>

- The act or acts not permitted by law.
- Displaced persons or groups of displaced persons.
- Persons who can commit the crime, including various actors according to context, such as the State, armed groups, non-State actors.
- Your possible intention or knowledge of the situation.
- The relationship of conduct with displacement, for example, if the crime is ordered or committed.
- The duration of the crime.
- The process of displacement and its consequences.
- The context in which the displacement happened (armed conflict, generalised violence, natural disaster, etc.)
- The penalties for the crime. In considering this situation, it is important to note that Article 77 of the Rome Statute provides for imprisonment for a maximum of 30 years or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment,

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<sup>64</sup> *Id.*

<sup>65</sup> *Cf. Ibid.*, p. 17.

a fine or forfeiture of proceeds, property and assets derived directly or indirectly from that crime.<sup>66</sup>

## 2. Internal Displacement as a Crime in Latin American Comparative Law

After having analysed the above, it is interesting to know the comparative experience of Colombia and Honduras. Both countries incorporated into their domestic legislation both international crimes related to displacement and ordinary crime.

Article 159 of the Criminal Code of Colombia<sup>67</sup> refers to property and persons protected by IHL, and therefore, for the conduct to be shaped persons and property must be immersed in what is called *material conditions of application*. Conditions are the contextual elements in which the violation of property and persons rights protected by IHL is defined. In a defined manner, this type of Colombian criminal law requires facing an armed conflict.

For its part, Article 180 of the Criminal Code of Colombia<sup>68</sup> points to crime against personal autonomy. The Brookings Institute's *Marco de referencia de soluciones duraderas para personas desplazadas* defines the Colombia

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<sup>66</sup> Cf. *Ibid.*, p. 19.

<sup>67</sup> Article 159 of the Criminal Code of Colombia defines: "Deportation, expulsion, transfer or forced displacement of the civilian population. Anyone who, on the occasion and during the development of an armed conflict and without any military justification, deports, expels, transfers or forcibly displaces civilian population from their settlement site, will incur shall incur a prison sentence from 10 to 20 years, a fine of 1,000 to 2,000 current legal monthly minimum wages, and the prohibition of the exercise of rights and public functions for 10 to 20 years" (own translation.)

<sup>68</sup> Article 180 of the Criminal Code of Colombia states: "Anyone who arbitrarily, through violence or other coercive acts directed against a sector of the population causes one or more of its members to change their place of residence, shall incur a prison sentence from ninety six (96) to two hundred and sixteen (216) months, a fine of eight hundred (800) to two thousand and two hundred and fifty (2250) current legal monthly minimum wages, and the prohibition of the exercise of rights and public functions for ninety six (96) to two hundred and sixteen (216) months. The movement of the population carried out by the public force when its objective is the security of the population, or in development of imperative military reasons, in accordance with international law, shall not be deemed to constitute forced displacement" (own translation.)

classification as a good legislative technique.<sup>69</sup> Article 181 contains the aggravating factors of the crime of internal displacement. The highlights of the criminal type include the following: (i) the identity of the perpetrator is irrelevant and (ii) displacement as a local crime is configured regardless of whether it is committed in the context of an armed conflict or not.<sup>70</sup>

In Colombia, the literal meaning of Article 180 allows us to infer that it is enough for a single person to be forced to move so that the conduct is configured. In practice, however, the Constitutional Court of Colombia had to reiterate that the condition of forced displacement is not limited to situations of armed conflict and is independent of the reasons for the violence, the quality of the actor —political, ideological, common or legitimate— or the way in which it operates.<sup>71</sup>

In addition to the aggravating circumstances of the crime of displacement, in Colombia displacement itself serves as an aggravating factor of other crimes. Thus, if a person commits a crime<sup>72</sup> in order to cause displacement, this circumstance must be investigated and punished as an aggravating act.<sup>73</sup> Likewise, Article 441 of the Criminal Code provides that whoever having knowledge of the commission of a crime of forced displacement fails to report it immediately to the authority without cause shall incur imprisonment.

Despite being one of the States with the most comprehensive systems for the care, investigation, punishment and reparation of the crime of internal

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<sup>69</sup> Cf. The Brookings Institution, *IASC Framework on durable solutions for internally displaced persons*, p. 44.

<sup>70</sup> Criterion validated by the Constitutional Court of Colombia, Follow-up Special Chamber T-025 of 2004 and its compliance orders, order 119 of 2013, p. 7 and 65.

<sup>71</sup> Cf. Constitutional Court of Colombia, Guardianship Decision 834/2014.

<sup>72</sup> Crime of omission of denunciation, breach of public duty by action or omission, agreement to commit crime, aiding or favouring the escape of prisoners.

<sup>73</sup> Cf. UNHCR, Generalitat Valenciana and Centre for Human Rights Studies of the Universidad Libre, *Desplazamiento forzado en Colombia. Derechos, acceso a la justicia y reparaciones*, p. 86.

displacement, the Colombian criminal typification has the following gaps and challenges, in accordance with international law:

- Unlike the regulation on the crimes of torture, extrajudicial execution, enforced disappearance and genocide, the Criminal Code of Colombia allows those accused of the crime of displacement to argue, as a defence, obedience as grounds for exoneration of criminal responsibility.
- It stipulates a 30-year prescription.<sup>74</sup>
- Absence of rules regarding the criminal liability of hierarchical superiors in the case of the military.<sup>75</sup>

In addition, in Colombia, the investigation of the criminal type of displacement has presented several challenges. Specifically, the doctrine indicates that it has a research deficit. Among the reasons for this deficit is the multioffensive nature of the criminal type, since many actions constituting it are investigated as personal injuries, such as actions against freedom or even against life, but in itself, displacement is lost in the process of qualification, investigation and sanction.<sup>76</sup>

Another reason for the deficit is the low level of complaints by displaced persons, as well as the unwillingness of judicial bodies to investigate it *ex officio*.<sup>77</sup> On the basis of this deficit, the Constitutional Court of Colombia determined that the judicial bodies must investigate the crime of displacement autonomously and regardless of whether or not other victimising events or crimes have occurred.<sup>78</sup>

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<sup>74</sup> Cf. Criminal Code of Colombia, Art. 83.

<sup>75</sup> Cf. Andreu-Guzmán, *Criminal Justice and Forced Displacement in Colombia*, *passim*.

<sup>76</sup> Cf. Aponte Cardona, "El desplazamiento forzado como crimen internacional: nuevas exigencias a la dogmática jurídico-penal," in *Vniversitas*, p. 51.

<sup>77</sup> Cf. National Centre for Historical Memory, *Una nación desplazada, informe nacional del desplazamiento forzado en Colombia*, p. 311.

<sup>78</sup> The obligation to investigate internal displacement autonomously was determined by the



In this context, the Colombian Commission of Jurists recommended that the General Prosecutor of the Nation “draw up a comprehensive inventory of existing criminal procedures [...] for the crime of forced displacement, and take measures for that crime independently of other possible crimes and human rights violations, rather than considering it a secondary aspect or a mere consequence of an armed conflict” (own translation.)<sup>79</sup>

For its part, in Honduras<sup>80</sup> forced displacement is a crime against the freedom of determination. With regard to the definition of *displacement* within the criminal type, while in Colombia it is referred to as *changing domicile*, in Honduras the criminal type includes the action of changing or leaving the place of residence, of commercial or labour activity, of educational facility or any location on which it has property rights.<sup>81</sup>

### 3. Internal Displacement as a Crime in Mexico

Mexico has not classified the crime of internal forced displacement at the federal level. However, federal entities of Sinaloa, Guerrero and Sonora included it in their respective criminal codes of 2020 and 2021. Since the most important element of the crime of displacement implies that people are forced to move from their place of habitual residence, the fact that the crime is not criminalised at the federal level can represent challenges for the correct and effective investigation and punishment.

The absence of the federal criminal type makes it difficult and hinders the role of victims as coadjuvant in criminal proceedings because they would not be

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Constitutional Court of Colombia — *Cf.* Constitutional Court of Colombia, follow-up order. No. A008-09, Thirteenth Resolution.

<sup>79</sup> Colombian Commission of Jurists, IX Informe sobre el Desplazamiento Forzado en Colombia 2013-2014, p. 29.

<sup>80</sup> *Cf.* Honduras Criminal Code, Decree No. 130-2017, Art. 139, 143, 144, 146 and 248.

<sup>81</sup> UNHCR and Global Protection Cluster, *op. cit.*, p. 17.

able to participate actively when the jurisdiction where they were physically located differs from where the investigation was being conducted. Thus, it is essential that there is correct coordination between public prosecutors' offices, and that the displaced person be allowed to report in the place where they are located and that their rights as a victim be respected.

Prior to the addition of the type in the Criminal Code in Sinaloa, the National Human Rights Commission (CNDH) recommended that the governor of the state of Sinaloa “draw up a document analysing the relevance of submitting an initiative law aimed at criminalising the crime of internal forced displacement of persons” (own translation,) as part of Recommendation No. 39/2017 on the case of 2,038 persons recognised as victims of internal forced displacement in the state of Sinaloa.

In developing the recommendation, the CNDH noted that the absence of a criminal type of displacement—and the inability of those who suffered from it to criminally report it—implied a denial of justice, while there is no criminal type that sanctions it autonomously, as well as the lines of investigation and protocols that adjust the action of public ministries to guarantee truth, justice and reparation to displaced persons.<sup>82</sup>

In another case documented and investigated by the CNDH, in Chihuahua, it was recommended that the governor of that state present a bill on the prevention and care of internal displacement, which classified the crime of internal displacement.<sup>83</sup>

The following is a comparative table that graphically outlines the constituent elements of the criminal types legislated in the three federal entities:

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<sup>82</sup> Cf. NHRC, Recommendation No. 39/2017 *on the case of 2,038 persons recognised as victims of internal forced displacement in the state of Sinaloa*, p. 173.

<sup>83</sup> Cf. NHRC, Recommendation No. 94/2019 *on the case of forced internal displacement of 80 members of a family group from the state of Chihuahua*, p. 194.

Element	Sinaloa <sup>84</sup>	Sonora <sup>85</sup>	Guerrero <sup>86</sup>
Active Subject	Anyone.		
Passive Subject	A person or group of people.		
Conduct	By violence or any other means or coercive act against a person or group of people, it causes...	Violence or any other coercive means compels a person or a group of people to...	It intends to possess, use, occupy or otherwise, temporarily or permanently, by the use of violence of any kind or by any means or by any coercive and intimidating means or actions, with or without the carrying and use of weapons, plan, promote, organise, perform, execute, or other related activity, which...
Causal Link	... leave their place of residence.	... leave their place of residence.	... leave their place of residence, domicile, property, possessions or housing, thereby affecting their human rights by forcing their displacement within or outside the territory of the state of Guerrero, as an effect of well-founded fear caused by the asset.

<sup>84</sup> Cf. Código Penal del Estado de Sinaloa, Art. 175 Bis.

<sup>85</sup> Cf. Código Penal del Estado de Sonora, Art. 241-A.

<sup>86</sup> Cf. Código Penal para el Estado libre y Soberano de Guerrero, Art. 220 Bis.

Penalty	Six to 12 years imprisonment and 300 to 600 days of fine.	Two to eight years in prison and a fine of 150 to 300 times the daily value of the unit of measure and update.	Six to 12 years imprisonment and 3,000 to 9,500 days fine of unit of measure and update.
Aggravating	It will increase by up to half when the crime is committed against children, adolescents, human rights defenders and journalists.	It will increase by half when committed against minors, older persons, people with a physical or mental disability, human rights defenders and journalists.	It will increase to twice the penalty when this crime is committed against vulnerable groups, including children and adolescents, older persons, people with disabilities, journalists and human rights defenders. This crime and its verification will require a complaint and must be prosecuted by the respective ministerial authority, as it is a matter of public order and social interest.
It is not considered displacement	The population movement carried out by the authority aiming at the security of the authority or by court order.	The population movement carried out by the authority aiming at the safety of the population.	The population movement carried out by the authority aiming at the safety of the population.

Of the classifications described above, it is highlighted:

- The active subject is not required to be qualified, that is, it is not required to be a public servant or a state-related entity, but it can be committed by anyone.

- It can be committed by violence or any other coercive means.
- Place of residence abandonment must be caused—in the case of Guerrero, it includes more acts, but they are not exclusive—. Regarding this, it is important to emphasise that crime classification is not rooted in the distance travelled by the displaced person, but in the involuntary and forced nature of the movement—so it can be from one colony to another—.
- Both nationals and persons residing in Mexico as foreign persons, refugees, stateless persons or migrants may be displaced persons. A person's migratory condition does not determine whether it can be displaced or not. It is enough to violate the autonomy of decision of where they live, so that they can denounce displacement as a crime or violation of human rights, or both; if possible. This is the case of many Venezuelan people who fled their country to others and once residing there, were forced to flee again to other locations in the same country providing protection.<sup>87</sup> Moreover, many of the displaced persons often experience secondary displacement over the years, and it is therefore essentially disproportionate requiring them to reside at least six months in the place of residence to be considered as such.
- To configure the criminal type, it is not interesting whether the original intention of the actor was to move or not; the important aspect is that the displacement actually occurs.<sup>88</sup> Arguing otherwise

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<sup>87</sup> In representing cases of persons in need of international protection between 2018-2020, CMDPDH had contact with Venezuelan people residing in Mexico who, in addition to being in need of international protection, were internal displacement victims. In Colombia, UNHCR and Consultancy for Human Rights and Displacement (CODHES, by its Spanish acronym) have documented the situation of Venezuelan people residing in Colombia who were also internal displacement victims. *Cf. CODHES, Graves violaciones de derechos humanos a población proveniente de Venezuela en Colombia, passim.*

<sup>88</sup> *Cf. Aponte Cardona, "Desplazamiento forzado, Sistema Interamericano y derecho penal interno hacia*

would imply acknowledging that, if there was no intention to provoke them, displacements cannot be prosecuted criminally.

- The penalty may be imprisonment and a fine.
- The population movement for security reasons and in the case of Sinaloa, by court order could not classify the conduct.
- The description included in the Guerrero Criminal Code stating that the type of criminal offence requires filing a complaint has not the same determination contained in the Code itself establishing that internal displacement is a crime of “public order and social interest” (own translation.) In this way, the most favourable interpretation is considering that, as a crime of public order and of social interest, its investigation and persecution should be *ex officio* and not by complaint.

Regarding this crime fraud, as stated by the First Chamber of the Supreme Court of Justice of the Nation of Mexico (SCJN), fraud has two modalities: direct and possible. Direct fraud is intrinsically related to the intention directly sought by the active subject, and contains all the consequences that, although not looking for them, are expected to occur. On the other hand, possible fraud occurs when the active subject does not pursue a result and does not evidently foresee it, but only predicts the probability of it occurring, but, if it actually happens, the subject assumes it in their will.<sup>89</sup>

For internal displacement crimes, the distinction of both modalities is significant. Displacement can be caused with the clear and concrete intention of causing a person or group of people to move—direct fraud—as well as, in

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una confluencia racional y consistente de diversos ámbitos de protección de derechos humanos”, in *Sistema Interamericano de Protección de los Derechos Humanos y derecho penal internacional*, p. 91.

<sup>89</sup> Cf. SCJN, First Chamber, Tesis 1era CV/2005, Volume XXIII, p. 207.

many cases, the active agent conducts criminal acts that end up causing displacement of one or more people, mainly constituting a possible fraud.

In this context, it will be up to the judicial authorities of Sinaloa, Guerrero and Sonora to analyse displacement facts over the time and actively and autonomously investigate the internal forced displacement crime.

The criminal classifications made in the above-mentioned federal entities constitute the first steps in the process of drawing attention to, research and determine sanctions to the complex phenomenon of internal displacement suffered by persons in Mexico. If it is federally classified, better methodologies, strategies and practices can be designed and implemented conforming a federal justice system.

In another vein, and although there is no general or federal policy in Mexico to pursue and investigate displacement crime, the local prosecutor's offices of Chiapas<sup>90</sup> and Chihuahua<sup>91</sup> issued investigation protocols for other related crimes connected with internal displacement.

In Chihuahua, the main positive findings of the investigation protocol include: (i) adopting the definition of displaced persons from the United Nations Guiding Principles, clarifying that the causes it states are merely enunciative and not limiting; (ii) including a set of principles that should govern crimes investigation related to displacement, such as immediacy, completeness, due diligence, impartiality, non-discrimination and unrestricted respect for human rights; and (iii) recognising the status of crime victim in internal displacement

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<sup>90</sup> See General Prosecutor of the State of Chiapas, Acuerdo por el que se Expide el Protocolo de Investigación de Delitos en Casos de Desplazamiento Forzado Interno, Acuerdo Núm. FGE/007/2019, *passim*.

<sup>91</sup> See General Prosecutor's Office of the State of Chihuahua, Protocol of Action for the Personnel of the General State Prosecutor's Office in the Investigation of Crimes Related to the Internal Forced Displacement of Persons, *passim*.

contexts allows victims to be registered in the state or federal victim register, as appropriate.

For its part, the Chiapas investigation protocol has the following important elements: (i) the protection axis of the protocol is the respect, guarantee and protection of displaced persons' human rights, (ii) the active and participatory role of the displaced person is recognised throughout the criminal procedure, (iii) the confidentiality of information provided by displaced persons and complainants is guaranteed, (iv) it has a differential and specialised approach distinguishing people's vulnerability levels and recognising different population groups' particular needs and (v) it provides coordination and institutional collaboration guidelines, reinforcing the need to coordinate between federal, state and local authorities.

## V. Elements for a correct approach to the crime of arbitrary displacement

From international and comparative experience in countries where the crime of arbitrary displacement was incorporated into domestic legislation, the following findings are highlighted:

### 1. Effective research

Effective investigation of the crime of internal displacement requires addressing a number of factors, including:<sup>92</sup>

- Determining the necessary material and personal capacity of the different actors involved in the criminal investigation, that must be identified on a case-by-case basis.<sup>93</sup>

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<sup>92</sup> *Cf. Ibid.*, p. 21.

<sup>93</sup> *Id.*



- Analysing the investigation context is very relevant to establish the criminal nature of the displacement, its risk patterns and profiles.<sup>94</sup> It is recommended to design an investigation methodology appropriate to the type and modality of crime commission, produced by the different kinds of actors, to establish responsibility degrees and levels of command and control.<sup>95</sup> Within the variables to document patterns it will be necessary to demonstrate the set of activities, logistics and communication means and criminal modus operandi in a given region and period. For its part, within the elements of context evaluation, it will be necessary to analyse geographical, political, economic, historical and social variables.

UNHCR and the Global Protection Cluster, for their part, have recommended research support with the creation of materials as a map for all stages containing the identification of facts and judicial information, the formulation of hypotheses and interviews, among others.<sup>96</sup>

- Investigating ex officio the displacement criminal type, without the need for displaced persons to file a criminal complaint so that it is effectively investigated and prosecuted.<sup>97</sup> To this end, there will be a need for continuous communication and coordination between the various actors and government orders, so that the judicial bodies can act efficiently in time and form.
- To strategically coordinate, in Mexico, the courts of the three government levels—municipal, state and federal—. If criminal type is gradually incorporated by the 29 federative entities remaining for

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<sup>94</sup> *Id.*

<sup>95</sup> Cf. National Center for Historical Memory, *op. cit.*, p. 336.

<sup>96</sup> Cf. UNHCR and Global Protection Cluster, *op. cit.*, p. 23.

<sup>97</sup> Cf. Colombian Commission of Jurists, *Informe sobre el derecho de acceso a la justicia, de las víctimas del desplazamiento forzado*, p. 32.

classifying it and/or if a criminal type is federally legislated, it will be necessary to build strategies and mechanisms to autonomously and comprehensively investigate displacement crime.

- Prioritising investigative action in justice administration: the strategy of prioritising investigative work in internal displacement cases was designed by the General Prosecutor of the Nation of Colombia.<sup>98</sup> This strategy aims at adopting criminal policy mechanisms to rationalise existing resources and determine pre-defined case care prioritisation criteria, by which investigations are not addressed from a particular, but from a contextual perspective.<sup>99</sup>
- Strengthening confidentiality and data protection mechanisms: personal information and facts reported by displaced persons, witnesses and other crimes victims should be confidentially treated, following the necessary steps to ensure the secrecy of investigation and the parties involved.
- Developing specific knowledge on how to conduct researches, capitalising on past and compared experiences as an investigation methodology.<sup>100</sup> Knowledge of how to find evidence for arbitrary displacement as an ordinary crime is limited. According to UNHCR and the Global Protection Cluster, there is feedback connection

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<sup>98</sup> “Criminal investigation technique that allow to establish cases attention order, based on previously defined criteria, of subjective nature (nature of victims and perpetrators); objective (number of victims, place of occurrence and crimes representativeness) and complementary (victims protection, among others).” Cf. Colombian Commission of Jurists, *op. cit.*, p. 34; and National Centre for Historical Memory, *op. cit.*, p. 335.

<sup>99</sup> See General Prosecutor of the Nation of Colombia, Directive No. 0001, *through which criteria for prioritization of situations and cases are adopted and a new criminal investigation and management system is created, passim.*

<sup>100</sup> Cf. UNHCR and Global Protection Cluster, *op. cit.*, p. 21.

between the lack of experience criminal prosecutions and of knowledge on how to pursue arbitrary displacement.<sup>101</sup>

- Historical truth determination: based on the complexity of the displacement phenomenon and the multiplicity of rights it violates, mechanisms must be implemented to clarify the historical truth accompanying the procedural truth, so as to ensure facts clarification, direct and indirect responsibilities and the motivations of those responsible.<sup>102</sup>
- In connection with this, for the UN human rights rapporteur on internally displaced persons, transitional justice is the approach that countries take to address systematic or widespread human rights violations, so numerous and serious that the ordinary justice system cannot or will not be able to provide an adequate response. For the rapporteur, transitional justice in displacement context “is not a special form of justice, but justice adapted to countries or communities transforming themselves after a period of internal displacement.”<sup>103</sup>

## 2. Appropriately framing the criminal type

National legislation may legislate various types of criminal offences relating to arbitrary displacement, including those classified as *international crimes* and those classified as *ordinary crimes*.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* Likewise, Cf. Sarmiento Álvarez, “La insuficiencia del derecho penal retributivo desde la perspectiva del derecho a la justicia de las víctimas de desplazamiento interno,” in Marcela Gutiérrez Quevedo and Bibiana Sarmiento Álvarez, *Cátedra Unesco, derechos humanos y violencia: gobierno y gobernanza. Debates pendientes frente a los derechos de las víctimas*, p. 43.

<sup>103</sup> United Nations General Assembly, Report of Special Rapporteur on the human rights of internally displaced persons, Resolution A/73/173 on the rights of internally displaced persons, par. 26.

Properly defining the criminal type by which the facts will be investigated is fundamental to establishing competences, for the investigation and evidence type to be collected, and also has an impact on sanctions should the investigation warrant.<sup>104</sup> An essential element to define the right type in each case is to know and define the context in which it is committed—if it is, for example, an armed conflict, we can have a war crime—.

### 3. Due process

Ensuring fair trials complying with due process is essential, as, apart from exercising rights, they are necessary for the investigation and sanction processes to reach the ultimate consequences. It is important to respect the accused persons' rights and to guarantee the effective participation of victims and witnesses, including ensuring their protection and security.<sup>105</sup>

To ensure a fair trial, it is necessary to have judicial, material and knowledge capacity including infrastructure for conducting interviews and hearings, the possibility of having videoconferencing statements and the ability to ensure the safety of parties involved in the process.

According to UNHCR and the Global Protection Cluster, “if criminal justice were perceived to be partial or inadequate, prosecution may hinder other related efforts, such as those to achieve durable solutions to displacement,”<sup>106</sup> access to justice and redress for victims is one of the requirements for their access to justice.

Likewise, “tackling impunity for past abuses may sometimes be perceived as being at odds with the objectives of peaceful coexistence and reconciliation, may contribute to generate political resistance or could even hinder the return of some people who fear that they may be criminally implicated in cases of

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<sup>104</sup> Cf. UNHCR and Global Protection Cluster, *op. cit.*, p. 21.

<sup>105</sup> Cf. *Ibid.*, p. 25.

<sup>106</sup> *Ibid.*, p. 26.

arbitrary displacement.”<sup>107</sup> For all this, ensuring a fair trial and due process and judicial guarantees is essential.<sup>108</sup>

#### 4. Investigation of arbitrary displacement as an autonomous crime

While some countries —and some federative entities in Mexico, as shown below— classified arbitrary displacement as a crime, in practice, there is great difficulty in establishing a direct connection between actors causing displacement and the residence change of people who begin to move in a dispersed manner.<sup>109</sup> This situation has led to the investigation of crimes that result in arbitrary displacement, but not such a crime itself. Thus, investigations have focused more on crimes such as homicide, injuries, threats, sexual violence and other crimes.

This is the case in Xenia, where, despite the fact that arbitrary displacement is classified as ordinary crime and as war crime, there are no convictions to date.<sup>110</sup> This problem has also affected other countries, such as Colombia, where a Memorandum of the National Directorate of Public Prosecutions was established to implement a strategy to investigate the crime of forced displacement as an autonomous crime.<sup>111</sup> The deficit of investigations by arbitrary displacement reached the Colombian Constitutional Court, which determined that the judicial bodies must investigate the crime of displacement autonomously and regardless of whether or not other victimising events or crimes have occurred.<sup>112</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Cf.* Aponte Cardona, “Desplazamiento forzado, Sistema Interamericano...,” quot., p. 91.

<sup>110</sup> *Cf.* UNHCR and Global Protection Cluster, *op. cit.*, p. 24 and 25.

<sup>111</sup> National Directorate of Public Prosecutions of Colombia, Memorandum 0035, *passim*.

<sup>112</sup> The obligation to investigate internal displacement autonomously was determined by the Colombian Constitutional Court. *Cf.*, Constitutional Court Colombia, follow-up order. No. A008-09, Thirteenth Resolution.

In these cases, a contextual analysis is essential, in which it is possible to determine, for example, organised power structures or apparatuses, agents and hierarchical superiors that operated in a certain area, ways of acting, similar cases, etc.

Just as it has been a challenge for the Colombian law enforcement agencies, the operators of the Mexican system will have to carry out specialised investigative work that separates, distinguishes and prioritises different criminal behaviours, without hiding the need to investigate the crime of displacement *per se*.

## 5. Continuous crime of permanent execution

The prohibition of persecution of acts committed before the entry into force of a criminal law is a fundamental principle in the criminal field. However, in the case of internal displacement, we should remember that this is a fact that continues in time until the displaced person reaches a durable solution.<sup>113</sup>

In this regard, arbitrary displacement can be characterised as a continuing or permanent crime, as most of the time it lasts over time and leaves displaced persons in an illegal state permanently.

Article 7 of the Federal Criminal Code of Mexico states that permanent or continuous crimes occur “when consummation lasts over time” (own translation.) For authors such as Claus Roxin, the crimes of permanent execution are those in which the crime is not concluded with the

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<sup>113</sup>This has been established by the Inter-American Court of Human Rights (IACHR) in its jurisprudence, in stating that it had jurisdiction to know about continuous displacement because, although displacement occurred before States recognised the jurisdiction of the Court, it constituted situations that persisted at the time of the analysis of cases. *Cf.* IACHR, *Moiwana Community v. Suriname*, par. 108; *Río Negro Massacres v. Guatemala*, par. 178.

consummation of the conduct, but rather the will is maintained over time to the exact extent that the unlawful state caused by it is maintained.<sup>114</sup>

Arbitrary displacement is not a single action that is consumed and exhausted over time, but a set of actions and omissions perpetuated over a given period of time.<sup>115</sup> This does not mean that it is necessary for displaced persons to constantly receive threats, but, according to Zaffaroni, “the permanence of the crime does not cease even if there have been short interruptions that, strictly speaking, have not had the effect of ceasing the state” (own translation.)<sup>116</sup>

## 6. Limitation

In relation to the foregoing, another interesting discussion is the link between the investigation and sanction of displacement as a crime and its limitation. According to Zaffaroni, the limitation of a crime of permanent execution, such as the crime of displacement, would begin to count from the last act of exhaustion.<sup>117</sup>

As an example, in Colombian legislation, the Penal Code criminalising arbitrary displacement entered into force until 2001, so many acts of displacement occurred before its entry into force. This Code also established a period of 30 years of limitation, which would begin to be counted “since the perpetration of the last act” (own translation.)<sup>118</sup>

In order to determine when the crime of arbitrary displacement ceases, it is important to remember that, in accordance with State obligations, the standard provided for in the Guiding Principles<sup>119</sup> and the same case law of the Court.

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<sup>114</sup> Roxin, *Derecho penal, parte general, Volume I*, p. 329, cited in Aponte Cardona, “El desplazamiento forzado como crimen internacional... *quot.*”, p. 32.

<sup>115</sup> *Cf. Ibid.*, p. 32.

<sup>116</sup> Zaffaroni, *Derecho Penal. Parte General*, p. 859, cited in Aponte Cardona, *op. cit.*, p. 36.

<sup>117</sup> *Cf. Ibid.*, p. 51.

<sup>118</sup> Código Penal Colombiano, Art. 83.

<sup>119</sup> *Cf. Guiding Principles, Principles 28-30.*

The IACHR points out that the possibility of return is a real option when the State provides the necessary conditions for a dignified and safe return to the habitual residence or voluntary resettlement elsewhere in the country.<sup>120</sup>

On the other hand, if arbitrary displacement constitutes an international crime, a crime against humanity, war crime or genocide, it is imprescriptible.<sup>121</sup> In that regard, the ICTY has rejected the argument of non-retroactivity, noting that “the concept of customary international law implies that its rules are legally binding in themselves and do not require that they have been explicitly adopted by states” (own translation.)<sup>122</sup>

## 7. Protection and assistance to victims and witnesses

In accordance with Mexico’s accusatory criminal system, Article 20 (C) of the Constitution and the National Code of Criminal Procedure, victims have the right to participate actively in all stages of criminal investigation.

For example, the aforementioned code states that the determinations of the Public Prosecutor's Office on the abstention from investigating, the temporary file, the application of a criterion of opportunity and the non-exercise of criminal action must be notified to the victim or offended party, who may challenge before the corresponding control judge.<sup>123</sup>

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<sup>120</sup> IACHR, *Chitay Nech et al. v. Guatemala*, par. 149. Regarding voluntary resettlement in another part of the country, Colombian experience shows that return is not the main solution requested by victims of displacement. Most prefer to integrate into the host community because they have not returned to their place of origin for a long time or because the situation of violence persists. The possibility of relocation to the host community or to a third territory should always be contemplated in repair and assistance measures.

<sup>121</sup> Cf. Convention on the Imprescriptibility of War Crimes and Crimes against Humanity, Art. 1.

<sup>122</sup> ICTY, Trial Chamber (II), *The Prosecutor v. Vojislav Seselj*, Case No. T-03-67-PT, par. 15 (original in French, free translation).

<sup>123</sup> Congress of the Union, National Code of Criminal Procedures, Art. 258.



Thus, the First Chamber of the SCJN determined that the rights of victims of crime have been progressively expanded, recognising their participation in criminal proceedings. The right of defence in favour of the victim and offended by the crime includes, *inter alia*, the right to be informed of the rights set out in the Constitution, and at their request, of the conduct of criminal proceedings, to assist with the Public Prosecutor's Office and to provide evidence, as well as to intervene in the trial and to lodge appeals in accordance with the law.<sup>124</sup>

While this chapter focuses on the classification and investigation of arbitrary displacement as a crime, it is also essential to remember that access to assistance and protection mechanisms, as well as their registration as victims in the National Registry of Victims, cannot be subject to the filing of criminal complaints, complaints before human rights commissions or protection before the judiciary.

Currently, displaced persons in Mexico can access protection and assistance mechanisms established in the General Victims' Law, hereinafter LGV, which recognises two possible types of victims of displacement: 1) victims of crime, in cases of persons who are victims of arbitrary displacement according to the criminal types established in the federative entities that have established it; and/or 2) victims of human rights violations.<sup>125</sup>

If a displaced person wants to have access to the assistance and redress system provided for in the LGV before the Executive Commission for Victim Assistance, hereinafter CEAV, or its approvals at the local level, they will need to have been recognised as a victim in criminal proceedings or in proceedings

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<sup>124</sup>SCJN, First Chamber, Amparo in Review 1284/2015, par. 75.

<sup>125</sup>On the basis of the interpretation of Article 4 of the LGV, as well as the practice of the Executive Commission for Victim Assistance, it is clarified that both victimological conditions are neither exclusive nor cumulative, that is, either one can only be a victim of crime and not of human rights violations or vice versa, or one can be a victim of crime and human rights violations simultaneously.

for human rights violations before the state human rights commissions or the CNDH,<sup>126</sup> among others.

Thus, Article 110 of the LGV provides that the quality of victim may be recognised by:

- the criminal court, by an enforceable decision
- the criminal or peace court that is aware of the case
- the court for amparo, civil or family, which has the elements to prove that the subject is a victim
- public human rights protection bodies
- international human rights protection bodies to which Mexico recognises competence
- the authority responsible for the violation of human rights that recognises such a nature
- the Executive Committee
- the Public Prosecutor's Office

In one of the few cases known to the Mexican judiciary on internal displacement, the Tenth Criminal Court of the First Circuit provided that the CEAV, which is not the CNDH, nor the state human rights commissions, nor a crime investigation agency, nor a trial person, has the competence to recognise the status of victims of internally displaced persons autonomously, as they are victims of human rights violations when they are internally displaced.

The foregoing was based on Article 110, Section VII, of the LGV, inferring that the CEAV is an institution “which by itself can grant the status of victim to a person or group of people who come to request is granted that quality,” a power that “is not autonomous or discretionary, while it is expressly delimited in the LGV” (own translation.) In the light of cases of forced internal

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<sup>126</sup> Chamber of Deputies of the Honourable Congress of the Union, Ley General de Víctimas, Art. 106-111.

displacement which have neither criminal complaints nor complaints before a human rights protection body, the CEAV should:

- Assess the information collected in the Single Victim Registration Form (Formato Único de Registro de Víctimas).
- Assess the referred information attached thereto.
- Request the information deemed necessary from any of the local or municipal law enforcement authorities, which are required to provide said information.<sup>127</sup>

In comparative law, the Colombian Constitutional Court ruled that registration in the Central Registry of Displaced Population (RUPD)<sup>128</sup> is exclusively declarative, but not constitutive in nature.<sup>129</sup> The displaced condition is acquired *de facto*<sup>130</sup> and not by the mere registration which the administrative authority may make in the RUPD.<sup>131</sup> In fact, in Colombia, some administrative authorities demanded that victims of displacement, in order to have access to the assistance system, needed to bring a guardianship action, which in Mexico would be the amparo trial.

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<sup>127</sup> Tenth Collegiate Criminal Court of the First Circuit, indirect amparo in Review 208/2018, p. 144 et seq.

<sup>128</sup> In Colombia, RUPD is a body established under Law No. 387 of 1997, established and regulated by Decree No. 2569 of 2000. By means of such registration, persons covered by the description provided for in the aforementioned law must complete the Single Registration Format to be registered as displaced persons. However, after the issuance of Law No. 1448 of 2011, this registration was expanded and the Single Registry of Victims was created, so that more types of victims could be registered.

In Mexico, the Mexican victim assistance system is designed in the General Victims' Law and the aforementioned registry is called the *National Registration of Victims*, and its obligations are developed by Articles 96-105 of the aforementioned law. For more information on the problems documented by displaced persons in Mexico to be registered and attended by the Executive Commission for Victim Assistance (CEAV), Cf. Peguero Moreno, Mariana and Rubio Díaz Leal, Laura, *El desplazamiento interno forzado en México: Respuestas del Estado y litigio estratégico*, p. 123-135.

<sup>129</sup> Constitutional Court of Colombia, Guardianship Decision 327 of 2001, *passim*.

<sup>130</sup> IACHR, *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal vs. Guate-mala*, par. 173.

<sup>131</sup> Cf., Constitutional Court of Colombia, Guardianship Decision 211/2010, *passim*.

In this context, the Constitutional Court clarified that, although guardianship is the appropriate legal avenue for demanding violations of the fundamental rights of displaced persons, their filing cannot be understood as a prerequisite for assistance.<sup>132</sup>

In this sense, although the existence of a criminal type strengthens the rights of the victims, since it provides them with procedural mechanisms to denounce the facts suffered, the foregoing does not mean that the victims have to file complaints to access assistance, protection and reparation, since the quality of victims is acquired with the verification of the damage or deterioration of the rights, regardless of whether the victim participates in any judicial or administrative procedure, as provided in Article 4 of the LGV.

The protection of victims of crime, especially when their testimonies are the main source of information, is paramount during the investigation and punishment processes.<sup>133</sup> In this regard, it is essential to ensure the protection of the physical and psychological integrity of victims, especially those at high risk of intimidation or revictimization.

## VI. Related offences

The multioffensiveness of the crime of internal displacement reveals a confusing and intricate scenario in which many of the legal assets protected by international human rights law, international criminal law and criminal law are simultaneously violated.

Thus, displaced persons often suffer crimes and human rights violations related to life, integrity, movement and residence, family unit, health, education, private property, among others.

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<sup>132</sup> Cf. Constitutional Court of Colombia, Guardianship Decision 025 of 2004, *passim*.

<sup>133</sup> Cf. UNHCR and Global Protection Cluster, *op. cit.*, p. 23.

In Africa, for example, the model law of the African Union for the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa provides, in its Article 56, for offences against humanitarian assistance to be covered by the domestic legislation of each country according to its own specificities. Sentences, which will be determined in accordance with national legal systems, shall be applied to:

- Anyone who denies internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and housing, and separates members of the same family.
- Anyone who prevents humanitarian assistance and the passage of all shipments, equipment and relief personnel to internally displaced persons.
- Anyone who attacks or damages the resources or other materials deployed for the assistance or benefit of internally displaced persons or destroys, confiscates or diverts such materials.
- Anyone who violates the civilian and humanitarian character of the places where internally displaced persons are hosted.
- Anyone who steals, loots, destroys, abuses or misuses humanitarian assistance for internally displaced persons.

Illegal obstruction of humanitarian relief operations is a violation of IHL and IHRL. In terms of individual responsibility, “intentionally using starvation of civilians (...) by depriving them of objects indispensable to their survival, including willfully impeding relief supplies,” is a war crime under the Statute of the International Criminal Court.<sup>134</sup>

The UN Security Council analysed the obstruction of humanitarian activities or access to humanitarian assistance as a basis for imposing specific sanctions on

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<sup>134</sup> “Oxford Institute for Ethics, *Law and Armed Conflict, Oxford Guidance on the Law Relating to Humanitarian Relief Operation in Situations of Armed Conflict*, p. 48.

individuals or groups.<sup>135</sup> Among the sanctions imposed are Al-Shabaab in Somalia,<sup>136</sup> and an anti-balaka commander in the Central African Republic.<sup>137</sup>

For its part, the Special Court for Sierra Leone convicted three militia leaders of war crimes for having directly targeted humanitarian workers and peacekeepers.<sup>138</sup>

In national law, another of the crimes that usually accompany displacement is dispossession. The act of causing dispossession is a crime punishable and prosecuted by criminal law, and in Mexico it is established in Article 395 of the Federal Criminal Code. Dispossession can be defined as the act of occupying a real state or property through the use of violence, threats or deception.

Although dispossession has distinct and distinguishable constituent elements of the crime of internal displacement, the cause-and-effect relationship between one and the other is undeniable. Many cases of displacement are caused by processes of land dispossession or vice versa; dispossession is an (un)intentional consequence of internal displacement. Dispossession of land and exploitation of natural resources of indigenous communities and collective territories is one of the main causes that “hides” the displacement of indigenous peoples' communities, for example.

The Colombian Constitutional Court ruled that “[w]hen the land disposed belongs to low-income farmers who survive thanks to the cultivation of land or animal husbandry, the violation of the right to property or possession results in

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<sup>135</sup> UN, Security Council, S/RES/1844 (2008), operative par. 8 (c), concerning Somalia; S/RES/1857 (2008) operative par. 4 (f), concerning the Democratic Republic of the Congo; S/RES/2216 (2015), operative par. 19, concerning Yemen; extracted from Oxford Institute for Ethics, *op. cit.*, p. 50.

<sup>136</sup> UN, Security Council, Committee established pursuant to resolutions 751 (1991) and 1907 (1902) concerning Somalia and Eritrea, extracted from Oxford Institute for Ethics, *op. cit.*, p. 50.

<sup>137</sup> UN, Security Council, Committee established pursuant to resolutions 2127 (2013), concerning the Central African Republic, extracted from Oxford Institute for Ethics, *op. cit.*, p. 50.

<sup>138</sup> Federal Department of Foreign Affairs (FDFA), *Humanitarian Access in situations of armed conflict*, p. 41.

a violation of the fundamental right to decent living (to the vital minimum) and employment” (own translation.)<sup>139</sup>

National and international crimes that often arise in connection with the crime of displacement must be investigated and punished independently and autonomously, without losing in the research process the magnitude and essence of the multiple effects caused by the phenomenon.

In conclusion, it is reiterated that the criminalization of displacement as an internal and international crime is one of the first steps that the Mexican State must take to guarantee and respect the right of access to justice for displaced persons. However, its positivisation will imply that judges not only adopt and conform international standards to Mexican reality, but rather build the standard of protection with the experiences, expectations and needs of victims of internal displacement as a starting point and point of arrival.

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<sup>139</sup>Constitutional Court of Colombia, Decision T-821 of 2007.

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